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(Pierce County No. 14-2-12880-6)

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

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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I. INTRODUCTION

The trial court certified an unprecedented class based on a clear misinterpretation of Washington Supreme Court law—an interpretation that Plaintiffs themselves had previously argued was incorrect. The trial court rejected the Supreme Court’s “inconvenience” standard in *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962), and instead relied on Plaintiffs’ “substitute rental car” standard and dicta from *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 989 P.2d 1181 (2000). There is no dispute that certification of a loss-of-use (“LOU”) class based on inconvenience would be improper, because whether a class member actually sustained inconvenience, and the extent of such inconvenience, are inherently individualized issues that cannot be proved with common, classwide evidence and procedures. (Defs.’ Br. 39-41.)

Plaintiffs’ response is to come up with still another position: that the trial court did not actually certify a class based on the “substitute rental car” standard, and that *Holmes* is no longer “good law.” (Pls.’ Br. 31, 34.) In granting USAA’s motion for discretionary review, this Court addressed and correctly rejected both arguments:

The trial court’s reliance on *Straka* dicta¹ discussing loss of use damage calculation, as opposed to the holding in *Holmes*,

¹ As Commissioner Bearse ruled, *Straka* addressed whether LOU could be recovered when the car was destroyed, and did not resolve how LOU should be measured. *See infra* p.20.

constitutes probable error.

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.

In contrast to *Straka*, the *Holmes* case is on point and has not been overruled.

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.

(3/10/17 Ruling Granting Review at 10, 12.)

Finally, class certification would be improper even under the trial court's "substitute rental car" standard. There is good reason why no other court has certified an LOU class—under any standard—and why the class here is particularly inappropriate: determining whether an insured was without the use of the car for at least one day, and was not reimbursed for LOU for the entire time the car was unavailable, requires an individualized review of facts that cannot be conducted classwide. (Defs.' Br. 42-49.)

Plaintiffs now attempt to defend class certification by invoking a trial court's "discretion" in class certification decisions. But the trial court's errors were not the result of an exercise of discretion. They were clear and obvious errors of law, resulting in an improper grant of class certification requiring reversal. The trial court's additional errors in relying on an expert opinion that was not based on any actual expert work, and in granting Plaintiffs summary judgment on USAA's Release defense when there were

disputed issues of material fact for a jury to decide, also require reversal.

II. RESTATEMENT OF THE FACTS AND PROCEDURAL HISTORY OF THE CASE

Plaintiffs' brief contains numerous misstatements of the record and the trial court's orders. USAA corrects the major misstatements below.

1. Plaintiffs were not entitled to a rental car at the time of the accident, because they chose not to purchase rental coverage. (Defs.' Br. 18-19.)

Plaintiffs contend that USAA "*repeatedly*" refused to give them a rental car. (Pls.' Br. 10 (emphasis in original).) But the citations in Plaintiffs' brief are not about Plaintiffs' entitlement to LOU under their *UIM* coverage, which is the subject of this action. Rather, USAA stated, on or soon after the day of the accident, that Plaintiffs were not entitled to a rental under *rental reimbursement coverage* because they chose not to purchase such coverage—a fact Plaintiffs do not dispute. (Defs.' Br. 18-19.) Once USAA opened UIM coverage, it offered to pay LOU, but Plaintiffs inexplicably never took USAA up on its offer. (*Id.* at 20-21; *see infra* p.5.)

Plaintiffs also assert that "[t]he appropriateness (or inappropriateness) of USAA's claims handling is . . . tangential to this case," because Plaintiffs "filed suit only for breach of contract, and do not seek to recover under the consumer fraud act." (Pls.' Br. 11 n.4.) Yet Plaintiffs proceed to complain about USAA's claims handling anyway. They contend that USAA should have immediately opened UIM coverage

on the day of the accident, without completing its investigation whether UIM coverage should attach, because Plaintiffs told the USAA claims adjuster that Ms. Turk was not at fault and that the other driver was uninsured. (Pls.' Br. 10-13; *see* Defs.' Br. 21-22.)

Plaintiffs cite no authority for this proposition. There is none. In fact, Plaintiffs' personal attorney, Jeannette Coleman, testified that her clients tell her "all the time" that the accident was not their fault (when it was); that she herself investigates her clients' putative UIM claims; and that insurers like USAA should have that same right. (CP 1098-1099, 1101 at 21:2-22:22, 34:5-17.)² Furthermore, USAA submitted uncontradicted expert evidence that USAA was entitled to conduct a UIM investigation, and that USAA handled Plaintiffs' claim appropriately. (CP 1068-1075.)

