

No. 50067-1-II  
(Pierce County No. 14-2-12880-6)

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DAVID TURK and MARISSA TURK,  
Plaintiffs-Appellees,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, USAA  
CASUALTY INSURANCE COMPANY USAA GENERAL  
INDEMNITY COMPANY, and GARRISON PROPERTY AND  
CASUALTY INSURANCE COMPANY,  
Defendants-Appellants.

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**APPELLANTS' OPENING BRIEF**

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SCHIFF HARDIN LLP  
Jay Williams, *admitted PHV*  
Paula M. Ketcham, *PHV pending*  
233 S. Wacker Dr., Suite 6600  
Chicago, Illinois 60606  
Tel: (312) 258-5500  
Fax: (312) 258-5600  
Email: jwilliams@schiffhardin.com

CORR CRONIN MICHELSON  
BAUMGARDNER FOGG &  
MOORE LLP  
Michael A. Moore, WSBA # 27047  
David Edwards, WSBA # 44680  
1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1051  
Tel: (206) 625-8600  
Fax: (206) 625-0900  
E-mail: mmoore@corrchronin.com  
dedwards@corrchronin.com

Attorneys for Defendants-Appellants

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## I. INTRODUCTION

This case involves the payment of loss of use (“LOU”) benefits under the uninsured/underinsured motorists physical damage coverage (“UMPD”) of the USAA Defendants’ Washington auto insurance policies.<sup>1</sup> Plaintiffs assert that Defendants failed to pay certain insureds LOU benefits after their cars were involved in accidents. The trial court certified a class consisting of USAA insureds who were involved in auto accidents covered under UMPD and who were without the use of their vehicle for at least one day, but excluding those insureds who received payment for a substitute rental car during the entire time they were without the use of their own vehicle. (CP 1414-1426.)

The trial court’s class certification order is unprecedented. No court has ever certified claims for LOU benefits. The reason is simple: to state a claim for LOU under Washington law, an insured must prove that he or she was actually “inconvenienced” by the loss of the vehicle during the time it was being repaired. *Holmes v. Raffo*, 60 Wn.2d 421, 431-32, 374 P.2d 536, 542 (1962). Whether an insured was actually inconvenienced, and the extent of any such inconvenience, are inherently individualized issues, unsuitable for class treatment. *Price v. City of*

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<sup>1</sup> Defendants-Appellants are United Services Automobile Association, USAA Casualty Insurance Company, USAA General Indemnity Company, and Garrison Property and Casualty Insurance Company (collectively, “USAA” or “Defendants”). Plaintiffs-Appellees are David Turk and his daughter, Marissa Turk.

*Seattle*, No. C03-1365RSL, 2006 WL 2691402, at \*8 (W.D. Wash. Sept. 19, 2006) (class certification improper in LOU case). Indeed, Plaintiffs did not seek certification of “inconvenience” claims; their proffered expert acknowledged that he could not develop a statistical model based on inconvenience; and the trial court did not certify a class for inconvenience.

Instead, the trial court held that class members’ claims could be adjudicated based not on inconvenience, but on the cost of a replacement rental car. (CP 1418-1419.) As Commissioner Bearse concluded in the Ruling Granting Review, that is precisely what the Supreme Court in *Holmes* held was improper: “[W]here . . . a plaintiff has not rented a substitute automobile, . . . [p]roof of what it reasonably would have cost to hire a substitute automobile . . . is not the measure of such damages.” *Holmes*, 60 Wn.2d at 431-32, 347 P.2d at 542; 3/10/17 Ruling at 10.

Indeed, in certifying the class, the trial court endorsed a theory that Plaintiffs themselves previously had rejected as contrary to Washington law. Before Plaintiffs moved for class certification, they defeated Defendants’ summary judgment motion by arguing that “Ms. Turk is entitled to loss of use damages, *not a rental vehicle*.” (CP 228-230 (emphasis added).) Plaintiffs correctly cited *Holmes* in arguing that “when a Plaintiff does not rent a vehicle, she is nevertheless entitled to receive general damages for inconvenience resulting from the loss of use

of a vehicle.” (CP 229.)

Yet when it came time to seek class certification, Plaintiffs did an about-face. Realizing that they could not get a class certified based on “inconvenience,” they switched gears and now argued that inconvenience was not the correct standard; the cost of a substitute rental was. The trial court accepted this erroneous argument.

This central legal error dooms class certification. There is no dispute that if the *Holmes* inconvenience standard applies, class certification would be improper. The Supreme Court’s ruling in *Holmes* clearly governs, and certification should be reversed for this reason alone.

But class certification would be improper even if the trial court’s “substitute rental car” standard applied. Determining whether an insured was without the use of his or her vehicle for at least one day due to an accident, and was not reimbursed for LOU for the entire time the vehicle was unavailable, requires an individualized review of the facts and circumstances surrounding that insured’s claim—an inquiry that cannot be conducted classwide. Moreover, the individualized facts necessary to make these determinations are not found in Defendants’ electronic databases, or even in the insurance claim files of the individual insureds. Instead, determining those facts would require discovery of each insured, each insured’s repair shop, the USAA claims adjusters and managers on

the file, and many other witnesses with information potentially relevant to that particular insured's claim. The purported "classwide" trial of the class members' claims would devolve into thousands of individualized minitrials—defeating the very purpose of the class certification rule.

The trial court brushed aside these problems by relying on the opinion of Plaintiffs' expert, Dr. Bernard Siskin, who claimed that he *could* construct a "statistical model" to deal with these individualized issues. But Dr. Siskin never constructed such a model; in fact, he admitted that he had not done any statistical work at all.

By contrast, Defendants' expert statistician did conduct an actual statistical analysis of a 500-file survey. She found that, contrary to Plaintiffs' contentions, Defendants' clear practice was to offer LOU to its insureds. In fact, that is precisely what Defendants did for David and Marissa Turk—but neither Plaintiffs nor their personal attorney ever took Defendants up on their offer. Defendants' expert also found that Defendants' claim files and electronic data did not contain the information Plaintiffs themselves conceded was necessary to determine issues of class membership, liability, and damages. The trial court therefore erred in denying Defendants' motion to strike the Siskin declaration.

Finally, the trial court appointed class representatives who were not members of the class and who were otherwise inadequate. Plaintiffs

were offered LOU under their UMPD coverage, but they never responded to Defendants' offer. Furthermore, the trial court expressly acknowledged that it could not determine whether David Turk was a class member, but appointed him as a class representative anyway. Marissa Turk is not an adequate class representative for the additional reason that she signed a Release Agreement releasing her claims at issue here. Although the trial court had previously ruled—three times—that Defendants could raise the Release Agreement as an affirmative defense, once Defendants argued in opposition to class certification that Ms. Turk was an inadequate class representative because of that Release, Plaintiffs immediately moved for summary judgment on this issue. The trial court granted Plaintiffs' summary judgment motion, not only precluding Defendants from asserting a release defense against Ms. Turk, but striking the defense in its entirety against all class members. This ruling, too, was clear error.

Defendants respectfully request reversal of these three orders and a remand for further proceedings on Plaintiffs' individual claims, including Defendants' Release defense.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in entering the order granting class certification and two related orders:

1. December 30, 2016 Class Certification Order (CP 1414).

2. December 13, 2016 Order on Defendants' Motion to Strike Declaration of Bernard R. Siskin, Ph.D., ISO Plaintiffs' Motion for Class Certification (CP 1406).

3. December 13, 2016 Order on Plaintiffs' Motion for Partial Summary Judgment on Defendants' Affirmative Defense regarding the Release Marissa Turk signed (CP 1404).

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred in holding, contrary to *Holmes v. Raffo*, 60 Wn.2d 421 (1962), that the measure of loss of use for a plaintiff who did not obtain a substitute rental vehicle is the cost of a rental car, rather than the plaintiff's "inconvenience."

2. Whether the trial court erred in certifying a class based on a misinterpretation of *Holmes v. Raffo*, when it was undisputed that class certification would be improper under the *Holmes* "inconvenience" test.

