

*App/Cross-Res. Brief*

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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Court of Appeals No. 30880-1-II

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

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**DAVID MOELLER, individually and  
as the representative of all persons similarly situated,**

**Appellant,**

**v.**

**FARMERS INSURANCE EXCHANGE,  
and FARMERS INSURANCE COMPANY OF WASHINGTON,**

**Respondents.**

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**BRIEF OF APPELLANT**

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**Court of Appeals No. 30880-1-II**

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TABLE OF CONTENTS

(continued)

Page

I.	ASSIGNMENT OF ERRORS .....	1
II.	STATEMENT OF THE CASE .....	3
	A. Filing and Certification of the Case and Claims At Issue ..	3
	B. Issues Raised In Farmers’ Motion for Summary Judgment	4
	C. Plaintiff’s Reply To The Issues Raised In Farmers’ Motion	5
	1. Plaintiffs Submitted a Substantial Statement of the Evidence of a Disputed Issue of Fact Preventing Summary Judgment .....	5
	2. The Policy Language At Issue .....	8
	3. Plaintiffs Submitted Support for the Reasonableness of Their Contract Interpretation .....	10
	4. Plaintiffs Submitted Unrebutted Evidence that Farmers’ Failure to Disclose and Adjust the Claims at Issue was a Per Se Violation of the CPA .....	13
	D. The Trial Court’s ruling .....	13
III.	STANDARD OF REVIEW .....	15
IV.	ARGUMENT .....	18
	A. Diminished Value is a Covered Loss Under Farmer’s Policy .....	18
	B. The Trial Court Erred In Failing To Find Plaintiffs’ Proposed Interpretation Of “Limits Of Liability Clause” Reasonable, And Therefore In Construing The Limits Of Liability Clause As A Diminished Value Exclusion .....	22
	1. Farmers’ Policy Language — Which Simply Limits Payment to the Full Value of the Damaged or Destroyed Property — Does Not Exclude Diminished Value .....	22
	2. Courts That Have Correctly Considered a “Limits of Liability Clause” Have Construed Similar Policies to Farmers As Not Excluding Diminished Value .....	25
	3. Respected Commentators Recognize Diminished Value as a Covered Loss .....	27
	4. The Decision Below Adopted Faulty Reasoning In Addressing The Limits Of Liability Clause .....	29

**TABLE OF CONTENTS**

(continued)

	<b><u>Page</u></b>
5. The Trial Court Should Have Considered Plaintiffs' Evidence Of The Reasonableness Of Their Contract Interpretation of the Limits of Liability Clause ...	32
C. The Trial Court Erred In Applying Its Own Holding To A Case Where There Was A Material Issue Of Disputed Fact As To Whether Vehicles In The Class Had Been Returned To Their Pre-Loss Condition .....	37
D. Once The Contract Is Properly Construed Summary Judgment On The CPA Claim Must Also Be Reversed ..	38
V. CONCLUSION .....	43

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**CASES**

<i>Allstate Co. v. Peasley</i> , 131 Wn.2d 420, 932 P.2d 1244 (1997) .....	16, 18, 34, 37
<i>Ashland Oil &amp; Refining Co. v. Cities Service Gas Co.</i> , 462 F.2d 204 (10th Cir. 1972) .....	31
<i>Barton v. Farmers Ins. Exch.</i> , 255 S.W.2d 451 (Mo. App. 1953) .....	26, 27
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990) .....	33, 34
<i>Carlton v. Trinity Univ. Ins. Co.</i> , 32 S.W.3d 454 (Tex. App. 2000) .....	19
<i>Dewitt Construction Inc. v. Charter Oak Fire Ins. Co.</i> , 307 F.3d 1127 (9th Cir. 2002) .....	21
<i>Eurick v. Pemco Ins. Co.</i> , 108 Wash.2d 338, 738 P.2d 251 (1987) .....	18, 29
<i>General Ins. Co. of Am. v. Gaueger</i> , 13 Wn.App. 928, 538 P.2d 563 (1975) .....	22
<i>Given v. Commerce Ins. Co.</i> , 796 N.E.2d 1275 (Mass. 2003) .....	20
<i>Grange Ins. Co. v. Brosseau</i> , 113 Wn.2d 91, 776 P.2d 123 (1989) .....	16
<i>Hansen v. Johnston</i> , 249 N.E.2d 133 (Ill. App. 1969) .....	31
<i>Hess v. North Pacific Ins. Co.</i> , 122 Wn.2d 180, 859 P.2d 586 (1983) .....	24, 31
<i>Hyden v. Farmers Ins. Exch.</i> , 20 P.3d 1222 (Colo. App. 2001) .....	25, 26
<i>Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.</i> , 124 Wn.2d 618, 881 P.2d 201 .....	36
<i>Labberton v. General Cas. Co. of Am.</i> , 53 Wn.2d 180, 332 P.2d 250 (1958) .....	22, 37, 38
<i>Leingang v. Pierce County Med. Bur., Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997) .....	40
<i>Lynott v. National Union Fire Ins. Co. of Pittsburgh</i> , 123 Wn.2d 678, 871 P.2d 146 (1994) .....	36

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>McDonald v. State Farm Fire and Cas. Co.</i> , 119 Wn.2d 724, 837 P.2d 1000 (1992) .....	16
<i>Mercer Place Condo. Assoc. v. State Farm Fire &amp; Cas. Co.</i> , 104 Wn. App. 597, 17 P.3d 626 (2001) .....	<i>passim</i>
<i>Missouri Terrazzo Co. v. Iowa National Mut. Ins. Co.</i> , 740 F.2d 647 (8th Cir. 1984) .....	21
<i>Moeller v. Farmers Ins. Co. of Washington</i> , No. 29480-0-II (Wash. App. 1/10/03) .....	4
<i>Odessa School District v. Insurance Co. of Am.</i> , 57 Wn. App. 893, 791 P.2d 237 (1990) .....	36
<i>Overton v. Consolidated Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002) .....	21
<i>Queen City Farms, Inc. v. Central Nat. Ins. Co.</i> , 126 Wn.2d 50, 882 P.2d 703 (1995) .....	35, 36
<i>Ray v. Farmers Ins. Exch.</i> , 246 Cal. Rptr. 593 (Cal. App. 1988) .....	26, 27
<i>Spratt v. Crusader Ins. Co.</i> , 109 Wn.App. 944, 37 P.3d 1269 (2002) .....	33, 37
<i>U.S. Life Credit Life Ins. Co. v. Williams</i> , 129 Wn.2d 565, 919 P.2d 594 (1996) .....	17
<i>Weyerhaeuser Co. v. Commercial Union Ins. Co.</i> , 142 Wn.2d 654, 15 P.3d. 115 (2001) .....	24

**STATUTES**

CR 56(c) .....	38
Washington Administrative Code .....	13
Washington Administrative Code § 284-30-330 .....	40
Washington Administrative Code § 284-30-350 .....	39

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**TREATISES**

8 <i>Couch on Insurance</i> 3d § 119:2 .....	19
11 <i>Couch on Insurance</i> 3d § 156:20 .....	18, 19
11 <i>Couch on Insurance</i> 3d, § 156:21 .....	19
12 <i>Couch on Insurance</i> 3d, § 175:47 (1997) .....	28
15 <i>Couch On Insurance</i> 3d § 177:19 (1997) .....	28
<i>Couch on Insurance</i> 3d, § 254:209 at 254-242 .....	33
6 Appleman, <i>Insurance Law and Practice</i> , § 3883 (1972) .	28
7A. Am. Jur. 2d, <i>Automobile Insurance</i> § 417, at 207-08 (1997) .....	29
A.L.R.2d § 4, at 342-46 (1955) .....	29
Washington Pattern Instructions § 30.10 .....	1
Washington Pattern Instructions § 30.12 .....	1

## I. ASSIGNMENT OF ERRORS

This case presents a question of contract interpretation: whether when Farmers Insurance Exchange (“Farmers”) elects to pay to repair an insured’s vehicle under its policy’s comprehensive and collision coverages, and the vehicle cannot be repaired to its “pre-loss condition,” whether Farmers must then indemnify its insured for any loss in the vehicle’s market value, (“diminished value”) resulting from the damage to the vehicle.