Plaintiffs also assert that there is no evidence they were ever told that USAA was conducting a UIM investigation. Yet in that same paragraph of their brief they concede that *Ms. Coleman* was communicating with USAA all along about its UIM investigation. (Pls.' Br. 11-12.) Furthermore, although Plaintiffs contend that USAA's claims manual required extending UIM coverage to them immediately, the very portion

² In fact, the Turk claim was complicated: there were three drivers, and the driver ultimately determined to be at fault did not own the car. (Defs.' Br. 19-20.) The adjuster took witness statements, obtained a police report (which did not confirm or deny whether the other driver was insured), and repeatedly contacted the at-fault driver and the owner to request insurance information. (*Id.*)

Plaintiffs quote states that UIM will be extended “based on the details reported.” (*Id.* at 12.) Here, the “details reported” did not justify opening UIM coverage at that time. (Defs.’ Br. 19-20.) As Plaintiffs acknowledge, however, this issue is irrelevant to their individual and class contract claims. Plaintiffs never sought to bring “delay” claims on behalf of the class.

2. **USAA offered Plaintiffs LOU when their UIM coverage attached. Plaintiffs never responded to USAA’s offer. If they had, USAA would have compensated them in full for any LOU.** (Defs.’ Br. 20-21.)

Plaintiffs’ complaint about when USAA extended UIM coverage is, as Plaintiffs concede, legally irrelevant to their contract claim. It is also factually irrelevant, because once USAA opened UIM coverage, it *did* offer LOU, but Plaintiffs’ attorney never responded to this offer. Plaintiff have never denied these facts. If Plaintiffs’ personal attorney had simply responded to USAA’s offer, Plaintiffs would have been fully compensated for LOU, and this case would never have been filed. Plaintiffs’ contention that USAA’s LOU offer came too late (after Plaintiffs’ car was repaired) is incorrect: USAA would have paid them for the *entire* period of lost use, even if all or a portion of the loss occurred before UIM was opened—which Plaintiffs also do not dispute. (Defs.’ Br. 20-22.)

3. **Plaintiffs’ Release Agreement expressly applied to “any and all claims” arising out of the accident.** (Defs.’ Br. 22-23.)

Plaintiffs focus on the title of the Release, but do not discuss its

operative language. Plaintiffs do not dispute that the Release expressly released “any and all claims” relating to the accident, or that this language is broad enough to encompass Plaintiffs’ LOU claims. (Defs.’ Br. 22-23.) Nor do Plaintiffs dispute that their personal attorney revised the Release to exclude from its scope one form of property damage—diminished value—yet did not exclude LOU property damage, even though she easily could have done so. (*Id.*)³ Thus, Plaintiffs’ contention that USAA “presented nothing” supporting its interpretation of the Release (Pls.’ Br. 21) is false.

Plaintiffs also repeatedly assert that a USAA claims representative “admitted” that the Release Agreement was a “bodily injury release” that “had nothing to do with property damage.” (Pls.’ Br. 1, 20-21.) This, too, is a misrepresentation of the evidence. The USAA claims representative merely confirmed that the *title* on the form was “Uninsured Motorist Coverage Release (Bodily Injury or Death with Subrogation Provision).” (CP 746 at 74:12-17.) But he was unable to testify about Plaintiffs’ Release because he had no knowledge of their agreement or of releases generally: he was on the Turk file for only a brief period at the inception of the claim; he had never even seen the form of Release at issue; he does not handle the

³ Plaintiffs assert that Ms. Coleman “told USAA that she was not addressing the property damage claim. The topic of LOU or property damages was never discussed or negotiated.” (Pls.’ Br. 20.) In fact, from the outset Ms. Coleman told USAA that she represented Plaintiffs on all aspects of their insurance claim, including the claim for “car rental” and “other benefits available to our client.” (CP 252.)

coverage at issue; and he does not deal with releases at all in his job. (CP 254-278, 745-747 at 73:16-75:18.) Thus, although USAA maintains that the plain language of the Release Agreement would warrant summary judgment in USAA's favor, at the very least, the trial court erred as a matter of law in granting summary judgment in favor of Plaintiffs. *See infra* p.25.

