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No. 53196-8-II
(Pierce County No. 14-2-12880-6)

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

JARRON ELTER, Individually, and as the representative of all Persons similarly situated,

Plaintiff-Appellee,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, USAA CASUALTY INSURANCE COMPANY USAA GENERAL INDEMNITY COMPANY, and GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendants-Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

After more than three years of ever-evolving attempts to defend the trial court's unprecedented loss-of-use ("LOU") class certification order, Plaintiffs[1] have pivoted once again. Although Plaintiffs now purport to embrace the Supreme Court's decision in *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962), Plaintiffs' position would render *Holmes* a nullity.

Early in the litigation, Plaintiffs were able to defeat summary judgment by relying on *Holmes* and arguing that the applicable LOU standard was not the cost of a substitute rental car, but the insured's "inconvenience"; for Ms. Turk, that "inconvenience" allegedly came in the form of being unable to run errands, get her hair done, or go to the movies or social events without getting rides from her friends.[2] But when it came time to seek class certification, and then to defend the trial court's class certification order in the first appeal, Plaintiffs changed course, arguing that the trial court correctly rejected the *Holmes* inconvenience standard and properly relied on Plaintiffs' "substitute rental car" standard based on *dicta*

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[1] The original class representatives were David and Marissa Turk. Defendants refer to the Turks as "Plaintiffs" as well.

[2] For example, Plaintiffs argued: "Ms. Turk is entitled to loss of use damages, not a rental vehicle." (CP 1139-1141.) "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 1140) (citing *Holmes*).) "The proper legal standard is to compensate the Plaintiff for inconvenience resulting from the loss of use of a vehicle." (CP 1140.) *See also* CP 434 (outlining Ms. Turk's alleged inconvenience damages).

in *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 989 P.2d 1181 (2000). (Defs.' Open. Br. 6.) Indeed, Plaintiffs went so far as to argue that *Holmes* was no longer "good law." (Pls.' Br. (10/15/17) 34.) Plaintiffs were compelled to distance themselves from *Holmes* because it is undisputed that a class based on the *Holmes* inconvenience standard could not be certified: whether a class member actually sustained inconvenience, the type of inconvenience, and the extent of any such inconvenience are inherently individualized issues that cannot be proved with common, classwide evidence and procedures. (3/10/17 Ruling Granting Review at 10, 12, 14 (citing *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)); Defs.' Open Br. 5-8, 41-44.)

In this second appeal, Plaintiffs have shifted position again. Plaintiff now contends that the trial court properly *followed Holmes* in ruling that the cost of a substitute rental car was "one method" of determining LOU. This argument misrepresents both *Holmes* and the class certification order.

The trial court did not rely on *Holmes* for its ruling that the cost of a substitute rental is "one method" of proving LOU—and for good reason: *Holmes* does not say that. Under *Holmes*, the cost of a substitute rental, while relevant evidence, *cannot be* the "measure of such damages." *Holmes*, 60 Wn.2d at 432, 989 P.2d at 542; *see* 3/10/17 Ruling at 10.

Underlying the *Holmes* inconvenience standard is the simple reality that when a plaintiff does not rent a substitute vehicle, and therefore has no special damages, the loss of a vehicle does not create a viable claim for general damages absent a legally cognizable injury: inconvenience.[3] But under Plaintiff's theory, a party who did not rent a substitute car or suffer any inconvenience, and therefore sustained no damages, would still collect damages based on the cost of a rental—a result flatly prohibited by *Holmes*.

Rather than rely on the holding in *Holmes*, the trial court instead relied on *dicta* from *Straka*—which also did not rely on *Holmes*, or any Washington law, but rather listed in passing four potential types of LOU cited in a general remedies treatise. (3/10/17 Ruling at 11-12.) *Straka* did not resolve how LOU damages are measured because it did not need to: the issue in *Straka* was whether LOU damages can be recovered at all when the vehicle was destroyed, as opposed to merely damaged. (*Id.* at 10.)