3. Whether, even under the trial court's improper "substitute rental car" test, the court erred in ruling that the ascertainability, commonality, predominance, and superiority requirements were satisfied, when issues of class membership, whether class members sustained a cognizable loss of use, and the amount of lost use cannot be determined through common proof, or even a file-by-file review, but would require individualized minitrials into the circumstances of each class member.

4. Whether the trial court erred in denying Defendants' motion to strike the expert report of Plaintiffs' statistician, and relied on that expert to find ascertainability, commonality, predominance, and superiority, when the expert did not do any actual statistical work or develop any statistical model, and his proposed "sampling" would violate U.S. Supreme Court precedent and due process.

5. Whether the trial court erred in ruling that the superiority requirement was satisfied, and failed to require Plaintiffs to submit a trial plan and a viable method for determining classwide liability and damages.

6. Whether the trial court erred in ruling that Plaintiffs were adequate class representatives with typical claims, when, among other things, (i) neither Plaintiff falls within the class definition or seeks the same relief they purport to bring on behalf of the class; (ii) the trial court acknowledged that it could not determine whether David Turk was a class member, but appointed him as class representative, anyway; (iii) Plaintiffs could have received an LOU payment, but never responded to Defendants' offer of such payment; and (iv) Ms. Turk's claims were barred by the Release Agreement.

7. Whether the trial court erred in entering partial summary judgment for Plaintiffs on the Release, when there were disputed issues of fact regarding the scope of the Release, and when the trial court struck the

affirmative defense not only as to Plaintiffs, but all class members.

#### **IV. STATEMENT OF THE CASE**

##### **A. Defendants' Practices Regarding Loss-of-Use Claims**

Defendants' policy and consistent practice is to pay LOU benefits to their insureds. (CP 1004-1005 ¶¶ 7, 13-14.) These benefits can arise from an insured's (1) Rental Reimbursement Coverage and (2) UMPD Coverage. Rental Reimbursement is a separate, inexpensive coverage that pays insureds for a rental car (regardless of fault) for the time reasonably required to return the vehicle to use. Under UMPD, LOU benefits are extended when the other driver is at fault and is uninsured or underinsured. If the insured does not have Rental Reimbursement, but sustained a loss of use while the car was being repaired, Defendants extend LOU benefits under UMPD for the entire period of the loss, even if all or a portion of the lost use occurred before UMPD was opened. (CP 1005 ¶ 14.) Defendants did that in the Turks' case. *See infra* pp. 17-23.

When an insured notifies Defendants of an accident, the claims adjuster will immediately determine if the insured has Rental Reimbursement Coverage. If so, and if the insured needs a rental, Defendants extend that benefit immediately. But if the insured (like Ms. Turk) does not have Rental Reimbursement Coverage, the adjuster must determine whether UMPD Coverage applies. (CP 1004 ¶¶ 8-9.)

The UMPD investigation includes (1) determining the damage to the insured vehicle; (2) determining who was at fault in the collision; (3) if the third party was at fault, determining whether the at-fault driver, the vehicle owner, or another party has insurance; and (4) determining whether any insurance is sufficient to compensate Defendants' insured. Defendants' claims handlers often must gather information from many sources, including vehicle damage repair estimates, statements from the insured, statements from the other driver(s) involved in the collision, statements from witnesses to the collision, police reports, third-party insurance databases, and verifications from the at-fault drivers about their insurance coverage, or lack of coverage. (CP 1004-1005 ¶¶ 9-12.)

UMPD investigations can take time. At-fault drivers are often difficult to reach and normally do not promptly respond to insurers' questions. Drivers and vehicle owners rarely want to admit their fault or lack of coverage, and often give fraudulent or incorrect information about their coverage at the scene of the accident. (CP 1071-1072 ¶¶ 16, 22.)

If the insured did not have Rental Reimbursement Coverage, but sustained a loss of use during the period the car was being repaired, Defendants will extend LOU benefits under UMPD for the entire amount of the loss of use, even if all or a portion of the lost use occurred before UMPD was opened. (CP 1005 ¶ 14.)

These practices were confirmed by a claim file survey of nearly 500 of Defendants' UMPD claims. The survey demonstrated that more than 43% of Defendants' insureds actually received a rental vehicle, and that another 36% were offered a rental, but declined; there was no affirmative evidence—of either an offer or lack of an offer—in the remaining 21%. Thus, approximately 80% of Defendants' insureds were offered a rental. (CP 1012-1013; *see infra* pp. 12-14.)

**B. The Many Situations in Which There Is No Loss of Use**

Insureds often do not suffer a loss of use after an auto accident, and therefore are not entitled to LOU benefits, for a number of reasons. (CP 1074 ¶ 30.) For example, the insured can choose not to have the car repaired, and instead to pocket the money from Defendants; in that case, the insured retains the use of the car. (*Id.*) Similarly, the insured could be recovering from injuries sustained in the accident and unable to drive; or the insured's license could have been suspended, leaving the insured legally unfit to drive; or the insured could be going on vacation and would not use the car while it is in the shop; or the insured drives the car only on certain days (e.g., weekends), and the car is in the shop only on the days the insured would not be using it anyway. (CP 1073 ¶ 28; CP 1013 ¶ 52.)

Likewise, the insured could have several vehicles and not need a rental—like Mr. Turk, who decided against rental coverage because he

had “so many vehicles” that he would not need rental coverage after an accident. *See infra* pp. 18-19. The insured could also have free alternate transportation, such as a loaner from the repair shop. (CP 1042 ¶ 39.)

These are not hypothetical scenarios. Defendants’ claim file survey found that insureds rejected Defendants’ offers of rental and/or LOU at least 36% of the time. (CP 1013 ¶¶ 48, 51; *see infra* pp. 12-14.)

### **C. The Expert Testimony**

Plaintiffs did not dispute that certification of a “loss of use” class based on the *Holmes* “inconvenience” test would be improper. Plaintiffs did not request certification of an inconvenience class, and presented no factual or expert evidence to support an inconvenience class. Instead, Plaintiffs requested, and the trial court certified, an LOU class based on the cost of a substitute rental vehicle. (CP 1414-1426.)

Plaintiffs claimed that they could “easily” identify class members and determine (1) whether the insured sustained a compensable loss of use, (2) whether that loss was for one day or more, and (3) whether the insured received payment for substitute transportation for the entire period of that lost use. (CP 721-722, 1414-1415.) Plaintiffs retained Dr. Siskin to determine whether he could develop a statistical model that would predict aggregate, classwide damages based on the average cost of a rental car. Dr. Siskin did not purport to address how damages could be

calculated or allocated to individual class members. (CP 937, 944-946.)

Defendants conducted a claim file survey and submitted the expert report of a statistical expert, Jeya Padmanaban. She concluded that a statistically reliable model to determine LOU classwide—using Plaintiffs’ theory of a substitute rental vehicle as the measure of LOU—could not be constructed. (CP 1048-1050 ¶¶ 9, 12, 13, 15.)

**1. Defendants’ Claim File Survey and Defendants’ Expert Statistician’s Report**

Defendants conducted a review of their electronic data and claim files, using a sample of 499 claim files, and retained Ms. Padmanaban to conduct an expert statistical analysis. (CP 1044-1055.) Ms. Padmanaban found that Defendants’ data and documents did not have all the information Plaintiffs themselves said were necessary to adjudicate the class members’ claims, and therefore could not be used to determine membership in the proposed class, liability, or damages: (1) whether an individual lost the use of the vehicle for a day or more, (2) the actual number of days the individual lost the use of the vehicle while it was being repaired, and (3) whether the person received payment for substitute transportation during the entire period of the loss of use. (CP 1048 ¶ 9.) Thus, the data and documents could not be used to determine which or how many persons are in the class, whether there was an alleged loss of

use for any individual or for the class as a whole, and the aggregate or individual amount of any loss of use. (CP 1049 ¶ 12.)

For some required information, an individual claim file review would be required. But even an individual claim file review would not yield much of the information required to construct a valid statistical model. (CP 1009-1014.) Defendants simply do not possess that information; instead, resolving these issues would require documents and testimony from insureds and third parties, like repair shops, among others.