4. The undisputed evidence is that USAA consistently offers LOU benefits to its insureds. (Defs.' Br. 8-10.)

Plaintiffs falsely assert that there is no evidence that USAA discloses and offers to pay LOU, and that "USAA provided no evidence, nor does it cite any proof, that it consistently pays loss of use." (Pls.' Br. 13 (emphasis in original).) In fact, the undisputed record evidence is that USAA "discuss[es] all pertinent benefits, including the presence of loss of use," with its insureds. (CP 119 at 20:16-22.)

The claim file survey supported this USAA policy. The survey showed that USAA offered its insureds LOU *at least* 80% of the time:

- More than 43% of USAA's insureds actually received a rental vehicle;⁴
- another 36% were offered a rental, but declined; and
- there was no affirmative evidence—of either an LOU offer or lack of an offer—in the remaining 21% of claim files.

(Defs.' Br. 10.) Indeed, Plaintiffs' own experience reflects these statistics.

As soon as USAA opened UIM coverage, it offered Plaintiffs LOU benefits,

⁴ Plaintiffs do not contend that the LOU amounts USAA paid were improper. (Pls.' Br. 15.)

and would have paid the entire amount of Plaintiffs' alleged LOU, if only Plaintiffs had responded to USAA's offer. *See supra* p.5.

Thus, the trial court's statement, which Plaintiffs repeatedly cite, that the claim file survey "suggests" that there is no evidence of LOU disclosure and payment for a large part of the class (CP 1417) is unsupported by the uncontradicted record evidence described above. The statement is also irrelevant, because the trial court ultimately decided not to make any findings on this issue. (CP 1418.)

5. The trial court relied on the testimony of Plaintiff's expert, Dr. Siskin, in certifying a class, even though he did no actual expert work. (Defs.' Br. 14-17.)

In the trial court, Plaintiffs repeatedly relied on their expert, Dr. Siskin, to obtain class certification—despite his not having done any actual expert work. (Defs.' Br. 14-17.) On appeal, Plaintiffs devote many pages to Dr. Siskin's opinions. Yet Plaintiffs now contend that the trial court did not rely at all on Dr. Siskin's testimony. Plaintiffs claim that the trial court itself "*carefully reviewed USAA's spreadsheet*" to come to its class certification ruling. (*Id.* at 16 (emphasis in original); *see id.* at 2 (trial court "cut out the middle man" and relied "on the *actual data* USAA itself produced, not Dr. Siskin's testimony") (emphasis in original).)

In fact, as the trial court stated at the class certification hearing, Plaintiffs provided the court with only the first page of the spreadsheet, not

the actual spreadsheet. (12/13/16 Hrg. Tr. at 38-39, 145.) And immediately after stating that it did not have the spreadsheet, the court proceeded to grant certification, without reviewing the spreadsheet. (*Id.* at 155.)

Furthermore, the trial court's class certification order clearly relies on Dr. Siskin's opinions. For example, the trial court cites Plaintiffs' assertions about the conclusions of the file survey (CP 1418 n.1, 1423-1424), but Plaintiffs' assertions came straight from Dr. Siskin. (CP 960-963, 1214-1220, 1231-1242, 1247-1252.) Likewise, the trial court stated that Plaintiffs had presented "what appears to be workable methods of determine [sic] the amount of loss on a class-wide basis for loss of use on both totaled and repairable vehicles," and that the court could use "data on similarly situated individuals to value the loss for others," including data on those insureds who received a rental. (CP 1424.) That, too, is based entirely on Siskin's testimony. (CP 1219-1220, 1250.) Indeed, in making this finding, the trial court relied on two cases dealing with expert testimony. (CP 1424 (citing *Moore v. Health Care Authority*, 181 Wn.2d 299, 332 P.3d 461 (2014); *Tyson Foods, Inc. v. Bouphakeo*, 136 S. Ct. 1036 (2016).)

6. Plaintiffs successfully resisted summary judgment by arguing that the proper LOU standard was the *Holmes* "inconvenience" standard, but argued for the "cost of a substitute rental" test when it came time for class certification. (Defs.' Br. 2-3.)