Under binding Washington precedent, then, the cost of a substitute

[3] As discussed in Defendants' Opening Brief, there are many instances in which the loss of use of a vehicle from an accident will cause no inconvenience at all. For example, the owner (like Mr. Turk) may have other cars to use, or may be on vacation during the time the car is in the bodyshop. (Defs.' Open. Br. 12-13.) In others cases, the cost of a rental car may be too high or too low to compensate for inconvenience. Accordingly, although the cost to rent a replacement *may* be *a* relevant consideration in calculating an amount that will compensate for inconvenience, *Holmes* dictates fair compensation for the *inconvenience* caused—not the cost of a rental. It is undisputed that this "inconvenience" inquiry requires individualized determinations that are incompatible with classwide adjudication.

rental car cannot be the measure of LOU. But that is precisely what will happen here in a classwide trial on the merits. The cost of a substitute rental will not be "one method" by which Plaintiff will attempt to establish classwide liability and damages; it will be the *only* method. There will be no other evidence at trial regarding the claims of class members—not the inconvenience injury (if any) they allegedly suffered, or the extent of that inconvenience. Indeed, Plaintiff's own expert—on which the trial court relied in certifying a class—admitted that his hypothetical "model" could not take into account any *Holmes* inconvenience damages, but was limited to the cost of a substitute rental vehicle. (Defs.' Open. Br. 14.)

Thus, Plaintiff's contention that the cost of a rental is "*one* method" that "could be" used to prove LOU (implying that there "could be" others) is untrue: it will be the only method. Worse still, under Plaintiff's trial plan, the "measure of damages" to be applied to the claims of putative class members—the cost of a rental—is the very standard Plaintiffs refused to accept as adequate for their own claims. It would be a violation of the class members' and Defendants' due process rights to impose a standard that will not fairly and adequately adjudicate those claims. (Defs.' Open. Br. 47.)

Accordingly, the original class certification order, based on the *Straka* "substitute rental car" standard, is fatally flawed under Washington law. And the new trial court on remand misinterpreted this Court's Opinion

by simply recertifying the original, invalid class through the mere "substitution" of a new named plaintiff. In any event, 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.' Open. Br. 6-7, 16-17, 41-44.)

II. PLAINTIFF'S MISSTATEMENTS OF THE RECORD

Plaintiff's brief contains numerous misstatements of the record and Defendants' positions, the most significant of which are addressed below.[4]

A. The Undisputed Record Evidence Is That Defendants Consistently Pay LOU.

Selectively quoting from portions of the record, Plaintiff wrongly contends that there was no evidence that Defendants consistently pay for LOU. (Pl.'s Br. 13.) Plaintiff ignores the *undisputed* evidence from the survey of 500 claim files, which confirmed that Defendants offered or paid LOU at least 80% of the time. (Defs.' Open. Br. 12.) At no point in this

[4] Plaintiff even asserts that Defendants did not set out a standard of review on appeal (Pl.'s Br. 12), when Defendants did precisely that. (Defs.' Open. Br. 28.)

years-long litigation did Plaintiffs present any evidence to the contrary.

Indeed, the experience of all Plaintiffs in this litigation confirms Defendants' practices in this regard. For the Turks, USAA offered them LOU benefits as soon as it opened UIM coverage, and would have paid the entire amount of Plaintiffs' alleged LOU if Plaintiffs' attorney had responded to USAA's offer. (Defs.' Open. Br. 10.) As for Mr. Elter, Defendants paid him $200, and simply asked Mr. Elter to substantiate his assertion that he was owed $625 in LOU. Thus, the trial court's statement, which Plaintiff repeatedly cites, that the claim file survey "suggests" that there is no evidence of LOU disclosure and payment for a large part of the class (CP 910) is unsupported by the uncontradicted record evidence.

Finally, Plaintiff's assertion that Defendants use the value of a substitute rental as a "proxy" for LOU is also wrong. (Pl.'s Br. 5, 18.) The *Holmes* inconvenience standard is inherently individualized. *See, e.g.*, *Price*, 2006 WL 2691402, at *6, 8; 3/10/17 Ruling at 9-12. If insureds believe that they have suffered inconvenience that cannot be measured by the cost of a replacement vehicle, they can inform Defendants. Indeed, Mr. Elter claimed that he was entitled to "loss of use," but he never responded to Defendants' request to substantiate that claim. (CP 964 ¶ 2.)