For example, the claim files do not show how long the insured was without the use of the vehicle due to repairs. (CP 1010-1012.) The key items that Dr. Siskin speculated he could use as a rough approximation of the repair time—the “day in/day out” information he contended was on repair estimates—are actually not there 95-99% of the time. (CP 1050-1051.) Furthermore, even if day in/day out information were available for every estimate, that would not reliably indicate the amount of time the car was actually out of commission and unavailable to the insured: the time a vehicle is in the shop is not the same as the time the vehicle was unavailable to the insured as a result of *collision-related repairs*. (CP 1037-1039.) Owners often will not pick up their vehicles on the day repairs are complete (CP 1011), and for many repairs, the repair time includes time to perform *non-collision-related* work that the customer

chooses to pay, and for which the insurer is not liable (CP 1038-1039). Plaintiffs' expert, Dr. Siskin, agreed that Defendants are not responsible for this time, but had no way to identify these cases. (CP 936-937.)

Finally, although the class definition excludes those who received rental reimbursement for the "entire time" of their compensable loss of use (CP 1415), there was no way to determine that from Defendants' electronic data or claim files, either. (CP 1050-1054.)

## **2. Plaintiffs' Expert Submission**

Plaintiffs' expert, Dr. Siskin, opined on a hypothetical "classwide damages model." (CP 960-963.) Dr. Siskin has worked closely with Plaintiffs' counsel for more than 15 years in providing expert testimony in "diminished value" cases. (CP 961.)

In this case, however, Dr. Siskin did not construct any statistical model. By his own admission, he did no "actual statistical work"; in fact, he did "very little" work at all, spending "maybe a few hours" on the case (CP 922, 927.) He did not collect, review, or analyze data. (CP 927-928.) He did not review any USAA claim files beyond excerpts of the Turk claim file that Plaintiffs' counsel introduced at a deposition. (CP 924-925.) He did not conduct any sampling. As Dr. Siskin admitted: "Nothing has been actually done." (CP 922.)

Instead, he simply speculated that he *could* construct a model to

determine an “estimate” of “class wide damages”<sup>2</sup> based on the average cost of a substitute rental. (CP 961-962.) Dr. Siskin admitted, however, that his proposed, but nonexistent, model could not address three critical issues for determining LOU under Washington law.

First, he admitted that it would be impossible even under his theoretical model to analyze the type of LOU permitted under *Holmes*: actual inconvenience to the insured. (CP 930.) Siskin conceded that such “inconvenience” damages would be highly individualized: “That type of loss would be individualized and I don’t see how it would show up in a claim form and I don’t see how you could get that.” (CP 930.)

Second, Dr. Siskin admitted that he could not construct a model to identify insureds who did not suffer any compensable LOU—such as those who would not have used their vehicle while it was being repaired, or who did not want a rental and rejected Defendants’ offer. (CP 944-946.) Dr. Siskin was unaware of any way to exclude those insureds from his hypothetical model. (*Id.*)

Third, Dr. Siskin agreed that Defendants would not be responsible for LOU during the time an insured’s vehicle is unnecessarily in the shop (for example, if the insured did not promptly pick up the car). (CP 936-

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<sup>2</sup> Plaintiffs conceded that Dr. Siskin’s “model” would produce only a “class wide estimate of loss”—not an actual classwide damages number. (Pls.’ Resp. to Mot. for Discretionary Rev. (02/13/2017) at 16.)

937.) Many people do not pick up their car promptly after repairs are completed, for a variety of reasons. (CP 1011 ¶ 41.) But Siskin admitted that he could not construct a model to take this factor into account, or otherwise determine whether the lost time was reasonable. (CP 936-937.)

Instead, according to Dr. Siskin, his hypothetical model would calculate “aggregate” classwide damages. (CP 926-927.) Siskin’s “model,” however, was based on data he assumed Defendants possessed, but which he had not seen. For example, Siskin claimed that he could inspect Defendants’ claim files, but he did not conduct any such review, and he did not know if the files contain the information he needed for his analysis. (CP 933.) He also speculated that he could interview repair shops and repair experts (which he also had not done), but there, too, he was unsure if that exercise would yield the necessary information. (CP 933, 943, 952.) He also stated that he could interview class members for their recollections (which he also had not done), but even he described this option as a “last resort.” (CP 933-934.) And he proposed to rely on a declaration submitted in another case by an employee of another insurer (GEICO) about unrelated GEICO data, which Siskin admitted he “didn’t understand” completely. (CP 922, 924-928, 931, 933-934, 936, 942-943.)

Finally, after Defendants’ expert opined on the results of the claim file survey, Dr. Siskin submitted a supplemental declaration in which he

proposed to take the data applicable to those in the sample who received a rental vehicle (who were not class members) and then “extrapolate” that data to those insureds in the sample who did not receive a rental. (CP 1247-1252.) But Dr. Siskin performed no study of the data to determine whether it was proper to make such an extrapolation. (*Id.*)

Ms. Padmanaban, on the other hand, did perform a statistical analysis of the data, and concluded that the characteristics of the two groups of persons were “statistically significantly different” and, therefore, that Dr. Siskin’s proposed “extrapolation” would be improper. (CP 1358-1359.) In fact, the incomplete nature of Defendants’ data was “statistically significantly different for most of the variables relied on by Dr. Siskin.” (CP 1359-1360.)

#### **D. The Named Plaintiffs’ Individual Claims**

##### **1. Ms. Turk’s Policy with Garrison**

Ms. Turk is the only named insured on her auto insurance policy with Garrison, the only designated operator of the car, and the only claimant on the November 17, 2013 loss at issue in this lawsuit. David Turk did not even submit an insurance claim for this loss; he is not a named insured or designated operator; he is not listed as an owner of the car; and he admitted that he never used her car. (CP 1089, 1093-1094.)

The only LOU claims Plaintiffs asserted were inconvenience-

related: Ms. Turk claimed that she could not run errands without asking friends for rides. (CP 1081-1084.) Mr. Turk claimed that he had to drive Ms. Turk from home (she lives with her parents) to work (she works for her mother). (CP 1079.) Plaintiffs claimed that Ms. Turk’s car was in the shop for 40 days (CP 723), but they alleged that the “average” number of days for class members was four days. (CP 186 ¶ 2.2.)

## **2. Plaintiffs’ Decision Not to Purchase Rental Coverage**

Neither Plaintiff elected to purchase Rental Reimbursement Coverage—which would have provided a rental immediately after the accident. (CP 1004.) Mr. Turk did not purchase this coverage on his own policies, because he had “so many vehicles” that he would not have needed a rental car if he got into an accident. (CP 1085 at 114:8-115:15.) Ms. Turk was originally covered under her father’s policies, and when she got her own policy, she simply copied what Mr. Turk had done with his, and “forgot” to include rental coverage on her policy, even though she recognized that rental coverage was something that she wanted. (*Id.*; CP 1090.) Ms. Turk admitted in her deposition that her decision not to purchase rental coverage was a mistake, and that she would purchase rental coverage in future policies. (CP 1085.) Had Ms. Turk signed up for rental coverage, Garrison would have paid her for a rental car immediately

on the day of her accident. (CP 1004 ¶ 9.)

Mr. Turk owns several cars, and he admitted that he never used Ms. Turk's car. (CP 1089, 1093-1094.) In fact, he never even submitted an insurance claim to Garrison—or any other Defendant—for any loss resulting from Ms. Turk's accident. (CP 529-530 ¶ 8; CP 1533 at Doc. No. 2.)

### **3. Ms. Turk's Insurance Claim**

Ms. Turk submitted a claim to Garrison for bodily injury and property damage from her November 17, 2013 accident. Her property damage claims included (1) claims for alleged "diminished value" to her car, and (2) claims for "loss of use." (CP 688-692, 703-705.)

On the day of the accident, Plaintiffs spoke with a claims adjuster. (CP 530 ¶ 9; CP 1584 at Doc. No. 5.) The adjuster immediately confirmed that damage would be covered as a collision loss under Ms. Turk's collision coverage. (*Id.*) The adjuster also explained to Ms. Turk that she did not have Rental Reimbursement Coverage. (*Id.*)

The claims adjuster undertook an investigation to confirm the damage to Ms. Turk's vehicle; whether either of the other two drivers in the collision was at fault; and if so, whether the at-fault driver or owner of the car carried insurance. The investigation was complicated by the fact that the driver ultimately found to be at fault was not the owner of the

vehicle. (CP 1005-1006 ¶¶ 16-17.) The adjuster requested a repair estimate and a copy of the police report, took witness statements, and repeatedly contacted the at-fault driver and vehicle owner to request their insurance information. (CP 1006 ¶ 19.)