Plaintiffs do not dispute that, before they moved for class

certification, they argued that the *Holmes*' "inconvenience" test applied. USAA had sought summary judgment on Plaintiffs' claims in part because Plaintiffs never took USAA up on its rental offer. (CP 521, 523-524.) In response, Plaintiffs argued that this offer was irrelevant, because they were entitled to "inconvenience" damages under *Holmes*:

- "Ms. Turk is entitled to loss of use damages, *not a rental vehicle*." (CP 228-230 (emphasis added).)
- "As USAA should know, when a Plaintiff does not rent a vehicle, she is nevertheless entitled to receive *general damages* for the *inconvenience* resulting from the loss of use of a vehicle." (CP 229 (emphasis added) (citing *Holmes*).)
- "The proper legal standard is to compensate the Plaintiff for *inconvenience* resulting from the loss of use of a vehicle." (CP 229 (emphasis added).)

When it came time for class certification, however, Plaintiffs reversed course, and argued for certification based on the cost of a substitute rental vehicle. Plaintiffs never sought certification of an "inconvenience" class, and their expert, Dr. Siskin, admitted that inconvenience damages "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.)

Plaintiffs repeated these same arguments in opposing USAA's motion for discretionary review, and contended that the cost of a substitute vehicle was the "measure of damages" for LOU. (2/13/17 Pls.' Resp. to Mot. for Discretionary Rev. at 10-12.) In fact, of the four different possible

types of LOU cited in dicta by *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 989 P.2d 1181 (1999), Plaintiffs cited the second: “(2) **cost of renting a substitute chattel.**” (*Id.* at 10 (emphasis in original).) Plaintiffs then argued that “[t]he measure of damages proposed here *is an approved method of measuring loss of use.*” (*Id.* (emphasis in original).) There is no question, then, that Plaintiffs relied on the *Holmes* “inconvenience” standard to avert summary judgment, but argued for the “cost of a substitute rental” test to obtain class certification.

7. The trial court relied on *Straka* to certify a class based on the cost of a substitute rental vehicle, not “inconvenience,” as required by *Holmes*.

Plaintiffs now also contend that the trial court never certified a class based on the “substitute rental” standard that Plaintiffs themselves had advocated on class certification. Plaintiffs misstate the trial court’s order.

The trial court repeatedly cited evidence regarding whether class members received rental vehicles, and certified a class based on “payment for substitute transportation.” Nowhere did the trial court even purport to certify an inconvenience class. (CP 1414-1415.)

Furthermore, the trial court’s class certification ruling was based on dicta in *Straka*, not on the *Holmes* inconvenience test. (CP 1419.) When discussing the state of Washington LOU law, the trial court cited *Straka* for the proposition that “under Washington law, ‘loss of use’ may be *measured*

by . . . the cost of renting a substitute chattel.” (*Id.* (emphasis added).) *Holmes*, of course, held that the cost of a substitute rental is “not the measure of damages”; inconvenience is. 60 Wn.2d at 431-32, 374 P.2d at 542. In fact, the trial court cited *Holmes* only for the proposition that “damages for loss of use of an automobile will be allowed despite the failure of the owner to procure another vehicle.” (CP 1419.) This *Holmes* principle is not disputed here; the issue is the “measure” of such damages when the plaintiff did not rent a substitute vehicle. The trial court did not cite to or even acknowledge the *Holmes* inconvenience standard.

As Commissioner Bears ruled, the trial court misapplied *Holmes*:

The trial court’s reliance on *Straka* dicta discussing loss of use damage calculation, as opposed to the holding in *Holmes*, constitutes probable error.

. . . .

. . . *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.

(3/10/17 Ruling at 10, 12.)

III. ARGUMENT

A. A Loss-of-Use Class Under the *Holmes* Inconvenience Standard Cannot Be Certified.

Despite Plaintiffs’ repeated shifts in position, one thing remains clear: Plaintiffs do not dispute that an LOU class based on class members’ “inconvenience” cannot be certified. As Commissioner Bears ruled:

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. . . .

. . .

. . . “[D]etermining loss of use damages for class members would require consideration of individual issues and cannot reasonably be proved on a classwide, formulaic basis”

(3/10/17 Ruling at 10, 12 (quoting *Price v. City of Seattle*, No. C03-1365RSL, 2006 WL 2691402, at *8 (W.D. Wash. Sept. 19, 2006) (class certification improper in LOU case).)