B. Plaintiff Misrepresents the "Substitution" Proceedings.

Plaintiff also misrepresents key facts surrounding the substitution

proceedings.

Plaintiff first asserts that he presented a declaration "demonstrating his typicality and adequacy." (Pl.'s Br. 2.) In fact, Mr. Elter's cursory declaration demonstrated his *lack* of typicality and adequacy. Mr. Elter attached documentation showing that USAA had requested that he establish a basis for his demand for $625 in LOU (he already had received $200), and Plaintiff did not deny that he never provided any such basis. Plaintiff thereby violated his express contractual duty to cooperate in the adjustment of his claim, rendering him atypical and inadequate. (Defs.' Open. Br. 26.)[5]

Plaintiff also wrongly asserts that Defendants "declined" to take discovery of Mr. Elter and "*demand[ed] that the Superior Court address the issue absent such discovery*." (Pl.'s Br. 2 (emphasis in original); *see id.* at 16.) That assertion is simply wrong: Defendants objected to Plaintiff's proposal (adopted by the trial court) to prevent any discovery on or argument against class certification other than that directed solely to Mr. Elter's typicality and adequacy. (Defs.' Open. Br. 26-27.) Defendants did not demand that the trial court decide class certification without discovery. To the contrary, Defendants argued that Plaintiff could not use

[5] Plaintiff asserts that he did not fail to cooperate, but he does not deny that this issue will need to be adjudicated, or that the factors cited in Plaintiff's analysis are highly individualized. (*See* Pl.'s Br. 16 n.6.)

"substitution" as a means of bypassing the requirements of CR 23, and that Plaintiff should be required to litigate this case in the ordinary course: (1) to file an amended complaint setting forth Mr. Elter's claim and allow Defendants to attack the sufficiency of that claim; (2) to permit Defendants to take discovery on Mr. Elter's individual claim and fitness as a class representative; and (3) to permit briefing and consideration of Commissioner Bearse's ruling that Plaintiffs' LOU theory—the basis for the original class certification order—was invalid under Washington law. (CP 974-989.) Postponing the class certification hearing for the limited discovery proposed by Plaintiff would not have addressed Defendants' many other objections to "substitution."

C. The Original Trial Court Relied on Plaintiffs' Expert, Dr. Siskin, in Certifying the Class.

Plaintiff contends that in certifying the original class, the trial court did not rely at all on Dr. Siskin's hypothetical "model," but instead "*carefully reviewed USAA's spreadsheet*" in reaching its class certification ruling. (Pl.'s Br. 20 (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 trial court granted

certification, without reviewing the spreadsheet. (*Id*. at 155.)

Furthermore, the class certification order clearly relies on Dr. Siskin's opinions, and does not make any independent findings based on the claim file sample. For example, the trial court cited Plaintiffs' assertions about the conclusions of the file survey (CP 911 n.1, 916-917), but Plaintiffs' assertions came straight from Dr. Siskin. (CP 492-495, 733-739, 750-761, 766-771.) 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 917.) That, too, is based entirely on Dr. Siskin's testimony. (CP 738-739, 769.) Indeed, in making this finding, the trial court relied on two cases dealing with expert testimony. (CP 917 (citing *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332 P.3d 461 (2014); *Tyson Foods, Inc. v. Bouphakeo*, 136 S. Ct. 1036 (2016); *infra* pp. 24-25.)

D. There Is No Basis in the Record for Dr. Siskin's Opinions, Which Are Purely Hypothetical and Not Based on an Analysis of Actual Data.

In their Opening Brief, Defendants demonstrated that a class could not be certified even under *Straka* "substitute rental car" standard. As Defendants' expert established, Defendants' data cannot be used to identify

class members under the three elements of the trial court's class definition: (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. (*See* Defs.' Open. Br. 15-16.) The facts necessary to prove these elements cannot be ascertained through a review of classwide evidence or Defendants' data. Indeed, they cannot be determined even through an individual review of each class member's 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 45.)