It is well settled as a matter of tort law that diminished value is recoverable in these circumstances. *See, e.g.,* Washington Pattern Instructions §§ 30.10 and 30.12. The issue in this case is whether Farmers has expressly *excluded* diminished value from its broad coverage obligation to “pay for loss to your car” under the policy it drafted, a clause which provides coverage for diminished value.

Because it ignored a key disputed issue of fact before it (Plaintiff presented *unrefuted evidence* that the type of body and frame damages at issue before the trial court were incapable of being repaired to pre-loss condition), and because it declined to consider evidence that Plaintiffs’ interpretation of the policy language at issue was reasonable, the court below erroneously shifted the burden of proof to Plaintiffs and found that diminished value was not a covered loss under the policy. The court then went on to hold that:

the insurance company's limit of liability is capped at the limit of returning the damaged vehicle to substantially the same physical, operating and mechanical condition that exists before the loss, and summary judgment is granted to the defendants on this issue.

TR. 12. Having found no coverage, the court below also dismissed the Washington Consumer Protection Act (CPA) count for failure to disclose and adjust for the claim. *Id.*

In reaching its ruling, the court below committed four errors of law:

(1) It misconstrued the broad coverage clause to “pay for **loss to your car**”<sup>1</sup> as not covering reduction in a vehicle's value due to the accident;

(2) Addressing the clause claimed to constitute an exclusion, the court never addressed the reasonableness of Plaintiffs' interpretation of that clause, failed to construe the claimed exclusionary clause in its entirety by ignoring important contractual language requiring repair or replacement be to a standard of “like kind and quality,” and failed to construe the claimed exclusion language strictly against the insurer;

(3) It improperly disregarded a disputed issue of fact – the existence of irreparable damage – that prevented application of its construction of the contract to the very case before it and improperly shifted

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<sup>1</sup> Loss is further defined in the policy as “direct and accidental loss of or damage to your insured car.” CP 19.

the burden of proof to Plaintiffs to show that an exclusion did not apply to the loss; and

(4) By incorrectly finding no coverage, it also incorrectly found Farmer's denial of liability was not in bad faith and therefore not a CPA violation.

Each of these errors is reviewed *de novo*. As discussed below, properly construed, Farmer's policy does not exclude coverage for diminished value.

## **II. STATEMENT OF THE CASE**

### **A. Filing and Certification of the Case and Claims At Issue**

This case was originally filed by Plaintiff David Moeller on May 18, 1999. Mr. Moeller sought class certification, and to obtain payment for the reduction in value suffered by his vehicle due to Farmers' inability to repair it to its pre-loss condition after it was damaged in an accident.

On September 13, 2002 after a four-day hearing based upon a fully developed factual record, the court below, while denying certification under CR 23(b)(2), certified a class of Washington policyholders under CR 23(b)(3) who asserted claims for breach of contract, and a violation of the CPA in Farmer's practice of failing to pay or adjust for diminished value losses. As the trial court identified the key claim at issue in its certification order: "plaintiff sought coverage for the diminished value

resulting from the accident damage that persisted even after repair.”

10/13/02 Order at 2. Addressing the common questions of fact and law the court below identified one key question as “whether vehicles in the class can be returned to their pre-accident condition.” *Id.* at 6.

Farmers sought review of the class certification decision under RAP 2.3(b)(2). Review was rejected by Commissioner Schmidt in a written ruling. *Moeller v. Farmers Ins. Co. of Washington*, No. 29480-0-II (Wash. App. 1/10/03).

On December 13, 2002, the court below approved a form of notice, and ordered mailed notice be disseminated to the class. As this court-approved notice told class members:

This case involves allegations that when certain automobiles sustain damage to their structural systems and bodies, they cannot be repaired to their pre-accident condition, causing the vehicles to suffer a loss in value called “diminished value.”

CP 145. The pleadings, class certification order, and notice therefore clearly established the issue in this case: must Farmer’s pay any diminished value under its policy when a vehicle cannot be repaired to its “pre-loss condition”?

**B. Issues Raised In Farmers’ Motion for Summary Judgment**

Prior to a then-approaching trial date, on May 28, 2003, Farmers moved for summary judgment. Without addressing the claims

certified by the trial court described above, Farmers' motion claimed that the loss at issue was "psychological diminished value" ('PDV') CP 82, 84 which was excluded by "policy language [which] limits the insured's liability to the cost to 'repair or replace property'" CP 84. The motion further argued that because Farmers' policy interpretation was correct, it was reasonable, and therefore the bad faith and CPA claims must also be dismissed. CP 85. Farmers did not argue that diminished value was not a "direct and accidental loss of or damage to **your insured car**" and therefore not covered under the policies *coverage* clause, see CP 14, rates Farmers only argued diminished value was excluded as a loss under the "Limits of Liability" clause of the policy. CP 84.

**C. Plaintiff's Reply To The Issues Raised In Farmers' Motion**

**1. Plaintiffs Submitted a Substantial Statement of the Evidence of a Disputed Issue of Fact Preventing Summary Judgment**

With their opposition, Plaintiffs submitted an extensive evidentiary submission including excerpts from depositions and affidavits from expert witnesses all designed to show that vehicles within the class had not been, and due to the types of damage they suffered *could not be* returned to their pre-loss condition. Plaintiffs argued that therefore the market value losses at issue were not "PDV", *i.e.*, a stigma loss, rather they were the result of Farmers' failure to repair class members' vehicles to their

pre-loss condition. CP 113-115. Plaintiff's factual submission in opposition to summary judgment included the following:

- An affidavit from Mr. James Duffie (an acknowledged expert in auto repair techniques) that the type of damage which had occurred to class members' vehicles could never be returned to its pre-accident condition. CP 113-114, 159-168.
- A declaration under penalty of perjury, and excerpts from the deposition of Dr. Peter R. Mould (a metallurgist with over 30 years experience with automobile production) showing that vehicle damage of the type at issue in this case could never be fully repaired. Dr. Mould's evidence was that repairs of the type performed on class members' vehicles always left the vehicles less safe and durable than they were before the accident. CP 116, 166-169, 170-174.
- A signed expert report from Dr. Bernard Siskin (a statistician with extensive experience in determining individual and classwide damages), which explained the process used to determine the existence and amount of damages for class members for trial through a statistical regression analysis of the difference in

market prices between undamaged and damaged and repaired vehicles. As Dr. Siskin explains, only vehicles that were identified through physical inspection (*i.e.*, vehicles not returned to the “pre-loss condition,” rather than hypothetical “stigma” damaged cars) had been studied. As such the damages at issue were those flowing directly from the failure to return vehicles to their pre-loss condition, not some hypothetical “stigma” loss. CP 117, 237-244.

- Excerpts from the deposition of Michael West (Farmers’ own body shop expert) in which he repeatedly conceded that it was impossible to fully repair vehicles within the class to their pre-loss condition; and that it was possible to tell that a vehicle had been repaired because of the physical difference in a car after repair. CP 116-u, 229-35.