Plaintiffs now assert either (1) that *Holmes* did not really set out an “inconvenience” test, but instead allowed plaintiffs to go to the jury solely using evidence of a substitute rental car that they never paid for; or (2) that the *Holmes* inconvenience test is no longer “good law.” (Pls.’ Br. 31-38.) Both contentions are directly contrary to Plaintiffs’ previous representations regarding the holding in *Holmes*, which they used to defeat USAA’s summary judgment motion. Plaintiffs cannot take one position to defeat summary judgment, and a contrary position to obtain class certification. More important, both assertions are wrong as a matter of Washington law.

1. *Holmes* Clearly Holds that When the Plaintiff Does Not Rent a Substitute Vehicle, the Measure of Damages Is the Inconvenience to the Plaintiff, Not the Cost of a Rental Car.

Plaintiffs’ argument against the *Holmes* “inconvenience” test is baffling. Plaintiffs note that under *Holmes* the cost of a substitute vehicle

can be “relevant evidence” of inconvenience. Yet Plaintiffs also acknowledge that the Court in *Holmes* held that the cost of a substitute rental “is not the measure of such damages.” *Holmes*, 60 Wn.2d at 431-32, 374 P.2d at 542; *see* Pls.’ Br. 23.

Plaintiffs have never contended that they can prove inconvenience as the “measure of damages” at a classwide trial. Nor did the trial court certify a class on that basis. The only “measure of damages” Plaintiffs argued for, and the trial court accepted, was the cost of a substitute rental. But under *Holmes*, the cost of a substitute rental—the only “evidence” Plaintiffs propose for a classwide trial—is not compensable “inconvenience” when the insured does not obtain a substitute rental. *Holmes*, 60 Wn.2d at 431-32, 374 P.2d at 542. The plaintiff still must prove that he or she sustained an *actual* loss of use—*i.e.*, was actually “inconvenienced.” Plaintiffs’ interpretation of *Holmes* misstates the case.

First, Plaintiffs’ interpretation of *Holmes* would eliminate the fundamental requirement that a plaintiff sustain an actual injury—here, an actual loss of use—and instead would allow a plaintiff to obtain a jury award based only on “[p]roof of what it reasonably would have cost to hire a substitute automobile.” (Pls.’ Br. 23 (quoting *Holmes*, 60 Wn.2d at 432, 374 P.2d at 542).) In support, Plaintiffs contend that the “only evidence” in *Holmes* was a series of questions and answers from the plaintiff’s trial

testimony about the cost of a rental. (Pls.' Br. 32-33.) Yet Plaintiffs misleadingly cut off that testimony, and fail to quote the portion establishing that the plaintiff there did sustain an actual loss of use:

Q. During that period that the car was being repaired, *you did without*, largely?

A. Yes.

Holmes, 60 Wn.2d at 429, 374 P.2d at 540 (emphasis added).⁵

Second, Plaintiffs did not dispute that there are many situations in which persons do not sustain a compensable loss of use following an accident, and therefore would not be entitled to payment for LOU. They may choose not to repair the car, but instead pocket the insurance money and retain the use of the car; they may be unable to drive after the accident for numerous reasons, including recovery from injuries sustained in the accident; they may not have intended to use the car while it was in the shop; and, like Mr. Turk, they may already own several vehicles and not need (or even want) a rental car. (Defs.' Br. 10-11.) These are not hypothetical

⁵ Plaintiffs rely on *DePhelps v. Safeco Ins. Co. of Am.*, 116 Wn. App. 441, 65 P.3d 1234 (2003), which in turn relies on *Norris v. Hadfield*, 124 Wn. 198, 213 P. 934 (1923), for the proposition that loss of use may be measured by the cost of a substitute rental. (Pls.' Br. 6.) *DePhelps*, however, does not address the loss of use of a car, rental replacement costs, or loss of use damages generally. And the Court in *Holmes* rejected Plaintiffs' interpretation of *Norris*. *Holmes*, 60 Wn.2d at 429, 374 P.2d at 540-41 ("We do not read the *Norris* case as a holding that where a pleasure car is negligently injured and must undergo a period of repairs, the rental value of another automobile, which would serve the same purposes, is *the measure of damages* for loss of use in such a case. At most, the language in the *Norris* case is dictum since there was no proof whatsoever as to the use value of the automobile in that case.") (emphasis in original).

scenarios. USAA's claim file survey showed that insureds rejected USAA's offer of a rental at least 36% of the time. In fact, David Turk himself did not believe that he needed rental coverage because he had many other vehicles to use in the event of an accident. (*Id.* at 18-19.)