Plaintiff now contends that Defendants misrepresented Dr. Siskin's opinions in arguing that he did no actual statistical work. (Pl.'s Br. 1 n.1, 20-23; *see* Defs.' Open. Br. 14.) Plaintiff asserts that Dr. Siskin *did* examine data on rebuttal—after Defendants had presented their expert analysis of the data—and that Dr. Siskin opined that the limitations of Defendants' data could be overcome because evidence of insureds who received a rental are a "type of 'control group' " whose "[o]n average" experience can be extrapolated classwide. (Pl.'s Br. 19.) Dr. Siskin opined that the experiences of this supposed "control group" are "almost certain" to be "functionally identical" to those of the rest of the class. (*Id.*; CP 751.)

In fact, Dr. Siskin performed no analysis of the data to determine whether it was appropriate to make such an extrapolation; he merely speculated that such an extrapolation would be statistically valid. Defendants' 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." (CP 863.) Therefore, Dr. Siskin's proposed "extrapolation" would be improper. Defendants' expert conclusion is also consistent with common sense and the findings of the claim file survey. Insureds who rejected Defendants' offer of a rental clearly did not need one, and therefore would have experienced no loss of use during the time their vehicle was being repaired; their experiences were clearly different from those who accepted Defendants' rental offer. Accordingly, it would make no sense to extrapolate the experiences of the "rental" group to those of the "non-rental" group. (Defs.' Open. Br. 19-20.)

III. ARGUMENT

A. The Trial Court Erred in Certifying a Class Based Solely on "Substitution."

1. On Remand, the Trial Court Was Required to Engage in a Rigorous Analysis of All CR 23 Elements Before Certifying a Class.

Plaintiff's latest argument regarding the effect of this Court's Opinion is baffling. Plaintiff previously argued, in the trial court and in

opposing Defendants' Motion for Discretionary Review, that this Court's Opinion was "law of the case" and conclusively resolved in *Plaintiff's* favor all elements of CR 23 except adequacy and typicality. (CR 1056-1067; Pl.'s Br. (6/21/19) 12-14; Pl.'s Br. (8/29/19) 14-17.) Indeed, that was the very basis of the substitution order: the trial court believed that it was "not being told by the Court of Appeals to do anything other than fix this representation issue. . . . The Court of Appeals only identified one problem with the class certification, . . . and I'm trying to correct that." (3/15/19 Hrg. Tr. at 15, 17.)

Plaintiff's Brief, however, does an about-face and initially concedes that this Court's Opinion did *not* resolve the other CR 23 elements like ascertainability, commonality, predominance, and superiority. Instead, Plaintiff contends that, as part of a remand, trial courts generally have "discretion" to decide whether to address issues that were not disposed of on appeal. (Pl.'s Br. 29-30.)

Plaintiff's argument omits one glaring issue: this Court *reversed* class certification. Accordingly, with the vacatur of the class certification order, there was no live class upon remand, and no class into which to "substitute" Mr. Elter. Thus, before certifying a class, the trial court was required to engage in the normal "rigorous analysis" and make factual and legal findings pursuant that all CR 23 elements were satisfied. (Defs.' Open. Br. 35-38.) There is no dispute that the trial court did not do so.

These CR 23 requirements were all the more important here, where Commissioner Bearse ruled that the original class certification order was based on a clear error of Washington LOU law. The trial court on remand was required, at the very least, to rule on the appropriate Washington LOU standard by which to evaluate whether all CR 23 elements could be satisfied. There is no dispute that the trial court failed to do so—indeed, it expressly declined to do so. But trial courts do not have "discretion" to certify classes without making those CR 23 findings. "Substitution" is not a means of bypassing these critical requirements. (Defs.' Open. Br. 36-40.)[6] As Commissioner Schmidt correctly noted, if this Court's Opinion vacated the entirety of the class certification order—and there can be no dispute that it did—then "the trial court committed probable error in entering the substitution order because it did not re-examine the requirements of CR 23." (7/18/19 Ruling at 6.)

Finally, in a footnote at the end of his argument, Plaintiff does yet another about-face and returns to his previous misrepresentation of this Court's Opinion. Plaintiff argues that because this Court expressly *declined* to decide the issue of substitution (12/11/18 Opinion at 17 n.8), that

[6] Plaintiff once again reverses the burden of proof and argues that it is incumbent on *Defendants* to move to decertify the class. (Pl.'s Br. 30.) Of course, *Plaintiff* has the burden of proving each element of CR 23. (Defs.' Open. Br. 30.)

amounted to a "mandate" for the trial court to "only decide a limited issue" of substitution, and this Court's *declining* to decide this issue "is equivalent to a finding against USAA on these issues." (Pl.'s Br. 31 n.12.)