As to Farmers’ claim that Plaintiff’s claims had always been merely “stigma claims,” Plaintiff noted that Farmers itself had disclosed several witnesses to attempt to counter Plaintiff’s claims of the impossibility to repair the vehicles within the class to their pre-loss condition, and was therefore obviously well aware of the actual claims at issue. *See, e.g.*, CP 116, 181-226. Plaintiffs argued that Farmers had

presented a hypothetical question of contract construction which was not presented by the facts before the court: *i.e.*, whether diminished value was covered if a vehicle *had been restored to its pre-loss condition*. Therefore, Plaintiffs argued a coverage determinative disputed issue of fact (whether class members' vehicles had been restored to their pre-loss condition) barred summary judgment on the grounds asserted by Farmers.

## 2. The Policy Language At Issue

Addressing the insurance policy language at issue, Plaintiffs next observed that the relevant sections of Farmers' policy (found in Part IV of the 3rd edition auto policy at pages 10 and 11) (CP 19) required Farmers, under the coverage clause, to "pay for **loss to your insured car.**" **Loss** is a bolded defined term: "**Loss** means direct and accidental loss of or damage to **your insured car**, including its equipment." *Id.* Plaintiff argued that it was undisputed by Farmers, and universally recognized in case law, that diminished value was a "direct and accidental loss" covered under the policy's coverage clause. CP 118. Because there was *coverage* for diminished value, the question, therefore, was simply one of whether, *given the evidence before the court that class members' vehicles had not been repaired to their pre-loss condition*, diminished value was *excluded* as a loss elsewhere in the policy.

Plaintiffs observed that the policy contained a section for "**Exclusions**," and included eleven specific exclusions. These included

such things as damage caused by “nuclear reaction, radiation or radioactive contamination,” “wear and tear,” or damage “during any organized or agreed-upon racing or speed contest.” There is no exclusion for diminished value in Farmers’ policy. CP 118, CP 19-20.

Finally, Plaintiffs noted that the section of the policy cited by Farmers as constituting an “exclusion” for diminished value, the “**Limits of Liability**” clause, did not simply promise to “repair” the vehicle as Farmer’s motion had asserted, rather the clause read, in its entirety, was as follows:

Our limits of liability for **loss** shall not exceed:

1. The amount with which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation.
2. \$500 for a **utility trailer** not owned by you, or a **family member**.

CP 20. Plaintiffs argued that this clause, *properly read in its entirety*, was not an exclusion for diminished value, rather it simply capped Farmers’ liability at the pre-loss value of the vehicle so as to prevent financial betterment. As Plaintiffs argued, a contract clause that expressly capped Farmer’s repair or replacement costs to items of similar value, by using “of like kind and quality”, could not reasonably be read as also *unambiguously excluding* the obligation to repair or replace the property’s value under the

same “like kind and quality” provision. Put another way, having used “of like kind and quality” to cap its own liability at pre-loss value, Farmers could not reasonably claim it had excluded value from its coverage of “loss” under the exact same words in the contract. CP 125-127.

### **3. Plaintiffs Submitted Support for the Reasonableness of Their Contract Interpretation**

Plaintiffs also submitted evidence and arguments to show that Plaintiffs’ interpretation of the contract clause was reasonable (and therefore the claimed exclusion was at best, for Farmers, ambiguous requiring it be construed strictly against the clauses). This included:

(1) Materials from the office of the Washington Insurance Commission (OIC) showing that the limitation of liability clause’s language did not exclude diminished value. As the OIC reasonably noted: “A ‘repair’ is not complete until a vehicle is restored to its value before a loss. If this is not possible, then an additional amount should be paid to complete the indemnification, which is part of the ‘repair.’” CP 324. Rejecting an effort to exclude coverage for diminished value without a reduction in rates the OIC similarly reasoned that:

“We understand that few claims have been paid under the theory of diminution in value, but this was likely due to ignorance on the part of both insureds and companies as much as anything. We believe the coverage has been in the policy, and the exclusion represents a decrease in coverage; rather than a clarification of coverage.”

(2) Testimony from Farmers' own auto physical damages claims manager for Washington, Douglas M. Johnson (consistent with Plaintiffs' proffered interpretation of the contract) that the limits of liability clause simply allowed Farmers to prevent "betterment," *i.e.*, making its insureds more than whole. According to Mr. Johnson under the limits of liability clause insureds are to be put back in the same position, but no better, after an accident. CP 126, 292-293.

(3) Testimony by Farmers' executive Peter Hickey, part of whose job responsibilities were to interpret insurance policies CP 120, 271-283], that under the limitation of liability clause "I think like kind and quality is, you should have equivalent value of the items that are being repaired or replaced." CP 121, 271-283. Mr. Hickey further explained that Farmers had considered adding an exclusion for diminished value yet:

In my opinion, any time you put an exclusion into a policy that would, you know, take coverage out of the policy, it would be met with consumer advocacy concerns....

If your competitors—if you have an exclusion in your policy and your competitors don't, you may be at a disadvantage in marketing those policies...

It seems to me that if you put in a policy type exclusion, they [regulators] may perceive that there's lesser coverage than there was and pricing should be adjusted accordingly.

CP 121.

(4) Testimony by Farmers' employee, Todd Polly, that the clause "like kind and quality" included (as Plaintiffs argued) a requirement for repair or replacement of value:

Q: In the context of a first party claim, if Farmers elects to replace a vehicle, would it be your understanding that it needs to be of like kind and quality?

A: Yes.

Q: And that would encompass the value, that the value should be similar?

A: Correct.

CP 121, 285-289.

Plaintiffs further argued that courts and respected commentators had found Plaintiffs' proffered construction of the clause reasonable, CP 127-131, and that it was unreasonable as a matter of contract law to attempt to read the limits of liability clause, which capped Farmers' liability at the pre-loss value of the damaged or destroyed property, as allowing for *less* than full performance under the coverage clause. CP 131-132.

Plaintiffs finally argued that the cases relied upon by Farmers – which either addressed (1) a claim for diminished value where the vehicle had been restored to its pre-loss condition, or (2) where there was no requirement in the policy at issue that any repair or replacement be of "like kind and quality" were irrelevant. CP 130-31.

**4. Plaintiffs Submitted Unrebutted Evidence that Farmers' Failure to Disclose and Adjust the Claims at Issue was a *Per Se* Violation of the CPA**

To address Farmers' claims that its conduct did not violate the CPA, Plaintiffs presented unrebutted testimony from Debra Senn, the former Insurance Commissioner of Washington, that Farmers' conduct in failing to disclose and adjust for diminished value losses was unreasonable as a matter of insurance practice, a violation of the Washington Administrative Code, and therefore a *per se* violation of the CPA. CP 133-136.

**D. The Trial Court's ruling**

The court below began its analysis by noting that in interpreting the policy it must "first review the language of the contract to decide if the language in controversy is reasonably or fairly susceptible to two or more different interpretations." Tr. 6. The court below, however, then declined to consider the evidence submitted by Plaintiffs as to the *reasonableness* of their interpretation of the limits of liability clause believing the evidence was intended to somehow add to, vary, or modify the contract. Tr. 7-8.]

The court below then started its analysis with the limits of liability clause and, failing to address the differences between an inclusionary (coverage) clause and an exclusionary clause, noted that there was no mention of diminished value in the "limits of liability clause." The

court therefore stated it would not read diminished value *coverage* into the limits of liability clause thereby increasing coverage. Tr. 8.