Under those circumstances, it would be improper to award an insured damages for "loss of use" based on the cost of a substitute rental car, because the insured was never inconvenienced as a result of the accident or by the fact that the car was being repaired. *See Holmes*, 60 Wn.2d at 431-32, 374 P.2d at 542; *Price*, 2006 WL 2691402, at *6.

Third, even if a class member sustained some actual loss of use, the cost of a substitute rental car does not translate into the amount of his or her "inconvenience." The claims of the Turks are a perfect example of this. 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 96-97, 1079.) But Plaintiffs never contended that the cost of a rental car equates to the "inconvenience" they allegedly sustained. In fact, they vigorously argued *against* that proposition in successfully defeating USAA's summary judgment motion. Nor do Plaintiffs contend that a supposed "class" trial—in which thousands of class members would have

to testify about their individualized experience of “inconvenience,” as Plaintiffs did—would be possible. (Of course, it would not.)

Fourth, Plaintiffs’ own expert admitted that his proposed (but nonexistent) model, based on the cost of a substitute rental car, could not address three critical issues for determining inconvenience under Washington law. Dr. Siskin conceded that (1) he could not construct a model that would measure a class member’s inconvenience; (2) 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); and (3) he could not construct a model to determine whether the alleged “lost time” a car spent in a repair shop was reasonable. (Defs.’ Br. 15-16.)

Thus, Plaintiffs’ proposed classwide “evidence” of the cost of a substitute rental car does not satisfy the minimum elements of an “inconvenience” claim, as correctly articulated by Commissioner Bearer:

(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*.

(3/10/17 Ruling at 12.)

Because Plaintiffs do not dispute that they cannot satisfy these

standards, and the trial court did not certify a class based on these standards, class certification was improper and should be reversed. “[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.” *Price*, 2006 WL 2691402, at *6.⁶

2. The Supreme Court’s Decision in *Holmes* Is Still Good Law.

Plaintiffs’ contention that *Holmes* may no longer be “good law” is even more puzzling. Plaintiffs’ argument is difficult to follow, but it appears to run something like this: *Holmes* equated “loss of use,” “general damages,” and “inconvenience”; the 1986 Tort Reform Act, RCW 4.56.250(1)(a)), replaced the terms “special” and “general” damages with “economic” and “non-economic” damages, and included “loss of use” as “economic damages” and “inconvenience” as “non-economic damages”;

⁶ Commissioner Bearsse cited *Price* as supporting the *Holmes* inconvenience standard. (3/10/17 Ruling at 12.) Citing the trial court’s order, Plaintiffs attempt to distinguish *Price* on the ground that in *Price*, “all of the Class were not legally entitled to drive a rental car.” (Pls.’ Br. 38; *see id.* at 23 n.12.) Plaintiffs misrepresent *Price*. *Price*’s adoption of the *Holmes* inconvenience standard did not depend on whether the class members were legally entitled to drive their vehicles; instead, *Price* relied on *Holmes* to apply the inconvenience standard when the class member did not obtain a substitute rental. 2006 WL 2691402, at *6. Furthermore, the denial of class certification in *Price* turned on several factors, including the fact that “many” (not all) of the class members were not entitled to drive, and the fact that the plaintiffs could not prove “the reasonableness of the time for which they are claiming loss of use damages,” because they could not prove that they promptly picked up their cars. *Id.* at *5. In any event, Plaintiffs’ contention, without any supporting evidence, that class members here who could not make use of a rental “can be identified” “using the data in USAA’s spreadsheet,” is directly contradicted by their own expert: Dr. Siskin specifically admitted he could not do this. (CP 944-946.)

Straka did not require inconvenience damages when a plaintiff does not rent a substitute vehicle; and the Consumer Protection Act, RCW 19.86.010 *et seq.*, does not allow recovery for “inconvenience,” but does allow recovery for loss of use. (Pls.’ Br. 34-38.) Plaintiffs’ argument fails at every level.

First, as Commissioner Bearnse correctly concluded: “the *Holmes* case is on point and has not been overruled.” (3/10/17 Ruling at 12.)

Second, the *Holmes* ruling does not depend on any linguistic equivalence between “loss of use,” “general damages,” and “inconvenience.” Instead, as Commissioner Bearnse ruled, *Holmes* clearly held that “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.” (*Id.* at 10.) *Holmes* happened to involve general damages—the plaintiff there did not rent a car, and therefore had no evidence of “specials”—but *Holmes* did not turn on whether the damages were characterized as “general.”