Plaintiff's argument turns this Court's express decision *not* to rule on those issues into the "equivalent" of an affirmative ruling *on* those issues (and against Defendants). The two cases Plaintiff cites are entirely inapposite. *Wallace Real Estate Invs., Inc. v. Groves*, 72 Wn. App. 759, 868 P.2 149, *aff'd*, 124 Wn.2d 881, 881 P.2d 1010 (1994); *Omni Grp., Inc. v. Seattle-First Nat'l Bank*, 32 Wn. App. 22, 645 P.2d 727 (1982). Those cases involved parties who, in order to prevail on appeal, needed specific *trial court* findings of fact in their favor, which the trial courts never made. This Court held that because the trial courts had not made those necessary findings, it would not engage in that factfinding, but instead would presume that the trial courts had ruled against the parties on those issues. *Wallace*, 72 Wn. App. at 773 n.9, 881 P.2d at 158 n.9 (rejecting appellant's attempt to raise alternative ground for reversal, when trial court made no findings that would support alternative ground); *Omni*, 32 Wn. App. at 28-29, 645 P.2d at 731 (rejecting party's attempt to raise alternative ground for affirmance, when trial court made no findings to support that argument).

Here, by contrast, this Court's Opinion was not silent on whether it was deciding the other CR 23 issues. Rather, the Court *expressly* stated that

it was *not* deciding the other CR 23 requirements or substitution and voiced no opinion on the merits of those issues, whether pro-Plaintiffs or pro-Defendants. Moreover, unlike the parties in *Wallace* and *Omni*, Defendants did not need this Court's findings on the other CR 23 factors in order to prevail on appeal and defeat class certification. This Court ruled in Defendants' *favor* on class certification based on CR 23's adequacy and typicality prongs alone, granting Defendants a complete appellate victory.

2. The "Substitution" Was Without Legal Basis.

In their Opening Brief, Defendants demonstrated that the trial court's certification of a class through "substitution" was erroneous as a matter of law and an abuse of discretion. There simply is no precedent for certifying a class merely by substituting a new named plaintiff—when there was no class into which the new plaintiff could substitute; when the new plaintiff was not required to file a complaint detailing his claim; when the defendant was not permitted to test the factual and legal validity of that claim; and when the trial court did not permit briefing on the CR 23 requirements, including the proper legal standard that would apply to the claims of the putative class. (Defs.' Open. Br. 35-40.)

Indeed, there was no basis for the trial court's conclusion that Mr. Elter satisfied the adequacy and typicality standards. There was no evidence of cognizable loss of use while Mr. Elter's car was being repaired,

and Mr. Elter's failure to cooperate in the adjustment of his claim by providing a basis for his "loss of use" demand leaves him subject to a defense that renders him inadequate and atypical. (12/11/18 Opinion at 16-17 (holding Ms. Turk inadequate and atypical due to release defense).)

In response, Plaintiff relies on a series of cases that have no application to this case. (Pl.'s Br. 34-35.) Defendants anticipated these arguments in their Opening Brief and will not repeat them here. There is simply no authority permitting certification of a class through substitution under the circumstances presented here. (Defs.' Open. Br. 37-40.)

B. The Trial Court Erred in Certifying a Class Based on a Misinterpretation of Washington LOU Law.

As Commissioner Bearse correctly ruled, the trial court's original class certification order was based on an erroneous interpretation of Washington LOU law. Rather than follow the *Holmes* inconvenience standard, the trial court relied on *dicta* in *Straka* to permit a classwide trial to proceed based *exclusively* on purported evidence of the value of a substitute rental car, without any regard for the pivotal requirement of inconvenience dictated by *Holmes*. (3/10/17 Ruling at 10-11; *see* Defs.' Open. Br. 41; *supra* pp. 1-5.)