The adjuster received the police report on November 26, 2013 (CP 530 ¶ 10, CP 1587-1596), but the police report neither confirmed nor denied whether the at-fault driver or the owner of that car had insurance coverage. (*Id.*) Nor was there any indication that the at-fault driver was cited for failure to carry insurance. Garrison therefore sent letters to the at-fault driver and the car owner asking for their insurance information. (CP 530-531 ¶ 11; CP 1598-1599, 1601-1602, 1604-1605 at Doc. Nos. 44-45.) On December 30, 2013, the at-fault driver returned Garrison's form, and stated that he did not have insurance. (CP 531 ¶ 12; CP 1607.) Shortly thereafter, Garrison opened up UMPD Coverage. (*Id.*)

#### **4. Garrison's Rental Offer, and Plaintiffs' Failure to Respond to that Offer**

Ms. Turk had her personal attorney, Jeannette Coleman, represent her throughout her claim, including her claim for a rental. (CP 688-692.) Ms. Coleman admitted in her deposition that in her dealings with Garrison, she represented Ms. Turk in all aspects of Ms. Turk's insurance claim, including Ms. Turk's UMPD claims for car rental. (*Id.*)

Because Ms. Turk did not purchase Rental Reimbursement Coverage, she was not eligible for a rental at the time of her accident. (CP 1004-1005 ¶¶ 9, 16.) But when Garrison determined that Ms. Turk’s UMPD Coverage applied, a claims adjuster left a voicemail message for Ms. Coleman asking if Ms. Turk needed a rental. (CP 531 ¶ 13; CP 1610-1611 at Doc. No. 71.)

Neither Plaintiffs nor their attorney ever responded to Garrison’s inquiry about whether Ms. Turk needed rental reimbursement under her UMPD coverage. At no time did they request LOU coverage under UMPD. (Id. ¶ 14.) If they had, Garrison would have paid for Ms. Turk’s loss of use for the entire time she was without her car. (CP 1007 ¶ 23.) Although Plaintiffs asserted below that Garrison’s offer of LOU came after Ms. Turk’s car was out of the shop (CP 725 n.9), that is irrelevant: Garrison would have paid for any loss of use Ms. Turk sustained for the entire period she lost the use of her car. (CP 1007 ¶ 23.)

#### **5. Plaintiffs’ Assertions of “Delay” in Opening UMPD Coverage**

Plaintiffs asserted below that Garrison should have extended UMPD coverage immediately upon notice of the accident, because Mr. Turk allegedly told the adjuster that the police report and “exchange of information” form showed that the other driver was not insured. (CP 724.)

Plaintiffs, however, did not make a “delay” claim on behalf of the putative class, presumably because of the individual issues involved.

Defendants retained an expert in the handling of Washington UMPD cases, Danette Leonhardi, who confirmed that Garrison had handled the Turk claim correctly. (CP 1070-1073 ¶¶ 9-27.) Ms. Leonhardi affirmed that “it was reasonable for [the adjuster] not to assume the allegedly at-fault driver was uninsured merely because he did not identify insurance coverage at the scene of the accident.” (CP 1072 ¶ 23.) Furthermore, Ms. Turk’s personal attorney, Ms. Coleman, agreed that Garrison was entitled to investigate both fault and the existence of insurance coverage before extending UMPD coverage. (CP 1071 ¶ 17.)

In any event, although Plaintiffs claimed that Garrison should have opened UMPD coverage sooner than it did, that alleged delay did not cause Plaintiffs any cognizable harm. Garrison offered to pay UMPD LOU benefits, and if Plaintiffs or their attorney had taken Garrison up on that offer, Ms. Turk would have been paid in full for the entire time of her alleged lost use. *See supra* p. 21.

## **6. Plaintiff’s Release of Her Claims**

On March 31, 2015, Ms. Turk, Ms. Coleman, and Mr. Turk had an in-person meeting to finalize the settlement of her claim. The Release Agreement provided that, in exchange for \$25,000, Ms. Turk released

“any and all claims” arising out of her accident:

I/we Marissa N Turk, . . . for and in consideration of the sum of twenty five thousand (\$25,000), . . . do release, and forever discharge Garrison Property and Casualty Insurance Company . . . , **in full and final settlement, from any and all claims that I/we may have under the Uninsured Motorist coverage** . . . for damages, both known and unknown, . . . resulting from [the November 17, 2013] accident.

(CP 684-685 (emphasis added).)

Ms. Coleman inserted by hand the following notation: “does not include claims for diminished value property damage”—a type of property damage claim that Ms. Turk then had pending. (CP 684, 1102.) The Release does not purport to exclude other types of claims for property damage such as loss of use—the claim at issue in this suit. (CP 684-685.)

Although Ms. Coleman and Plaintiffs knew of Ms. Turk’s pending LOU claims (a species of property damage), they did not exclude those claims from the scope of the Release. Instead, the only property damage claims they excluded were for diminished value. (CP 695, 703-705, 712, 714.) Ms. Coleman admitted that they could have inserted an exclusion for LOU claims, but did not do so. (CP 636, 697-699.)

#### **E. The Proceedings Below**

On September 30, 2014, Plaintiffs brought this suit on behalf of themselves and a class of auto insureds alleging that Defendants had failed to pay for a rental car under their UMPD coverage. (CP 183-192.) The

Complaint contains a single count for breach of contract. (CP 191.)

On November 13, 2015, Defendants filed a summary judgment motion based in part on Ms. Turk's release of her claims. (CP 514-527.) On January 22, 2016, the trial court denied Defendants' motion, stating that it was "not willing to find that the release covers bodily injury and property damage." (1/8/16 Hrg. Tr. at 42; CP 511-513.) The trial court, however, did not find that the release covered only bodily injury damage, but instead made clear that "everything is still going forward in this lawsuit" (1/8/16 Hrg. Tr. at 43), and subsequently confirmed that the release issue "certainly [is] going to be part of the lawsuit in some fashion." (3/4/16 Hrg. Tr. at 10.)

On February 19, 2016, Garrison moved for leave to file a Counterclaim against Ms. Turk based on the Release. (CP 566-603.) The Counterclaim was based on the same issues raised by the affirmative defense in Defendants' original Answer, which the trial court had already ruled was in the case. (1/8/16 Hrg. Tr. at 43; 3/4/16 Hrg. Tr. at 10.)

On March 4, 2016, the trial court denied Garrison's motion without prejudice on the ground that "no new facts have been presented." (3/4/16 Hrg. Tr. at 9.) The trial court observed—without ruling—that the release issue "does feel more like an affirmative defense rather than a counterclaim," but ruled that Defendants could re-file the motion to assert

a counterclaim if new facts were discovered in the depositions of David Turk, Marissa Turk, and Jeannette Coleman. (*Id.* at 10; CP 627-628.) Defendants thereafter conducted that discovery.

On May 12, 2016, based on this new evidence, Defendants filed a renewed motion for leave to assert a Counterclaim against Ms. Turk, and also to make minor amendments to their existing affirmative defense based on the Release Agreement. (CP 632-641.)

On May 20, 2016, the trial court denied the renewed motion. (CP 861.) The trial court stated that it did not “see any new or conceivable facts to allow the amendment to allow an answer and counterclaim, especially after the summary judgment ruling.” (5/20/16 Hrg. Tr. at 19.) Yet the court also stated that her ruling would not affect Defendants’ affirmative defense of release. (*Id.* at 19-20.)

On July 5, 2016, Defendants filed a motion for discretionary review of the trial court’s May 20, 2016 ruling. Although this Court denied Defendants’ motion for discretionary review of the May 20 decision, this Court concluded that the trial court had “committed probable error” in denying Defendants leave to assert the Release as a counterclaim. (8/24/16 Ruling Denying Review at 5.)