Third, the Tort Reform Act has no relevance here. The Act’s definitions of “economic” and “noneconomic” damages apply only “[a]s used in this section,” RCW 4.56.250(1), which limited non-economic damages for claims of “personal injury and death”—not property damage claims like Plaintiffs’. *See id.* 4.56.250(2). Furthermore, the fact that the Act defined economic damages to include loss of use, and noneconomic

damages to include inconvenience, does not change the holding of *Holmes* that when the plaintiff *does not rent a substitute car*, the “measure of damages” is inconvenience. The Act nowhere purports to retroactively change the definitions of terms used in prior judicial opinions like *Holmes*.

Fourth, *Straka* does not address the situation in this case—the proper measure of “loss of use” when the plaintiff does not rent a substitute vehicle. *Holmes* does. As Commissioner Bearse correctly concluded:

In *Straka*, this court addressed whether loss of use damages could be recovered for accidents in which a vehicle was destroyed, as opposed to merely damaged.

The *Straka* appeal did not need to resolve how loss of use damages are measured. Nor did *Straka* involve a class action suit. And it is impossible to determine from the opinion how the trucking company was calculating its loss of use damages. Finally, *Straka* involved a loss of use claim for a commercial vehicle, which implicated other loss of use damages, such as lost profits.

So this court’s statement in *Straka* that “[l]oss of use may be measured by (1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the plaintiff’s own chattel, or (4) interest, is dictum. Further, *Straka* cites to a treatise for this proposition, not *Holmes*. In contrast to *Straka*, the *Holmes* case is on point and has not been overruled. *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.

(3/10/17 Ruling at 10-12 (citations and footnote omitted).)

Finally, the Consumer Protection Act has no relevance here. As Plaintiffs themselves concede, they bring no CPA claims in this case. *See supra* p.3. In any event, the Act does not recognize “inconvenience” as an

injury because the Act specifically requires proof of “injury to a person’s *business or property*,” which “excludes personal injury, mental distress, embarrassment, and inconvenience.” *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 433, 334 P.3d 529 (2014) (internal quotations omitted). There is no such limitation here.

B. Class Certification Would Also Be Improper Under the Trial Court’s “Substitute Rental Vehicle” Standard.

USAA demonstrated that class certification was also inappropriate under the trial court’s “substitute rental vehicle” standard. (Defs.’ Br. 42-49.) According to the trial court’s class definition, Plaintiffs would need to prove (1) that each putative class member actually sustained a loss of use, (2) that the loss of use was for one day or more, and (3) that the class member did not receive substitute transportation for the “entire period” the class member was without the use of the vehicle. (*Id.* at 42.) But the facts necessary to prove these elements cannot be ascertained through a review of classwide evidence. In fact, they cannot be determined even through a review of each class member’s individual claim file, because information outside the claim files—such as the testimony of the insured, the USAA adjusters, and the bodyshop that repaired the vehicle, among others—would be required to make these determinations. (*Id.* at 12-17.) Because the trial court’s conclusory findings that Plaintiffs’ “classwide” proof, and USAA’s

defenses, could be established using the limited USAA claims data have no basis in the record (Defs.' Br. 42-49), certification was not based on tenable grounds. *Oda v. State*, 111 Wn. App. 79, 91, 44 P.3d 8, 14 (2002).

Plaintiffs contend that the trial court committed no error because evidence of insureds who received a rental are a “type of ‘control group’ ” whose “[o]n average” experience can be extrapolated classwide. According to Plaintiffs, the data of insureds who received a rental can be extrapolated to that of class members who did not receive a rental, because their respective experiences are “almost certain” to be “functionally identical.” (Pls.' Br. 15; CP 1232.) The trial court accepted this argument. (CP 1414-1426.) This argument fails on several levels.

First, this argument, and the trial court’s finding, rely entirely on the declaration of Dr. Siskin—whose opinions Plaintiffs now contend were irrelevant to the trial court. *See supra* p.8; Pls.' Br. 2, 15.

Second, Dr. Siskin’s “opinions” are entirely speculative, because they are not based on an actual review of any data or claim files, or any actual statistical work, but rather on what he *might* do in the future. (Defs.' Br. 14-17, 43-46.) An expert declaration announcing an intent to opine at some future point is insufficient. *See, e.g., Fosmire v. Progressive Max. Ins. Co.*, 277 F.R.D. 625, 630-31 (W.D. Wash. 2001).