In response, Plaintiff asserts that (1) under *Holmes*, evidence of the value of a rental car is "one method" of determining LOU, and

(2) "inconvenience" may no longer be the relevant LOU standard. Neither contention is correct.[7]

Commissioner Bearse correctly rejected Plaintiff's first argument. *Holmes* did not say that the cost of a substitute rental was "one method" of determining LOU. Although evidence of the value of a substitute rental can be relevant, is it *not* the "measure of damages." (3/10/17 Ruling at 10 (citing *Holmes*, 60 Wn.2d at 432).) Here, however, the *only* evidence at a classwide trial purporting to establish class members' claims will be supposed evidence of the average value of a substitute rental car. There will be no evidence of any class member's inconvenience under *Holmes*. Indeed, there cannot be any such classwide "inconvenience" evidence, because inconvenience is an inherently individual issue that, as Commissioner Bearse recognized, precludes class certification. (*Id.* at 9-12; *see infra* pp. 21-22.) Accordingly, at the classwide trial in *this* case, the value of a substitute rental *will be* the class members' "measure of damages," contrary to *Holmes.*

Plaintiff's argument regarding the continuing validity of *Holmes* misstates the procedural posture and holding in *Holmes.* Plaintiff first

[7] Plaintiff also falsely asserts that Defendants' position is that evidence of the value of a rental car is "prohibited" at trial. (Pl.'s Br. 36.) In fact, Defendants argued that such evidence can be relevant, but it is not the measure of damages.

asserts that *Holmes* "did not approve [a jury] instruction on 'inconvenience,' nor has any case ever stated that what is recoverable for loss of use is the amount of 'inconvenience.' " (Pl.'s Br. 38.) In fact, that is precisely what *Holmes* did. *Holmes* specifically rejected the portion of the proposed jury instruction providing that the general damages for a person who did not obtain a substitute rental consist of "the reasonable rental" value of the automobile, *Holmes*, 60 Wn.2d at 432, 374 P.2d at 542, and specifically held that general damages consist of "such sum as will compensate him *for his inconvenience*," *id.* at 431, 374 P.2d at 542 (emphasis added).

Plaintiff's footnote argument that the *Holmes* inconvenience standard is no longer "relevant," and that *Straka* should apply, is wrong on several levels. Plaintiff appears to contend that *Holmes* equated "loss of use," "general damages," and "inconvenience," and that 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," thereby allegedly "separating" loss of use from inconvenience. (Pl.'s Br. 39.)

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

Plaintiff's reliance on *McCurdy v. Union Pacific Railroad Co.*, 68 Wn.2d 457, 413 P.2d 617 (1966), is misplaced. *McCurdy* did not hold that "inconvenience" damages are improper because they are supposedly "subjective." The opinion does not even address that issue, but instead holds only that the amount of time an insured is without the use of the vehicle should be measured by an objective standard. *Id*. at 470, 413 P.2d at 625. In fact, *McCurdy* cites *Holmes* favorably for the proposition that LOU consists of "general damages," which *Holmes* makes clear means "inconvenience resulting from the loss of use of an automobile." *Id*.; *see Holmes*, 60 Wn.2d at 431, 374 P.2d at 542.[8]

Second, the Tort Reform Act has no relevance here. The Act's definitions of "economic" and "noneconomic" damages apply only "[a]s

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[8] Plaintiff offers an incomplete quote from *McCurdy* to argue that LOU damages are not inconvenience, but "recovery . . . for the making of repairs." (Pl.'s Br. 5.) In fact, the full quote refers to calculating the *period of time* for LOU using the reasonable repair time. 68 Wn.2d at 470, 413 P.2d a 624-24. Plaintiff also relies on *DePhelps v. Safeco Insurance Co. of America*, 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. (Pl.'s Br. 5.) *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 Plaintiff's interpretation of *Norris v. 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).

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 Plaintiff's. *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 does not retroactively change the definitions of terms used in prior judicial opinions like *Holmes*.

Finally, *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:

> 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).)

C. It Is Undisputed That a Class Based on the *Holmes* Inconvenience Standard Cannot Be Certified.

Despite Plaintiff's repeated shifts in position, one thing remains clear: Plaintiff does not dispute that a class based on the *Holmes* inconvenience standard cannot be certified:

> [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 12 (quoting *Price*, 2006 WL 2691402, at *4-6).) Indeed, Plaintiff's own expert, who allegedly will provide the testimony establishing classwide damages, conceded that his hypothetical model could not address a class member's inconvenience. (*See* Defs.' Open. Br. 17-18; CP 462 (Dr. Siskin admitting 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.").)