Plaintiffs did not challenge the existing Release affirmative defense until November 14, 2016, when—after Defendants argued that

Ms. Turk was an inadequate class representative because of the Release— Plaintiffs filed their motion for partial summary judgment directed to Defendants’ affirmative defense. (CP 1121.)

On December 13, 2016, the trial court held a hearing on the three motions at issue in this appeal.

First, the trial court granted Plaintiffs’ partial summary judgment motion on the Release. Although the Release applied to “any and all claims” arising from the accident, the court ruled (for the first time) that the Release “unambiguously” applied only to bodily injury claims. (12/13/16 Hrg. Tr. at 25) Furthermore, the trial court struck Defendants’ affirmative defense not only as to Plaintiff Turk’s individual claims, but in its entirety as to all class members. (*Id.* at 24-25.)

Second, the trial court denied Defendants’ motion to strike the Siskin declaration. (CP 1406-1407; 12/13/16 Hrg. Tr. at 78:24-25.) Apart from stating that this was “not a battle of the experts at this point,” the trial court conducted no examination of the content of Siskin’s declaration, and gave no reason for allowing the Siskin declaration—“even though,” the trial court acknowledged, “he has not developed a specific model and plugged in the data for a measure of damages under the correct standard.” (12/13/16 Hrg. Tr. at 79:1-4.)

Finally, the trial court granted Plaintiffs’ class certification motion

and certified the following class:

All USAA insureds with Washington policies . . . where USAA determined the loss to be covered under the Underinsured Motorist (UIM) coverage, and their vehicle suffered a loss requiring repair, or the vehicle was totaled, during which time they were without the use of their vehicle, for a day or more.

Excluded from the proposed Class are . . . those who received payment for substitute transportation from USAA *during the entire period they were without the use of their vehicle.*

(CP 1414-1415 (emphasis in original))

The trial court did not certify an LOU class based on “inconvenience”; nor did Plaintiffs ask the court to do so. Instead, citing *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 211, 989 P.2d 1181, 1183 (1999), the trial court stated that in Washington, loss of use may be measured by (1) lost profit, (2) the cost of renting a substitute vehicle, (3) the rental value of the plaintiff’s car, or (4) interest. The trial court concluded that “[e]vidence of the value of a rental car therefore appears to be one method of showing the value of loss of use.” (CP 1419.)

Calling commonality a “low threshold,” the trial court found that commonality was satisfied based on “common policy language, common questions of whether policy holders were advised (or not advised) about loss of use, and what happened to those who were advised.” (CP 1420-1421.) In so ruling, the trial court relied on the “diminished value” class certified in *Moeller v. Farmers Insurance Co.*, 155 Wn. App. 133, 149,

229 P.3d 857, 865 (2010), *aff'd*, 173 Wn. 2d 264, 267 P.3d 998 (2011).

The trial court did not cite any authority for certification of an LOU class.

The trial court found that typicality was satisfied because the conduct that allegedly affected the Turks also affected class members, “even though the method to determine the period for which loss of use was owed may vary slightly based on whether any member of the Class’ vehicle was drivable, or whether it was totaled or repaired.” (CP 1422.)

The trial court also found that the “adequacy of representation” element was satisfied, and appointed both David and Marissa Turk as class representatives. (CP 1422-1423.) But the trial court could not determine whether Mr. Turk was a member of the class. (CP 1423.) The trial court stated that Mr. Turk was a “named insured,”<sup>3</sup> and “chauffeur[ed]” Ms. Turk while her car was in the shop. (*Id.*) But the trial court stated that “[w]hether that is sufficient to qualify Mr. Turk as a class member is not for the Court to decide at present.” (*Id.*)

Finally, the trial court also found predominance and superiority, and that the class members’ individual damages claims were small enough to justify a class action. (CP 1423-1425.)

#### **F. The Ruling Granting Review**

On March 10, 2017, this Court granted Defendants’ motion for

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<sup>3</sup> There is no record evidence for this finding. *See infra* pp. 48-49.

discretionary review. Commissioner Bearse ruled that the trial court's reliance on dicta in *Straka*, rather than the holding of *Holmes*, constituted probable error. Where, as here, a plaintiff has not rented a substitute car, the measure of damages is "inconvenience," not the cost of a rental car:

In *Holmes* our Supreme Court held that:

where, as here, a plaintiff has not rented a substitute automobile, he is nevertheless entitled to receive, as general damages in the event liability is established, such sum as will compensate him for his inconvenience. Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury, but is not the measure of such damages. It is relevant evidence in determining the general damages for inconvenience resulting from loss of use of an automobile.

*Holmes*, 60 Wn.2d at 431- 32 (emphasis added). Under *Holmes*, in cases where a plaintiff does not rent a substitute vehicle, the proper measure of damages is such sum as will compensate the plaintiff for his or her inconvenience. See, e.g., *Price v. City of Seattle*, No. CO3- 1365RSL, 2006 WL 2691402, at \* 4- 6 (W.D. Wash. Sept. 19, 2006). The cost to rent a replacement vehicle, while relevant, "is not the measure of such damages." *Holmes*, 60 Wn.2d at 432. . . .

. . .  
. . . *Holmes* demonstrates that it was probable error for the trial court to conclude that the cost of renting a car is the proper measure of loss of use damages for a private vehicle when the owner has not rented a substitute vehicle. *Holmes*, 60 Wn. 2d at 431- 32.

(*Id.* at 10, 12.)

Commissioner Bearse also noted that *Straka* lists the potential types of LOU damages generally, but, unlike *Holmes*, does not address the

proper measure of LOU when the plaintiff does not obtain a substitute rental; instead, *Straka* addressed whether LOU could be recovered when the vehicle was destroyed, as opposed to merely damaged. (*Id.* at 10-12.) Furthermore, the Commissioner noted that *Straka* did not even cite *Holmes*, but rather a general treatise, which in turn did not cite *Holmes* or address the issue of the measure of LOU when the plaintiff does not rent a substitute vehicle. (*Id.* at 11-12.)

Commissioner Bears also cited the federal decision in *Price* as “support[ing] that *Holmes*’s inconvenience damages holding remains in effect and that this standard counsels against class certification”:

The *Price* court [held that] (1) each plaintiff must show the reasonableness of the time period for the loss of use claim . . . (2) each plaintiff must show that he or she could have used their vehicle had it not been out of service . . . ; and (3) the measure of damages for any plaintiff that did not rent a replacement vehicle was the “inconvenience” standard set out in *Holmes*.

(*Id.* at 12.) Commissioner Bearnse ruled that “*Price*’s conclusion that ‘determining loss of use damages for class members would require consideration of individual issues and cannot reasonably be proved on a classwide, formulaic basis’ is persuasive and further supports USAA’s claim that the superior court committed probable error in certifying the class.” (*Id.* at 12-13.)

## V. STANDARD OF REVIEW

The trial court's orders granting class certification and denying Defendants' motion to strike the Siskin report are reviewed for abuse of discretion. *See, e.g., Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168–69, 151 P.3d 1090, 1093 (2007); *Orion Corp. v. State*, 109 Wn.2d 621, 638, 747 P.2d 1062, 1071 (1987). A trial court abuses its discretion when its decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115, 118 (2006).

“[T]he class action rule does not contemplate automatic affirmance whenever a trial court certifies a class.” *Weston*, 137 Wn. App. at 168, 151 P.3d at 1092. “[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable.” *Id.*

A trial court abuses its discretion on a motion to strike when it applies the wrong legal standard or considers legal conclusions. *See Orion Corp.*, 109 Wn.2d at 638, 747 P.2d at 1071.

The trial court's order granting Plaintiffs' motion for partial summary judgment is subject to *de novo* review. *Landstar Inway Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P.3d 327, 335 (2014).

## VI. SUMMARY OF THE ARGUMENT

The trial court's three orders should be reversed.

First, the trial court erred in certifying a class based on an erroneous LOU standard. It is undisputed that class certification would be improper under the *Holmes* “inconvenience” standard. Accordingly, class certification should be reversed for this reason alone. The class certification order was based on clear errors of law, and was not the result of an exercise of “discretion.” The certification order is manifestly unreasonable and based on untenable grounds.