The court below then went on to discuss the coverage clause finding that diminished value was not a “direct and accidental loss.” As the court reasoned:

[The] value of the vehicle prior to the accident which resulted in the loss is not tangible property, nor it is a physical injury to be compensated.

Numerous states have found the same interpretation of this contract language to be persuasive and controlling, thereby not ambiguous, and not construed to include the preaccident value of the car as a compensable loss.

Tr. 10.

Next, addressing the “like kind and quality” obligation in the limitation of liability clause (but without addressing the reasonableness of Plaintiffs’ suggested construction of the clause as simply limiting Farmers’ obligations to the pre-loss value of the property to prevent “betterment”), the court below noted that it was “persuaded by the weight of authority from other jurisdictions that ‘like kind and quality’ language is unambiguous and does not provide coverage for diminished value, even in those cases where a loss of market value may be demonstrated by persuasive evidence.” Tr. 11-12.

Having not ever construed “like kind and quality” by considering Plaintiffs’ interpretation of the clause the court below next considered the single word “repair” without reference to any other of the clause’s provisions and held: “there is no inherent concept of value in the ordinary meaning of the word ‘repair.’” As a result of this analysis, the court found that “the insurance company’s limit of liability is capped at the limit of returning the damaged vehicle to substantially the same physical, operating, and mechanical condition that exists before the loss, and summary judgment is granted to the defendants on this issue.” Tr. 12.

The court below did not address Plaintiffs’ factual showing that the vehicles in the class had not, in fact, been returned to their “pre-loss condition,” or explain how this showing could be reconciled with the court’s own ruling. Finally, finding Farmers’ interpretation of its policy “reasonable”, the court below dismissed the CPA claims. Tr. 12-13.

### **III. STANDARD OF REVIEW**

“Summary judgment is available only if the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Mercer Place Condo. Assoc. v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 601, 17 P.3d 626 (2001) (citing CR 56(c)). Review of a summary judgment motion is *de novo*. *Id.* (citing *Mountain Park Homeowners Ass’n, Inc. v.*

*Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1984)). Similarly, construction of an insurance policy provision is a question of law, and therefore reviewed *de novo*. *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (citing (*Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988))); *Mercer Place Condo Assoc.*, 104 Wn.App. at 601.

The first rule of policy construction is that “the insurance contract must be viewed in its entirety, a phrase cannot be interpreted in isolation.” *Allstate Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997)(citing *Hess v. North Pac. Ins. Co.*, 122 Wn.2d 180, 186, 859 P.2d 586 (1983)). Therefore, “when construing the policy, the Court should attempt to give effect to each provision in the policy.” *Id.*

Next, as noted in *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992) (cited by Farmers below):

“Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.” *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (quoting Restatement (Second) of Contracts § 200 (1981)). Insurance policy language must be interpreted in accord with the way it would be understood by the average person. *National Union Fire Ins. Co. v. Zuver*, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988). An insurance policy provision is ambiguous when it is fairly susceptible to two different interpretations, both of which are reasonable.

As noted in *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996) (cited by Farmers below), in ascertaining this meaning, extrinsic evidence (such as the statements of Farmers' employees) are admissible:

In order to aid courts in ascertaining the intent of the parties to a contract, we adopted the "context rule" in *Berg*. *Berg*, 115 Wn.2d at 667, 801 P.2d 222. Under that rule, extrinsic evidence is admissible in order to assist the court in ascertaining the intent of the parties and in interpreting the contract. *Berg*, 115 Wn.2d at 667, 802 P.2d 222. Such evidence is admissible regardless of whether or not the contract language is deemed ambiguous. *Berg*, 115 Wn.2d at 669, 801 P.2d 222. At the same time, however, we cautioned that extrinsic evidence cannot be considered for the purpose of varying the terms of a written contract.

*Id.* at 569.<sup>2</sup>

When two different interpretations of a policy provision are offered, the analysis then differs based upon whether an inclusionary or exclusionary clause is at issue:

"An inclusionary clause in insurance contracts should be liberally construed to provide coverage whenever possible." *Riley v. Viking Ins. Co.*, 46 Wash.App. 828, 829, 733 P.2d 556 (1987) (citing *Pierce v. Aetna Cas. & Sur. Co.*, 29 Wash. App. 32, 627 P.2d 152 (1981)). "[E]xclusionary clauses are to be construed strictly against the insurer." *Eurick v. Pemco Ins. Co.*, 108 Wash.2d 338, 340, 738 P.2d 251

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<sup>2</sup> The court below refused to consider evidence as to the reasonableness of plaintiff's interpretation, an issue discussed below at 32-36.

(1987) (citing *Farmers Ins. Co. v. Clure*,  
41 Wash.App. 212, 215, 702 P.2d 1247 (1985)).

*Mercer Place Condo Assoc*, 104 Wn.App. at 602-3.

#### IV. ARGUMENT

##### A. Diminished Value is a Covered Loss Under Farmer's Policy

Although the argument was never advanced by Farmers in its motion, the court below held that there was no coverage for diminished value because any reduction in value resulting from the inability to repair a car to its "pre-loss condition" was not a "direct and accidental loss" because the court reasoned it was not "tangible property" or a compensable "physical injury." Tr. 10. In so holding the court below fundamentally misunderstood the coverage clause in the policy, which must be construed broadly to afford coverage. *Mercer Place Condo Assoc*, 104 Wn.App. at 602-3; *Peasley*, 131 Wn.2d at 424.

Insurance, including this policy, protects against unforeseen events, thus, a "direct and accidental loss of, or damage to" the vehicle is simply a triggering event for a claim to be covered under the policy.<sup>3</sup> Both Insurance treatises and case law have widely defined the words "direct loss" and "accidental loss" as triggering events, not some additional requirements of a *physical loss* to be added to the policy, as did the court below. Here, the Policy requires indemnification for "direct loss" which

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<sup>3</sup> Whether the loss is direct or accidental is a question of fact to be determined by the jury. 11 *Couch on Insurance* 3d § 156:20.

includes as a matter of black letter law any loss flowing from the accident including diminished value. *See* 11 *Couch on Insurance* 3d, § 156:21 (stating that “direct loss” refers to a causal relationship – the harm resulting from an immediate or proximate cause).

The Policy also requires indemnification for “accidental loss.” In motor vehicle policies, the liability insured against is generally confined to that caused by an “accident.” Where the term is not defined in the policy, its definition is determined from its common meaning to the average person. The average person places a broad definition on accident. In fact, the term “accident” is more comprehensive than the term “negligence” and in its common signification, accident means, “an unexpected happening without intent or design.” 8 *Couch on Insurance* 3d § 119:2. Under an automobile policy defining loss as “direct and accidental loss or damage to the automobile” – “accidental” means “an unexpected happening without intention or design.” 11 *Couch on Insurance* 3d § 156:20. In other words, accident is properly “construed to relate to the cause rather than the effect.” 8 *Couch on Insurance* 3d § 119:2.

As a result of these well recognized principles, even courts which have found that diminished value is *excluded* under a limitation of liability clause with different language than found in Farmers’ policy have found diminished value to be a “direct and accidental loss.” *See e.g.*, *Carlton v. Trinity Univ. Ins. Co.*, 32 S.W.3d 454, 461 (Tex. App. 2000)

(finding diminished value is a “direct and accidental loss”; “the issue is not whether the insurance agreement is broad enough to cover the loss, but whether the limit of liability is broad enough to cap Trinity’s obligation to pay it”); *Given v. Commerce Ins. Co.*, 796 N.E.2d 1275 (Mass. 2003) (finding that diminished value is a direct and accidental loss).