Instead, Plaintiff asserts that *Price* is limited to situations in which the class members are "not legally entitled to drive," and contends that LOU classes have been "widely certified." (Pl.'s Br. 43, 46.) Neither argument is correct.

First, Plaintiff misrepresents *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 period of time for which [they] claim[] loss of use damages," because they could not prove that they promptly picked up their cars. *Id.* at *5. In any event, Plaintiff's contention 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 476-478.)

Second, Plaintiff asserts that LOU classes are "widely certified," yet proffers only one example: the 2007 decision in *Potter v. Washington State Patrol*, 161 Wn.2d 335, 166 P.3d 684 (2007), which was superseded the next year, 165 Wn. 2d 67, 196 P. 3d 691 (2008). This is the first time that Plaintiffs have cited this case in four years of litigation—and for good reason: the case did not turn on certifying an LOU class. Instead, the case involved the tort of conversion (the defendant had unlawfully impounded and auctioned off the class members' vehicles), in which loss of use was only a small portion of the potential claim for loss of the entire vehicle. Accordingly, the Court had no occasion to address whether, as here, a class

based solely on LOU could be certified. 165 Wn. 2d at 85–87, 196 P.3d at 700-01. Under the *Holmes* inconvenience standard, class certification is clearly improper.

D. Class Certification Would Be Improper Even Under the *Straka* "Cost of a Substitute Rental" Standard.

As Defendants have demonstrated, a class could not be certified even under *Straka* "substitute rental car" standard, because Defendants' limited data cannot ascertain the circumstances relevant to class members' LOU claims. *See supra* pp. 9-11; Defs.' Open. Br. 15-16, 45.

Plaintiff's contention that the limitations of Defendants' data can be overcome by Dr. Siskin's hypothetical damages model and "statistical sampling" are not only contrary to the record evidence, *see supra* pp. 9-11; Defs.' Open. Br. 14-15, but are legally unsupported.[9]

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.' Open. Br. 14-16.) An expert declaration announcing an intent to opine at some future point is insufficient. *See, e.g., Fosmire v. Progressive Max. Ins. Co.*, 277

[9] Plaintiff goes so far as to argue that any problems with Dr. Siskin's analysis can be "adjusted" by placing the burden of proof on *Defendants* to use the claim file survey to support their defenses. (Pl.'s Br. 2, 30.) This procedure would be a clear violation of Defendants' constitutional rights. (Defs.' Open. Br. 33, 49-50.)

F.R.D. 625, 630-31 (W.D. Wash. 2001).

Furthermore, the trial court's reliance on the use of "sampling" and "averages" violates United States Supreme Court precedent and constitutional due process. *See Tyson*, 136 S. Ct. at 1048; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *see* Defs.' Open. Br. 44-47. Plaintiff's 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.) Plaintiff fails 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, Plaintiff does not dispute that this *Tyson* principle would not apply to a claim for breach of contract. 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.[10]

[10] Plaintiff asserts that *Moore* allows "sampling" or "averages" to establish classwide liability. *Moore* is inapposite, because it predates the Supreme Court's decision in *Tyson*, 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

IV. CONCLUSION

Defendants respectfully request that the Court (1) reverse the trial court's Decision recertifying a class (CP 1119-1120); (2) reverse the original class certification (CP 907-919), including the court's denial of Defendants' motion to strike the Siskin declaration (CP 899-900), and rule that class certification is improper here; and (3) remand for further proceedings based on Plaintiff's individual claims only.

DATED: June 1, 2020

Respectfully submitted,

s/ Michael A. Moore

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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. 181 Wn.2d at 313, 332 P.2d at 468. Plaintiff does not and could not make this argument here.

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Defendants-Appellants herein.

2. I hereby certify that on June 1, 2020, I caused a true and correct copy of the foregoing to be served on the following via the Washington State Appellate Courts' Portal E-Service and e-mail to the following:

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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.

DATED: June 1, 2020, at Seattle, Washington.

s/ Mary Beth Dahl
Mary Beth Dahl

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