Second, class certification would be improper even under the trial court’s “substitute rental vehicle” standard. Determining whether an insured was without the use of the vehicle for at least one day, was entitled to payment for LOU, and did not receive LOU benefits for the “entire time” the vehicle was being repaired requires the adjudication of individual liability and damages issues, and cannot be determined classwide. The ascertainability, commonality, predominance, and superiority requirements of CR 23 are therefore not satisfied here.

Third, the trial court erred in denying Defendants’ motion to strike the expert report of Dr. Siskin. The trial court relied on Dr. Siskin to find ascertainability, commonality, predominance, and superiority, yet Dr. Siskin did not do any actual statistical work or develop a statistical model. Furthermore, his proposed “sampling” would violate U.S. Supreme Court precedent and due process.

Fourth, the trial court erred in finding superiority, and failed to require Plaintiffs to submit a trial plan and a viable method for determining liability and damages.

Fifth, the trial court erred in ruling that Plaintiffs were adequate class representatives with typical claims. Neither Plaintiff fell within the class definition; the trial court acknowledged that it could not determine whether David Turk was a class member, but appointed him as a representative; and Ms. Turk's claims were barred by the Release.

Finally, the trial court erred in entering partial summary judgment for Plaintiffs on the Release. There were disputed issues of fact regarding the scope of the Release, and summary judgment was therefore improper as to Marissa Turk, and certainly improper as to all class members.

## **VII. ARGUMENT**

### **A. Plaintiffs Had the Burden of Proving Each Element of CR 23.**

Plaintiffs had the burden of proving each element of CR 23(a) and 23(b)(3): (1) ascertainability, (2) numerosity, (3) commonality, (4) predominance, (5) typicality, (6) adequacy of representation; and (7) superiority. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 269, 259 P.3d 129, 133 (2011).

**Ascertainability.** A proper class definition is "critical" to class certification, because it identifies the persons who are entitled to any relief

and who will be bound by a final judgment, and enables the court to assess whether all the CR 23 requirements have been met. *See, e.g., Williams v. Oberon Media, Inc.*, 468 F. App'x 768, 770 (9th Cir. 2012).<sup>4</sup> The class must be sufficiently identifiable, but not overly broad, and must not require the court to conduct individualized factual inquiries to determine who is in the class. *See, e.g., O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998).

**Commonality.** The Supreme Court recently rejected the trial court's ruling that commonality is a "low threshold." (CP 1437.) In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that for an issue to be "common," it must be "capable of classwide resolution" and "resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. 338, 350, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). If individualized proof is needed to adjudicate the class claims, there is no commonality, because liability cannot be determined with common, classwide proof. *See, e.g., In re American Med. Sys., Inc.*, 75 F.3d 1069, 1081-82 (6th Cir. 1996).

**Predominance.** Predominance is "more exacting and stringent" than commonality, and requires the court to "substantially analyze"

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<sup>4</sup> "Because CR 23 is identical to its federal counterpart," Washington courts rely on federal cases in interpreting CR 23. *Schnall*, 171 Wn.2d at 271, 259 P.3d at 134.

whether common issues predominate over individual ones. *Schnall*, 171 Wn.2d at 270-71, 259 P.3d at 133-34; *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 20, 65 P.3d 1, 6-7 (2003). When individual inquiries are necessary to determine liability or damages, class treatment is inappropriate. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545-46 (9th Cir. 2013); *Ginsburg v. Comcast Cable Commc'ns Mgmt. LLC*, No. C11-1959RAJ, 2013 WL 5441598, at \*2-3 (W.D. Wash. Sept. 24, 2013).

**Adequacy and Typicality.** The requirements that a class representative's claims be "typical" of those of the class, and that the representative "fairly and adequately" represent the interests of that class, ensure that the representative possesses the same interest and suffers the same injury as class members. *See, e.g., Dukes*, 564 U.S. at 345-46 & n.2. At a bare minimum, the named plaintiff must be a member of the class. *See, e.g., Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 504-05 (9th Cir. 1980). Typicality focuses on the nature of the class representative's claims, and whether they have the same characteristics as those of the class. *Dukes*, 564 U.S. at 352-53; *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011). Adequacy requires a determination of, among other things, whether there are any conflicts of interest between the plaintiff and class members. *Dukes*, 564 U.S. at 349 n.5. If the named plaintiffs' claims are subject to a unique defense, their claims are not

typical, and they are not adequate class representatives. *E.g.*, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508-09 (9th Cir. 1992); *Schnall*, 171 Wn.2d at 270-71, 259 P.3d at 134.

**Superiority.** Among the factors to be considered when evaluating superiority are the difficulties likely to be encountered in the management of a class action. CR 23(b)(3); *Schnall*, 171 Wn.2d at 269-70, 259 P.3d at 133. Indeed, the “critical” factor that must be addressed before certifying a class “is to determine how the case will be tried on a classwide basis.” Fed. R. Civ. P. 23 advisory committee’s note (2003). It goes without saying that the trial plan may not violate a defendant’s constitutional rights to due process, and fair trial, and a jury trial. A defendant has the right to present “any individual affirmative defense it may have” in a meaningful manner. *E.g.*, *Dukes*, 564 U.S. at 367 (class certification improper because defendant deprived of ability to present defenses to individual claims); *Ginsburg*, 2013 WL 5441598, at \*2.

Plaintiffs had to satisfy the above requirements “through evidentiary proof,” and demonstrate precisely *how* they would prove at trial—with common, classwide evidence—all elements of their claims. *Weston*, 137 Wn. App. 164 at 173, 151 P.3d at 1095; *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L.Ed.2d 515 (2013). As this Court has observed, the class certification rule “‘does not set forth a mere

pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.’ ” *Admasu v. Port of Seattle*, 185 Wn. App. 23, 33 n.18, 340 P.3d 873, 878 n.18 (2014) (emphasis in original).<sup>5</sup>

As part of that proof, Plaintiffs were required to submit a trial plan demonstrating how the purportedly common issues will actually be tried, consistent with due process. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187, 1190 (9th Cir. 2001). The absence of a trial plan demonstrates that there is no manageable method to handle the individualized issues Defendants are entitled to raise.

Because class actions are “susceptible to abuse,” *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 187, 35 P.3d 351, 355 (2001), courts “must engage in a ‘rigorous analysis’ to ensure that the prerequisites of the rule have been met.” *Schwendeman*, 116 Wn. App. at 18-19, 65 P.3d at 5. Courts must “look past the pleadings” and examine “all the evidence in the record,” expert reports, defenses, and the

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<sup>5</sup> The trial court ruled that the allegations of Plaintiffs’ Complaint must be accepted as true. (CP 1416; CP 726.) The only support for that proposition is a passing reference in a footnote in one case (*Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320 n.4, 54 P.3d 665 (2002)), which in turn relied on a 42-year-old federal case. Washington law is now very clear: a court must “look past the pleadings” and examine the proof the plaintiff offers to prove its theories. *E.g., Oda v. State*, 111 Wn. App. 79, 93-94, 44 P.3d 8, 15-16 (2002) (reversing certification when trial court accepted pleading allegations).

substantive law to make a “meaningful determination” whether the plaintiff has met its burden—even if that implicates the merits of the claims. *Id.* at 21 n.34; *Weston*, 137 Wn. App. at 168-69, 151 P.3d at 1093.

As demonstrated below, the trial court abused its discretion, and erred as a matter of law, in certifying a class here.

**B. The Trial Court Erred as a Matter of Law in Declining to Follow the *Holmes* “Inconvenience” Standard.**

As Commissioner Bearse correctly concluded, “inconvenience” is the LOU standard under Washington law where, as here, the plaintiffs did not rent a substitute car. The Supreme Court in *Holmes* could not have been clearer that the cost of a substitute rental—the standard adopted by the trial court—is *not* an appropriate measure of LOU under these circumstances. *See supra* pp. 29-31. In fact, *Holmes* specifically rejected a jury instruction that LOU was the “the reasonable rental or use value of the automobile.” 60 Wn.2d at 431-32, 374 P.2d at 542.