Moreover, even were the term “physical injury,” a term not found in the relevant section of the policy, CP 19-21, *to be added into the policy’s coverage clause* as the court below erroneously did, the court below would still have erred in finding no coverage because “physical injury” to “tangible property” in an insurance policy is merely a *trigger* for the recovery for any damages (including diminished value) flowing from the loss.

The issue usually arises in the context of General Comprehensive Liability (GCL) policies which unlike Farmers’ policy sometimes include an *express* trigger for “physical damages” in the coverage clause. In the few published cases where a defendant has attempted to assert the reasoning adopted in the court below’s decision; that diminished value was not recoverable despite the existence of “physical injury” to the property, the proposition has been soundly rejected. For example, finding coverage in the facts similar to those in this case under a comprehensive general liability policy (CGL) with a “physical damage”

trigger, the court in *Missouri Terrazzo Co. v. Iowa National Mut. Ins. Co.*, 740 F.2d 647, 650 (8th Cir. 1984), noted that:

Here, the physical damage to tangible property, i.e., the physical deterioration of the floor, is manifest. We agree with Missouri Terrazzo that the diminution in value in this case is ‘merely a means of measuring the damage sustained as a result of the property damage.’ We therefore hold that the district court did not err in its conclusion that Missouri Terrazzo’s liability to National Supermarket was based on ‘property damage,’ as that term is defined in the policy. Thus, it is clear that the policy covered National Supermarket’s claim for damages unless an exclusionary clause is applicable.

*Id.* Applying Washington law the Ninth Circuit has reached the same result. Noting the clear difference between *damages* and the *actual physical injury to property*, the Ninth Circuit found that “intangible economic injuries may result from physical injury to tangible property.” *Dewitt Construction Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1136 (9th Cir. 2002).

The Washington Supreme Court has also noted the difference between the *property damage* trigger and *covered* damages that flowed from a loss under a GCL policy: “‘Damage’ means the actual loss, injury, or deterioration of the property itself. [citation omitted] ‘Damages,’ on the other hand, means compensating loss or damage.” *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 428, 38 P.3d 322 (2002). Because the diminished value suffered by Plaintiffs’ vehicles results from physical damage to the

vehicle, it is covered by the policy. *See e.g., General Ins. Co. of Am. v. Gaueger*, 13 Wn.App. 928, 931, 538 P.2d 563 (1975) (holding that consequential damages flowing from the physical injury to tangible property is covered), *Labberton v. General Cas. Co. of Am.*, 53 Wn.2d 180, 186-87, 332 P.2d 250 (1958). These cases endorse the universal principle of insurance law that once the injury is covered by the policy (in this case damage to the injured vehicle), then all of the resulting damages are covered. In other words, because it is indisputable that there was physical injury to Plaintiffs' vehicles, any and all damages flowing therefrom, and not expressly excluded by the policy, are clearly covered under the policy. *General Ins. Co. of Am.*, 13 Wn.App. at 932.

**B. The Trial Court Erred In Failing To Find Plaintiffs' Proposed Interpretation Of "Limits Of Liability Clause" Reasonable, And Therefore In Construing The Limits Of Liability Clause As A Diminished Value Exclusion**

**1. Farmers' Policy Language — Which Simply Limits Payment to the Full Value of the Damaged or Destroyed Property — Does Not Exclude Diminished Value**

The court below committed a fundamental error in attempting to construe the term "repair or replace" in isolation — shorn of its context — rather than in the context of the entire limits of liability clause. The actual policy at issue promises to compensate for all "direct and accidental loss of, or damage to" the vehicle. As discussed above, loss in value (regardless of whether it is "PDV" as asserted by Farmers below, or, as alleged by Plaintiffs, flows from the inability to restore a vehicle to pre-

accident condition) clearly is the result of direct and accidental damage to the car; *i.e.*, an accident.

Farmers therefore attempted to find an exclusion in the “limits of liability” clause which limits Farmers’ liability for loss to:

The amount which it would cost to repair or replace damaged or stolen property with  
[1] other property of *like kind and quality*, or  
[2] *with new property less an adjustment for physical deterioration and/or depreciation.*

CP 14 (emphasis added). Read properly, however, this clause merely sets the property’s pre-loss value as a limit on recovery so as to prevent “betterment”; it does not do the opposite and exclude value from being part of the loss that is compensated, leaving an insured with an uncompensated loss.

The limits of liability clause by its own terms applies to all types of claims, be they total losses or partially or fully repairable property. Therefore, the requirement to provide up to the *cost* of property of “like kind and quality” or new property “less an adjustment for physical deterioration and/or depreciation” applies regardless of whether the property is “replaced” or “repaired.” Read properly, the clause simply caps Farmers’ obligation for loss to the pre-loss value of the property.<sup>4</sup> A policy clause that expressly references value as the limit of Farmers’ obligations cannot, at the same time, be interpreted so as to exclude value when it

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<sup>4</sup> As noted about at 10-11, Farmers’ own auto physical damages claims manager for Washington, Douglas M. Johnson agreed with this implementation of the provision.

comes to the extent of Farmers' obligation to its insureds. *See, e.g., Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 669, 15 P.3d. 115 (2001) (rules of construction require that same clause must have the same meaning). It is worth repeating that several Farmers executives and the office of the Washington Insurance Commissioner all believe that "like kind and quality" includes value. *See* above at 10-12.

In *Hess v. North Pacific Ins. Co.*, 122 Wn.2d 180, 859 P.2d 586 (1983) (cited by Farmers below), the Washington Supreme Court applied similar reasoning in the context of a fire insurance policy with a similar clause. In *Hess*, property had been destroyed, and the insured claimed they were entitled to *more* than the value of the destroyed property. The court noted "the insurer has never contended that it does not owe, at a minimum, the actual cash value of the destroyed insurance building." *Id.* at 185. Addressing the insured's claim for *more, i.e.,* betterment, the *Hess* court observed that "the underlying purpose of property insurance is indemnity." 122 Wn.2d at 182. Considering a set of payment options to "repair or replace," the court found that the policy provision acted to set a limit on payments to the "actual cash value" of the insured property. The limitation of loss clause in the instant contract does the same thing: in effect, it limits payments by Farmers to the "actual cash value" of the insured property. It does not allow Farmers to, as the court below in effect

ruled, leave the insured with property that is worth *less* than it was before the property was damaged and repaired or replaced.

**2. Courts That Have Correctly Considered a “Limits of Liability Clause” Have Construed Similar Policies to Farmers As Not Excluding Diminished Value**

Although Plaintiffs know of no case construing a contract that incorporates value *so expressly* into its terms (by expressly incorporating the value of the damaged or destroyed property into the limitation of loss clause through reference to “depreciation”) numerous courts have rejected the argument that repair to “like kind and quality” in a limits of liability clause does not require repair to pre-accident value. For example, in *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Colo. App. 2001), the court rejected Farmers’ claim that it must simply provide its insured “with a comparably functioning” vehicle, observing the “once having made the choice [to repair the vehicle] Farmers was responsible, under the terms of the policy, for providing plaintiff with a vehicle of like kind and quality.” 20 P.3d at 1224.

Explaining the meaning of “like kind and quality.” In the limits of liability clause the *Hyden* Court reasoned:

Initially, we note that, during oral argument, Farmers explained that the “of like kind and quality” phrase obliged it only to return the Jeep to plaintiff in “substantially the same condition as it was before the accident.” Yet, according to one leading commentator, “A vehicle is not restored to substantially the same condition if

repairs leave the market value of the vehicle substantially less than the value immediately before the collision.” L. Russ, *Couch on Insurance 3D* § 175:47 at 175-54 (1998). We agree with this commentator.