USAA’s expert, on the other hand, *did* perform a detailed statistical

analysis of the data. She concluded that the characteristics of “rental” and “non-rental” insureds were “statistically significantly different for most of the variables relied on by Dr. Siskin.” (Defs.’ Br. 17.) This expert conclusion is consistent with common sense and the findings of the claim file survey. Insureds who rejected USAA’s offer of a rental car clearly did not need a rental, and therefore would have experienced no loss of use during the time their damaged vehicle was being repaired; their experiences were clearly different from those who accepted USAA’s offer of a rental. Accordingly, it would make no sense to extrapolate the experiences of the “rental” group to those of the “non-rental” group. (*Id.* at 16-17.)

Finally, the trial court’s reliance on the use of “sampling” and “averages” violates United States Supreme Court precedent and constitutional due process. *See Tyson Foods, Inc. v. Bouphakeo*, 136 S. Ct. 1036 (2016); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *see* Defs.’ Br. 44-47. Plaintiffs’ only argument is that *Tyson* held that “*Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability.” (Pls.’ Br. 40.) True, but Plaintiffs fail to cite the actual holding of *Tyson*. Under *Tyson*, representative evidence in a class action is appropriate only in very narrow circumstances: when the statistical evidence would be admissible in an individual case. *See Tyson*, 136 S. Ct. at 1048. In *Tyson*, the statistical

evidence would have been admissible in an individual case as a matter of substantive Fair Labor Standards Act law. *See id.* Here, however, Plaintiffs do not dispute that this *Tyson* principle would not apply to a claim for breach of contract under Washington law. Nothing in Washington law allows a plaintiff bringing an individual claim for breach of contract to prove the elements of that claim by relying on evidence of other persons.⁷

C. Neither Named Plaintiff Is an Adequate Class Representative with Typical Claims.

USAA demonstrated that neither Plaintiff is a member of the class. David Turk did not even submit an insurance claim for LOU benefits, and Marissa was never denied a rental at the time her loss was “determined . . . to be covered” under her uninsured motorists coverage. (Defs.’ Br. 47-49.)

In support of the certification order, Plaintiffs argue that the trial court correctly found David Turk to be a member of the class. (Pls.’ Br. 43.) In fact, the trial court specifically *declined* to find that David Turk’s claim was “sufficient to qualify [him] as a class member,” yet the trial court appointed him as a class member anyway. (CP 1423.) Plaintiffs cite no

⁷ Plaintiffs assert that *Moore v. Health Care Authority*, 181 Wn.2d 299, 332 P.3d 461 (2014), allows “sampling” or “averages” to establish classwide liability. *Moore* is inapposite, because it predates the U.S. Supreme Court’s decision in *Tyson v. Bouphakeo*, and is limited to the calculation of damages, not the determination of liability. In *Moore*, classwide liability had already been established, and the court addressed only the damages issue. Furthermore, the use of average costs was proper there only because it was shown to be *more accurate* than using the class members’ actual expenses to determine damages. *Id.* at 313, 332 P.2d at 468. Plaintiffs do not—and could not—make this argument here.

authority allowing a person who is not a member of the class to be a class representative. There is none.

D. The Trial Court’s Summary Judgment Ruling on the Release Should Be Reversed.

The Release is further proof of Plaintiffs’ inadequacy as class representatives. (Defs.’ Br. 22-23, 48-50.) That is precisely why Plaintiffs moved for summary judgment on that claim—despite the fact that, when class certification was not an issue, the trial court ruled three times that USAA’s Release defense should remain in the case. (Defs.’ Br. 5, 24-26.)

Plaintiffs’ arguments for upholding the trial court’s ruling rely on misrepresentations of the record. *See supra* pp.6-7. At the very least, the Release’s broad “any and all claims” language, and the fact that Plaintiffs’ own attorney clearly did not believe that the Release applied only to bodily injury claims (because she felt the need to exclude a type of property damage claim), mean that there are disputed issues of fact that must be tried to a jury. (Defs.’ Br. 22-23, 48-50.)

IV. CONCLUSION

The trial court’s orders should be reversed.

DATED: November 6, 2017 Respectfully submitted,

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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 November 6, 2017, I caused a true and correct copy of the foregoing document to be served upon the following in the manner indicated below:

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

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