The trial court’s ruling is directly contrary to *Holmes* and its progeny. The trial court cited *Straka* for the proposition that LOU can be measured by lost profit, the cost of a substitute vehicle, the rental value of the car, and interest. (CP 1418-1419.) But *Straka* merely listed the types of LOU that theoretically could be recovered in LOU cases, without regard to whether the plaintiff rented a substitute car. *Straka* did not

address, and certainly did not contradict, the Supreme Court’s ruling in *Holmes* that when the plaintiff did *not* obtain a substitute rental, the proper measure of LOU is not the cost of a substitute rental, but the plaintiff’s actual inconvenience. *See supra* pp. 29-31.

**C. It Is Undisputed that a Loss-of-Use Class Based on the *Holmes* “Inconvenience” Standard Cannot Be Certified.**

There is no dispute that under the *Holmes* “inconvenience” standard, a class cannot be certified here. A purported “inconvenience” class would require, at a minimum, testimony from each class member that he or she suffered an actual loss of use—*i.e.*, was actually inconvenienced—as a result of required repairs to the car. If an insured cannot prove that he or she would have used the vehicle while it was being repaired, there is no cognizable loss of use. *Price*, 2006 WL 2691402, at \*5 (no loss of use when driver was not legally entitled to drive car); *Steinman v. City of Seattle*, 16 Wn. App. 853, 856, 560 P.2d 357, 359 (1977) (plaintiff must prove that he would have used equipment at time it was under impound). As demonstrated above, there are myriad reasons why an insured will not be inconvenienced by the fact that his or her car is being repaired, and therefore suffer no loss of use. *See supra* pp. 10-11.

Determining a person’s “inconvenience” is something that requires testimony from the individual insured as to how—if at all—he or she was

actually inconvenienced, and it necessarily will vary from person to person. For example, Ms. Turk is a 25-year-old single woman who lives at home with her parents, in a household with multiple cars; who works with her mother; who was driven to work and back home by her parents (her parents would not let her take cabs or public transportation); and who complained that, because her car was in the shop, she could not run errands, get her hair done, or go to social events without getting rides from her friends. (CP 1078-1084.) Ms. Turk's alleged inconvenience would not be typical to that of, say, a single mom with three children, one car, and a full-time job working for a boss who is not her parent. Or of a retired jetsetter with a garage full of sports cars and a personal chauffeur.

Furthermore, the insured must prove that the repair time for *collision-related* damage was reasonable. "Damages to compensate for this loss may only take into account the reasonable time in which the automobile should have been repaired." *Holmes*, 60 Wn.2d at 430, 374 P.2d at 541; *e.g.*, *Straka*, 98 Wn. App. at 211-12, 989 P.2d at 1183. As part of that proof, plaintiffs have a duty to mitigate damages. *Straka*, 98 Wn. App. at 212 & n.9, 989 P.2d at 1183 & n.9. These are also individualized issues. *See, e.g., Price*, 2006 WL 2691402, at \*8.

Moreover, the plaintiff must have been diligent in retrieving the car when repairs were complete. So, for example, in *Price*, where a

putative class of plaintiffs sued Seattle seeking LOU damages for the time their vehicles were illegally impounded, the court held that class certification was improper because, even though the City had unlawfully impounded the vehicles, each class member would need to prove that he or she promptly redeemed the vehicle; the court would not presume that fact. *Price*, 2006 WL 2691402, at \*5 (“Plaintiffs offer no plan to prove the reasonableness of time for which they are claiming loss of use damages; instead, they make the conclusory assertion that ‘there is no basis for believing that any owner who redeemed her vehicle was unreasonably dilatory in doing so.’ ”).

Because evidence of inconvenience necessarily will vary from person to person, an LOU inconvenience class cannot be certified:

[L]oss of use damages cannot be fairly determined on a classwide basis by simply aggregating the amount of money that each class member would have paid to rent comparably-sized vehicles during the impoundment period. Instead, determining loss of use damages for class members would require consideration of individual issues and cannot reasonably be proved on a classwide, formulaic basis.

*Price*, 2006 WL 2691402, at \*6; *see* CR 23.

Because class certification was predicated on the wrong legal standard, the trial court necessarily abused its discretion.

**D. Class Certification Would Be Inappropriate Even If the Cost of a Substitute Rental Were a Valid Measure of LOU Under Washington Law.**

**1. The CR 23 Ascertainability, Commonality, and Predominance Requirements Are Not Satisfied.**

Class certification would still be improper even under the trial court's misinterpretation of Washington LOU law. Determining whether an insured was even a member of the class, and could recover under the trial court's theory, would require individualized inquiries that cannot be determined classwide. The ascertainability, commonality, and predominance requirements were not satisfied. CR 23(a)(2), (b)(3).

According to the theory proffered by Plaintiffs, and adopted by the trial court, adjudicating an insured's claim requires evaluating at least three issues: (1) whether the insured sustained a compensable loss of use (however defined), (2) whether that loss was for one day or more, and (3) whether the insured received substitute transportation for the entire time he or she was without the use of the car. But the facts necessary for these inquiries cannot be found even through an individualized file review: the information is not in Defendants' files, and would require testimony from, among others, the insured, the USAA employees who handled the file, and the repair shop that repaired the car. *See supra* pp. 12-17. Moreover, even if all relevant information were available for a sample, the information is subjective, biased, unreliable, and inherently deficient, and

therefore, as a matter of sound statistical principles, cannot be predictive of the remaining claims. (CP 1116-1119; CP 1049 ¶ 13.)

The trial court concluded that the class was ascertainable because Defendants' files contained evidence of when the UMPD claim was opened, whether the vehicle was drivable, and which insureds received a rental. (CP 1420.) But the disconnect between these findings and the class definition is palpable: none of these findings addresses the three minimum requirements for class membership outlined above.

The trial court also disregarded evidence that insureds were offered LOU at least 80% of the time, on the ground that this issue simply went "to the size of the class" or (perhaps) the "merits." (CP 1418 n.1.) In fact, this evidence goes directly to Plaintiffs' ability to prove that certification is proper. Although Plaintiffs acknowledged that they would have to prove (at a minimum) that Defendants "routinely" failed to pay insureds LOU owed under Washington law (CP 1414), the fact that at least 80% of insureds *were* offered rentals means that Plaintiffs cannot possibly establish any systematic or classwide violation of Washington law.

**2. The Trial Court Erred in Relying on Dr. Siskin's Declaration to Overcome Individualized Inquiries.**

The trial court declined to conduct any analysis of Dr. Siskin's hypothetical model, stating that it would not address a "battle of the

experts.” Yet the trial court ruled that common issues predominated by relying on Dr. Siskin’s claim that he could develop a model in the future. (CP 1424.) This ruling was legally erroneous and an abuse of discretion.

First, the “rigorous analysis” “requires discussion of the theory of the plaintiffs’ case as well as consideration of the statistical model with which they intend to prove it.” *Oda v. State*, 111 Wn. App. 79, 94, 105, 44 P.3d 8, 16, 21 (2002) (reversing class certification). An expert declaration announcing an intent to opine at some future point is insufficient. *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 630-31 (W.D. Wash 2011) (striking statistical expert declaration at class certification when declarant had not actually built a model). Here, Dr. Siskin did not merely fail to provide a completed statistical model—he provided no model at all. The trial court therefore had no basis to rule that Plaintiffs will be able to prove classwide liability and damages at trial.

Second, even if Dr. Siskin develops a “statistical sampling” model in the future, it could not be used to determine classwide issues. The United States Supreme Court has rejected the “novel project” of “Trial by Formula,” because it would deprive defendants of their due process right to litigate individual defenses to individual claims. The Court rejected a proposal to “extrapolate” the results of a “sample” to the class as a whole:

The Court of Appeals believed that it was possible to

replace such [individual] proceedings with Trial by Formula. A sample set of the class members would be selected, . . . The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. *We disapprove that novel project. . . . [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.*

*Dukes*, 564 U.S. at 367 (emphasis added).