The phrase “of like kind and quality” does not, in our view, unambiguously support Farmers’ position that it was obligated only to restore plaintiff’s Jeep to a functioning capacity. Indeed, the term “quality” can have a meaning different from the word “kind,” *Webster’s Ninth New Collegiate Dictionary* 661 & 963 (1991), and it often conveys “a degree of excellence” or “a superiority in kind.” *Webster’s Ninth New Collegiate Dictionary* 963 (1991). Because the words “kind” and “quality” are joined together by “and” rather than by “or,” ordinary purchasers of insurance could reasonably expect Farmers to provide them with vehicles substantially equivalent in both function *and* value to those which they drove prior to any accidents.

In our view, the phrase “of like kind and quality” is ambiguous because it fails to specify the protections afforded by the policy. Accordingly, it must be construed in favor of plaintiff and against Farmers.

*Id.* at 1225. As the *Hyden* court noted, numerous courts had similarly construed “like kind and quality” to include value. *Id.*<sup>5</sup>

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<sup>5</sup> There appear to have been only two other Diminished Value decisions involving Farmer’s policy. In *Barton v. Farmers Ins. Exch.*, 255 S.W.2d 451 (Mo. App. 1953), the court found that when “plaintiff’s testimony shows that even after repairs were made, the car was not placed in its former condition,” *id.* at 456-7, that under the repair or replace to “like kind and quality” obligation “the measure of damages should have been the difference between the value of the automobile prior to the upset and its value when repaired.” *Id.* at 456. In *Ray v. Farmers Ins. Exch.*, 246 Cal. Rptr. 593 (Cal. App. 1988), two judges found that:

To the extent Ray’s automobile was repaired to its pre-accident safe, mechanical, and cosmetic condition, Farmers’s obligation under the policy of insurance to repair to “like kind and quality” was discharged.

### 3. Respected Commentators Recognize Diminished Value as a Covered Loss

The leading authorities on insurance law have all recognize loss in value as compensable loss. For example, Blashfield's *Cyclopedia Of Automobile Law And Practice* recognizes loss in value compensation, stating:

The restoration may or may not be accomplished by repair or replacement of broken or damaged parts, *but there cannot be said to be a complete restoration of the property satisfying the intention of the policy except where there is no diminution of value between the car as it was before the injury and as it is in its restored or repaired condition.*

6 Blashfield, *Cyclopedia of Automobile Law and Practice* § 3791 (emphasis added). In *Couch on Insurance*, the concept of loss in value is also discussed with approval:

Where the repairs by the insurer under a collision policy did not substantially restore the automobile to its former condition and value, *the proper measure of damages was the difference in the value before it was wrecked*

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*Id.* at 596. Another judge dissented, and after a long analysis of the meaning of “like kind and quality,” noted that:

To permit the insurer to repair the car to comparable physical condition and function while its value has plummeted does not compensate the insured with a car of “like kind and quality” as the average person would understand those words. The purpose of the policy is to compensate plaintiff for any loss or damage, less any deduction. Plaintiff is entitled to have a car just as valuable as the car was before the accident. Anything less would not be adequate compensation for the loss sustained.

*Id.* at 599. Unlike *Barton*, which involves the facts of this case, *Ray* is a “stigma” case in which the majority (but not the dissent) found coverage to have ended once a vehicle was restored to its pre-accident physical condition.

*and the value after it was wrecked, repaired,  
and tendered to the insured.*

15 *Couch On Insurance 3d* § 177:19 (1997) (emphasis added). *See also*  
12 *Couch on Insurance 3d*, § 175:47 (1997). *Appleman's Insurance Law*  
*And Practice* also recognizes that the option to repair or replace requires  
restoration of pre-loss condition and value of the automobile:

Such a clause has been held to mean the  
restoration of the automobile to its condition or  
value prior to the damage. *Accordingly, the cost*  
*of repairs and replacement will not operate as a*  
*limitation of liability unless the automobile is*  
*restored to its previous condition*, and the courts  
have, where the repairs have failed to fully  
restore the vehicle to its former condition, either  
allowed recovery for the difference between the  
fair cash value before and after the accident or  
have awarded the diminution in value in  
addition to the cost of repair.

6 *Appleman, Insurance Law and Practice*, § 3883 (1972) (emphasis added).

And, *American Jurisprudence, Second Edition*, has adopted the same  
reasoning:

In cases where the motor vehicle can be  
repaired, subject to the operation of the  
deductible clause, the measure of recovery is the  
cost of repairs, not in excess of the value of the  
vehicle before the accident, providing that the  
repairs restore the vehicle to its former market  
value.

\* \* \*

[I]t has often been said that the correct measure  
of loss caused by a collision is the difference in  
market value of the automobile immediately  
before the collision and the combined amount

of its market value immediately after being repaired, plus the deductible. It is not the value to the owner which controls but the value to those who constitute the market in used cars.

7A. Am. Jur. 2d, *Automobile Insurance* § 417, at 207-08 (1997). *See also* A.L.R.2d § 4, at 342-46 (1955).

#### **4. The Decision Below Adopted Faulty Reasoning In Addressing The Limits Of Liability Clause**

The court's decision below never addressed Plaintiffs' reasonable interpretation of repair and replacement of "like kind and quality" in the limits of liability clause; and simply noted that it was "persuaded by the weight of authority from other jurisdictions that 'like kind and quality' language is unambiguous and does not provide coverage for diminished value." In so holding the court below made several legal, and logical, errors.

First, the court below evidently confused the coverage clause and the claimed exclusionary clause. The issue was not as the trial court viewed it whether there was *coverage* for diminished value in the limits of liability clause. By asking the wrong question, and evidently improperly placing the burden on Plaintiffs to show some express coverage language, the court below improperly failed to construe the claimed exclusionary clause "strictly against the insurer" as required by Washington law. *Eurick*, 108 Wn.2d. at 340; *Mercer Place Condo Assoc.*, 104 Wn.App. at 602-3.

Second, the court below's statement that the "weight of authority" was that "like kind and quality" was "unambiguous," Tr. 11, is simply wrong. Plaintiffs in fact showed below that when courts had addressed and interpreted an obligation to "repair or replace" to "like kind and quality" (the language found in Farmer's limits of liability clause) when there were allegations that the vehicles at issue had not been repaired to their "pre-loss condition" that they had *universally* found no exclusion for diminished value, *see* CP 152-157, (citing 14 decisions finding clause either ambiguous or finding no exclusion for diminished value). As Plaintiffs noted below, numerous cases had found "repair or replace" language *without any further "like kind and quality requirement"* unambiguous, CP 152-157, but this is not the language in Farmer's policy; and is therefore irrelevant. Plaintiffs know of no court anywhere that has held that diminished value is *excluded* under a policy with language like that in Farmers' policy where the vehicle has not been repaired to its pre-loss condition.

Third, the court below found "repair" unambiguous finding "there is no inherent concept of value in the ordinary meaning of the word "repair." Tr. 12. Although this reasoning is at least arguable if this were the only language at issue, (but see above at 10-11' 27-28, finding this reasoning incorrect) this was not the policy language before the court. It is

well-established that “a phrase cannot be interpreted in isolation” as the court below did. *Hess*, 122 Wn.2d. at 186.