The Supreme Court allowed only a very limited exception to this principle: when the statistical evidence would be admissible in an individual case. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046-48, 194 L.Ed.2d 124 (2016). In *Tyson*, the Court determined that the statistical evidence could be used in a Fair Labor Standards Act (“FLSA”) collective action because, under the FLSA, the employer’s failure to maintain adequate time records meant that any individual employee could rely on statistical sampling evidence to prove his or her individual claims. And because, as a matter of FLSA precedent, an employee could rely on this evidence in an individual case, it was not per se inadmissible to prove the claims of the class. *Id.* at 1048.<sup>6</sup>

The Court cautioned, however, that even in FLSA actions, not all

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<sup>6</sup> Since *Tyson*, courts have uniformly held that that the use of statistical evidence is appropriate at the class certification stage only if that evidence would be admissible in an individual case. See, e.g., *Kotsur v. Goodman Global, Inc.*, No. CV 14-1147, 2016 WL 4430609, at \*7-8 (E.D. Pa. Aug. 22, 2016) (rejecting use of sampling in defective-product class action).

“representative” evidence can establish classwide liability: “Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked.” *Id.* at 1048. In *Tyson*, the Court determined that the statistical evidence could be used in a Fair Labor Standards Act collective action because, as a matter of FLSA law, an employee could present that evidence in an individual case. *Id.* at 1048; *see also, e.g., Gipson v. County of Los Angeles*, No. 14-56183, 2017 WL 3049554, at \*1 (9th Cir. July 19, 2017) (unpublished) (certification of class improper when “damages suffered by individual class members were insufficiently similar to be established through representative testimony”).

Here, unlike the FLSA claims in *Tyson*, nothing in Washington contract law allows a plaintiff bringing an individual claim for breach of contract to forgo proving the elements of that claim—based on evidence specific to that plaintiff—by using evidence of *other* class members’ experiences. Accordingly, Dr. Siskin’s proposed model—even if it existed—could not be considered in determining class certification.

### **3. The Trial Court Erred in Finding Superiority, and Further Class Proceedings Would Violate Defendants’ Constitutional Rights.**

The trial court also erred in finding superiority without requiring Plaintiffs to submit a valid trial plan. Indeed, further class proceedings

would violate Defendants’ constitutional rights. Any attempt to try these individualized claims on a classwide basis would deprive Defendants of their due process right to a fair trial, including the right to present all defenses to individual claims, and the right to a trial by jury. See *Dukes*, 564 U.S. at 367.

Plaintiffs may not ignore these highly individualized issues in urging the adjudication of thousands of claims *en masse*. The fact that this is a class action does not alter the elements of Plaintiffs’ claims, and cannot “abridge, enlarge, or modify any substantive right.” *Id.* There is simply no way to try all of the class members’ claims in one common trial without violating due process and fundamental class action principles—changing the substantive law, and the procedural rules, all in an attempt to make a hopelessly unwieldy case manageable. Defendants’ fundamental constitutional rights may not be circumscribed or abridged simply because it would otherwise be impossible to conduct a manageable class trial.

#### **4. The Court Erred in Ruling That the Adequacy and Typicality Requirements Were Satisfied.**

It is axiomatic that class representatives must be members of the class they seek to represent. See, e.g., *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 152 L.Ed.2d 453, 462 (1977); CR 23(a)(3), (a)(4). The class definition requires, at a minimum,

that (1) an insured submitted a claim to Defendants that (2) was “determined . . . to be covered” under the UMPD Coverage, and that (3) the insured suffered a loss of the use of the vehicle while it was being repaired. (CP 1414.) Yet neither Plaintiff here is a member of that class.

The trial court appointed David Turk as class representative even though the court admittedly could not find that his claim was “sufficient to qualify [him] as a class member.”<sup>7</sup> (CP 1423.) Mr. Turk never even submitted an insurance claim for this accident, and he therefore had no UMPD claim that Defendants “determined [was] covered”—the threshold requirement for class membership. And he never asserted a claim for a rental vehicle; in fact, he always denied ever needing one.

As for Marissa Turk, at the time she was denied a rental, her loss was not “determined . . . to be covered” under UMPD. And when Garrison did determine that the loss was covered under UMPD, it immediately offered her LOU benefits, to which neither she nor her personal attorney ever responded. Defendants thus never denied her LOU benefits under her UMPD claim, and she is not a class member.

Finally, Ms. Turk is also inadequate because she released her claims. Neither the trial court nor Plaintiffs disputed that Defendants’

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<sup>7</sup> The court stated the Mr. Turk was a “named insured,” but the undisputed documentary evidence shows that he is not. (CP 529 ¶ 8; CP 1490-1491.)

Release defense would render Ms. Turk inadequate. When a named plaintiff's claims are the subject of a unique defense, the claims are not typical, and the plaintiff is not an adequate class representative. *Schnall*, 171 Wn.2d at 270-71, 259 P.3d at 134. As demonstrated below, the trial court improperly removed the issue of the Release from this case by granting Plaintiffs' motion for partial summary judgment.

**E. The Trial Court Erred in Entering Summary Judgment for Plaintiffs on Defendants' Release Defense.**

Plaintiffs attempted to solve the problems of Ms. Turk's inadequacy by seeking partial summary judgment on Defendants' Release defense. The trial court obliged—notwithstanding that on three previous occasions the court had ruled that the Release claims would remain in the case. *See supra* pp. 24-29. That ruling was erroneous as a matter of law.

There is no dispute that the Release expressly applies to “any and all claims” arising out of the accident; that LOU claims are encompassed by this language; and that Ms. Turk's personal attorney exempted from the Release only one form of property damage (diminished value), and not loss of use—an implicit acknowledgment that the Release *did* cover property damage claims. Yet the trial court found that the “unambiguous” Release applied only to bodily injury claims because its title was “bodily injury or death with subrogation provisions.” (12/13/16 Hrg. Trans. at

20.) That title, however, simply reflected the relevant insurance coverage—not the scope of the Release, which clearly applied to “any and all claims.” (CP 684.) But even if the title were significant, it would at most create a genuine issue of material fact precluding summary judgment in Defendants’ favor. It would not warrant judgment *against* Defendants.

The trial court compounded its error by entering judgment on the Release claims in their entirety—as directed not only to Ms. Turk, but to other class members. There was no evidence on the claims of other class members. Striking the release defenses in their entirety was error.

### **VIII. CONCLUSION**

Defendants respectfully request that the Court (1) reverse the trial court’s order granting class certification, including the court’s denial of Defendants’ motion to strike the Siskin declaration; (2) reverse the trial court’s order granting partial summary judgment to Plaintiffs on Defendants’ Release defense; and (3) remand for further proceedings based on Plaintiffs’ individual claims only.

DATED: July 21, 2017

Respectfully submitted,

*s/ Michael A. Moore*

CORR CRONIN MICHELSON  
BAUMGARDNER FOGG &  
MOORE LLP

Michael A. Moore, WSBA # 27047

David Edwards, WSBA # 44680

1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1051  
Tel: (206) 625-8600  
Fax: (206) 625-0900  
E-mail: mmoore@corrchronin.com  
dedwards@corrchronin.com

**SCHIFF HARDIN LLP**

Jay Williams, *admitted PHV*  
Paula M. Ketcham, *PHV pending*  
233 S. Wacker Dr., Suite 6600  
Chicago, Illinois 60606  
Tel: (312) 258-5500  
Fax: (312) 258-5600  
Email: jwilliams@schiffhardin.com  
pketcham@schiffhardin.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin Michelson Baumgardner Fogg & Moore LLP, attorneys for Defendants-Appellants herein.

2. On July 21, 2017, I caused a true and correct copy of the foregoing document to be served upon the following in the manner indicated below:

Stephen M. Hansen  
Law Offices of Stephen M. Hansen, PS  
1821 Dock Street, Suite 103  
Tacoma, WA 98402  
steve@stephenmhansenlaw.com

Scott P. Nealey  
Law Office of Scott P. Nealey  
71 Stevenson, Suite 400  
San Francisco, CA 94015  
snealey@nealeylaw.com

**Attorneys for Plaintiffs-Respondents**

**Attorneys for Plaintiffs-Respondents**

*Via E-Mail*

*Via E-Mail*

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: July 21, 2017, at Seattle, Washington.

s/ Christy Nelson  
Christy Nelson

**CORR CRONIN MICHELSON BAUMGARDNER FOGG & MOORE LLP**

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