Finally, the trial court reasoned that its construction was necessary so as to not deprive the insurer of its “choice of means.” Tr. 11. In so holding the court below failed to address the fact (discussed extensively below at CP 132-133) that the limits of liability clause simply allows for alternative methods of performance by Farmers. However, Farmers’ inability to fully perform under the alternative it claims it selected, *i.e.*, pay to repair the vehicle so that it is fully restored to “like kind and quality” does not limit its obligation to then provide additional performance under other clauses so as to render full performance of its promise to pay for all “loss.” As Plaintiffs explained below, when full performance cannot be obtained under one option, it is the privilege of choosing that option to the exclusion of others, *not the obligation of full performance* (as the court below reasoned), which is lost. *See e.g., Hansen v. Johnston*, 249 N.E.2d 133, 135-6 (Ill. App. 1969). As the court in *Ashland Oil & Refining Co. v. Cities Service Gas Co.*, observed:

What is the consequence of failure because of impossibility of one of two alternative performance provisions in a contract? The cases hold that where a contract requires a promisor to do a certain thing or to do something else the impossibility of one mode of performance “does not discharge him from his obligation to render the alternative performance which has not become impossible.”

462 F.2d. 204, 211 (10th Cir. 1972) (citations omitted).

In this case the contract requires the payment of money to repair or replace loss. Farmers is therefore obligated, if it elects to pay to “repair or replace” the damaged property, to do so fully (to “like kind and quality”), leaving no unrepaired or unrepairable damage which causes a reduction in value of the property, or it must pay for any remaining “loss,” *i.e.*, damages under the limitation of liability clause. Plaintiffs do not argue that Farmers cannot elect to pay cash to repair the property, instead they note that Farmers must pay for any remaining loss to the insured if Farmer’s election to pay to repair does not fully restore the property to its pre-loss condition, *i.e.*, to “like kind and quality” as the contract promises.

**5. The Trial Court Should Have Considered Plaintiffs’ Evidence Of The Reasonableness Of Their Contract Interpretation of the Limits of Liability Clause**

As noted above, Plaintiffs also introduced evidence below as to the reasonableness of the interpretation of the “like kind and quality” language in the limits of liability clause they proffered, *i.e.*, that it includes value. They also introduced evidence of the reasonableness of their interpretation of the “limitation of liability” clause itself, *i.e.*, that it simply limits the payments for loss to property’s pre-loss value so as to prevent “betterment.” This evidence -- in large part constituting admissions by a party opponent admissible under the plain language of CR 56(c) -- is highly probative, not as the court below mistakenly believed to show “unilateral or

subjective intent” but rather to show that the Plaintiffs’ interpretation of the contract was reasonable and therefore the claimed exclusionary language must be strictly construed against the insurer.<sup>6</sup>

In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) (cited by Farmers below), the Washington Supreme Court addressed the “plain meaning rule” which required an ambiguity be found before evidence as to the parties’ intent could be introduced. *Id.* at 660, 801 P.2d at 228. In *Berg*, the Court rejected “the theory that ambiguity in the meaning of contract language must exist before evidence of the surround circumstances is admissible,” thereby adopting the “context rule.” *Id.* at 669, 801 P.2d at 230. *Berg* itself involved a negotiated lease, where the meaning of “gross rentals” as the parties had intended, and whether it included reimbursements by subtenants, was at issue. *Id.* at 661-2, 801 P.2d at 225-6. What the parties had *intended* by “gross rentals,” not whether “gross rentals” was ambiguous (the phrase itself appears clear on its face) was therefore at issue. The *Berg* court’s broad (and oft quoted) statement that:

we are mindful of the general rule that parol evidence is not admissible for the purpose of

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<sup>6</sup> In rejecting the proffered evidence the trial court cited *Spratt v. Crusader Ins. Co.*, 109 Wn.App. 944, 37 P.3d 1269 (2002) where Division Three found a policyholder’s declaration as to the meaning of a term “not relevant to the intention of the parties at the time the policy was executed,” *id.* at 949, 37 P.3d at 1272-73, Plaintiffs’ evidence, however, does not attempt to present *their own independent understanding*, rather they have shown the understanding of Defendant’s own employees and others. Such material is properly admissible “to aid in the interpretation of the instrument.” *Id.*, 37 P.3d at 1272. See, e.g., *Couch on Ins.*3d, § 254:209 at 254-242 (admissions by insurers relevant to contract construction).

adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. But, as stated in *Olsen v. Nichols* [cite], parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.

*Id.* at 669, 801 P.2d at 229-30 (quoting *J. W. Seavy Hosp. Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P. 668 (1944)), therefore relates primarily to a showing of “intent” which is not expressed in the contract itself; i.e., meaning not found in the contract’s four corners.

Here, however, Plaintiffs recognize that a standard form contract is at issue, so that “mutual intent” as found in certain cases like *Berg* is not at issue. This, however, does not mean that evidence of the reasonableness of Plaintiffs’ interpretations of the “limitation of liability clause” and “like kind and quality” is to be ignored. Rather, because one of the questions before this Court is whether the language in Farmers’ contract is “fairly susceptible to two different but reasonable interpretations,” *Peasley*, 131 Wn.2d at 424, evidence on this point can be considered.

Numerous courts, *including the very cases cited by Farmers* below, have considered evidence of this precise type to determine the “reasonableness” of the parties’ proposed interpretations of the contract.

In *Queen City Farms, Inc. v. Central Nat. Ins. Co.*, 126 Wn.2d 50, 882 P.2d 703 (1995), when the issue of the meaning of the “pollution exclusion” was before the court, the insured argued that drafting history “should not be considered as evidence of the parties’ intent, but instead should be considered as one reasonable interpretation of the ambiguous exclusionary language.” 126 Wn.2d at 83. The Court agreed noting that: “if the interpretation proposed by the insured came from the mouth of the drafter of the provision, ordinarily this would be some evidence that the proposed interpretation is reasonable.” *Id.* at 89, 882 P.2d at 722-3 (*quoting* K. Abraham, *Environmental Liab. Ins. Law* 38-39 (1991)). The court then approved of the admission of admissions by the insurer noting that:

In reaching our conclusion that the reported representations of the insurance industry to state regulators may be considered insofar as they present a reasonable interpretation of the policy language, we do not treat the statements as extrinsic evidence of the parties’ intent. As explained above, there is no evidence of the parties’ mutual intent in this record. However, where unresolved ambiguity exists in an insurance provision, the insured is entitled to bring before the court any reasonable construction of the policy language favorable to the insured.

*Id.* at 86; *Accord Key Tronic Corp., Inc. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 630, 881 P.2d 201, 208 (1994) (noting that extrinsic evidence is considered when it “represented a reasonable construction of the policy language”) (cited by Farmers and the court below).

Similarly, in *Lynott v. National Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 693, 871 P.2d 146, 154 (1994), also cited by Farmers below, the court considered intrinsic evidence of (1) the insurers’ failure to further clarify the contracts’ terms despite knowledge of the issue and (2) the availability of a specific exclusion (which was not in the policy at issue) in rejecting an insurer’s claims that coverage was excluded. *Id.* This is, of course, precisely the type of evidence at issue in the instant motion: admissions by Farmers that: (1) it knew its language was unclear, and (2) a decision by it not to clarify its policy or add exclusionary language for diminished value. *See also Odessa School District v. Insurance Co. of Am.*, 57 Wn. App. 893, 899-901, 791 P.2d 237, 240-1 (1990) (cited by Farmers below; rejects insurers’ “narrow interpretation” of policy language based in part on extrinsic evidence).

Because this Court must address the issue of the “reasonableness” of the parties proffered interpretations of the “limitation of liability” clause (something the court below failed to do), Farmers’ own

admissions on this point are highly relevant and clearly admissible.<sup>7</sup> Taken together with the reasoning above the limits of liability clause in Farmers' policy is at best for Farmers ambiguous. It therefore must be narrowly construed against the insurer and cannot act as a diminished value exclusion. *Peasley*, 131 Wn.2d at 424.

**C. The Trial Court Erred In Applying Its Own Holding To A Case Where There Was A Material Issue Of Disputed Fact As To Whether Vehicles In The Class Had Been Returned To Their Pre-Loss Condition**

As noted above, the trial court held that the "limits of liability is capped at the limit of returning the damaged vehicle to substantially the same physical, operating, and mechanical condition that exists before the loss." Tr. 12. Summary judgment was granted on this basis. *Id.* Putting aside the fact that the court's construction of the exclusion added numerous words and limits not found in the policy, it is black letter law that "the burden of proving that the loss is within the exclusionary clause is upon the insurance carrier." *Labberton*, 53 Wn.2d at 186 (finding claim was covered as insurer had failed to show that the claim fit into an exclusion).

Here, Plaintiffs have presented un rebutted evidence that Farmers failed to repair Plaintiffs' vehicles to their pre-loss condition. *See above* at 6-7. More fundamentally though, Farmers presented no evidence

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<sup>7</sup> The use of a defendant's own admissions are, of course, different than the use of a retained expert to attempt to impart specialized meaning unknown to the average insured as was rejected in the case cited by the court below. *See, Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 950, 37 P.3d 1269, 1273 (2002) ("the average person is not likely to consult an English professor when purchasing an insurance policy").

on this issue, and issue where they carried the burden of proof. Summary judgment was therefore in error as (1) Farmers failed to carry its burden of showing by *uncontroverted facts* that an exclusion applied to the loss. *Labberton*, 53 Wn.2d at 186, and (2) even had Farmers presented evidence on the point, disputed issues of material fact barred summary judgment. *Mercer Place Condo. Assoc.*, 104 Wn. App. at 601; CR 56(c).

**D. Once The Contract Is Properly Construed Summary Judgment On The CPA Claim Must Also Be Reversed**

Below Farmers presented no evidence that its claims handling and denial of the claim was “reasonable,” rather it simply asserted reasonableness. Yet the record below, CP 118-122, showed that the two Farmers’ witnesses most familiar with Diminished Value (both of whom were assigned to study the issue by Farmers management), along with others within Farmers, testified that:

- “like kind and quality” (as found in the limitation of loss provision) included “value” as part of the repair and replace obligation
- Farmers considered a clarifying endorsement, or exclusion for diminished value on numerous occasions
- However, no changes were made to the policy because to “take coverage out of the policy” for diminished value would likely have:
  - (1) met with resistance from consumer advocates;
  - (2) put Farmers at a disadvantage in marketing its policies;

- (3) caused problems with insurance regulators (who might deny the change);
- (4) have likely forced Farmers to reduce its insurance rates; and
- (6) increased the risk from litigation.

CP 117-121. Farmers' failure to clarify its policy's language, or to exclude diminished value, occurred while it was expressly instructing its adjusters to reject diminished value claims. *See* CP 118.

Farmers' course of conduct towards the class viewed in the light most favorable to Plaintiff (as is required by the summary judgment standard) therefore involved: (1) failing to disclose anything regarding diminished value (2) perhaps paying a few claims while (3) telling any insured who made a claim that diminished value was not a covered loss while (4) knowing that its claim that "like kind and quality" excluded diminished value was false yet (5) electing not to add a diminished value exclusion or clarify its policy language because doing so would (6) highlight the diminished value claim and would likely cost Farmers far more than improperly denying claims would. Viewed in a light most favorable to Plaintiff, this conduct is a clear *per se* violation of WAC § 284-30-350, which states that:

- (1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.

- (2) No agent shall conceal from first party claimants benefits, coverages or other provisions of any insurance policy or insurance contract when such benefits, coverages or other provisions are pertinent to a claim.

*Id.* It is also a *per se* violation of WAC § 284-30-330, and therefore an “unfair methods of competition and unfair or deceptive acts or practices in the business of insurance,” *id.*, to:

- (1) Misrepresenting pertinent facts or insurance policy provisions. . . .;
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. . . .;
- (4) Refusing to pay claims without conducting a reasonable investigation. . . .; [or]
- (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

*Id.* Even a *single* violation by an insurer of any WAC provision is a *per se* violation of the CPA. *Leingang v. Pierce County Med. Bur., Inc.*, 131 Wn.2d 133, 151, 930 P.2d 288, 297 (1997).

Testimony of Plaintiffs’ expert Debra Senn, the former Insurance Commissioner of this State was introduced below. This testimony showed that:

- When she was Insurance Commissioner, her office had clearly indicated to

insurers that diminished value was a covered loss, and that had the issue been brought to her attention there would have been "either enforcement action or a bulletin" for their failure to pay the claim. CP 305-306;

- The Professional Staff of the OIC rejected an exclusion for diminished value without a corresponding reduction in premium because diminished value was covered under the current policy. CP 308;
- Her office interpreted the policy this way because diminished value was not listed in the exclusions and it was "an actual loss to the vehicle" so that diminished value was part of coverage. CP 309;
- That the evidence she had seen showed that:

"[I]n this case is that there was a consistent policy by Farmers to not cover diminished value in first party claims; and, because you're talking about coverage and disclosure, to not tell the customer about it. And, in fact, not only to not tell the customer about it, then of course there was a long series of memos about whether or not there should be a proposed exclusion, which talked about how, "Oh, no. We think that there's so few claims it will get us in trouble with the regulators, the consumers, the agency, the agents." And also a directive to managers, Washington managers, that when they go out they should, during the inspection, take preventive measures to make sure that a claim for diminished value isn't made. You know, if ever

there was I would say a classic case of failure to disclose, this is it.”

CP 310.

- That Farmers’ conduct — of recognizing ambiguity in its policy and not clarifying it so as to avoid claims — was unreasonable. CP 311, 313, 319;
- That: “Farmers just hid the ball, and that’s a classic, classic violation in the Unfair Practices Act.” CP 312;
- That it was unreasonable for a carrier to simply assume something was not covered until told by a court that it was. CP 312;
- That it was unreasonable to attempt to read “repair” without also considering “like and kind quality” which required that the insured be put back into their “pre-loss condition;” as “the standard is greater than just repair; it is repair the property with like kind and quality.” CP 315, 314;
- That Farmers policy *expressly* included value as part of like kind and quality by reference to “physical deterioration and/or depreciation in its policy.” CP 315; and
- That Farmers’ conduct was unreasonable and a per se violation of the WAC and therefore of the CPA. CP 316, 317, 318.

Farmers made no effort below to present any contrary evidence that its conduct was not a CPA violation. As shown above, at best, there is a disputed issue of fact as to whether Farmers’ conduct constituted a CPA

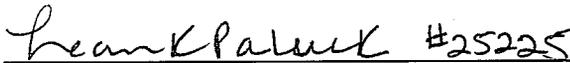
violation, and if the ruling as to coverage is reversed, the summary judgment as to the CPA claims must be reversed as well.

## V. CONCLUSION

For the foregoing this Court should find diminished value to be a covered, non-excluded loss under Farmers' policy and reverse the grant of summary judgment.

RESPECTFULLY SUBMITTED this 23<sup>RD</sup> day of February, 2004.

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**CERTIFICATE OF SERVICE**

I certify that on February 23, 2004, I caused a true and correct copy of this Brief of Appellant to be served on the following *by hand delivery via ABC Legal Messengers.*

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