

Supreme Court No. 84500-0

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

DAVID MOELLER,

Plaintiff/Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and
FARMERS INSURANCE EXCHANGE,

Defendants/Petitioners.

PETITIONERS' SUPPLEMENTAL BRIEF

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ORIGINAL

TABLE OF CONTENTS

I. INSURERS ARE NOT CONTRACTUALLY OBLIGATED TO REPAIR FIRST-PARTY INSUREDS' VEHICLES AND PAY DIMINISHED VALUE CLAIMS 1

 A. Recent Decisions Show That a Substantial Majority of Modern Courts Reject Diminished Value Claims. 1

 B. The Court of Appeals' Ruling Eliminates the Insurer's Repair Option, Is Contrary to the Contract Language and Mischaracterizes Moeller's Claim..... 3

 1. The Ruling Eliminates the Insurer's Repair Option. 3

 2. The Court of Appeals' Ruling Is Contrary to the Express Language of Moeller's Policy. 9

 3. The Court of Appeals Mischaracterized Moeller's Claim. 12

II. THE TRIAL COURT ABUSED ITS DISCRETION IN CERTIFYING THIS CASE AS A CLASS ACTION 14

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| CASES | |
| <i>Allgood v. Meridian Sec. Ins. Co.</i> , 836 N.E.2d 243 (Ind. 2005) | 1 |
| <i>Am. Mfrs. Mut. Ins. Co. v. Schaefer</i> , 124 S.W.3d 154 (Tex. 2003) | 1 |
| <i>Bickel v. Nationwide Mut. Ins. Co.</i> , 206 Va. 419, 143 S.E.2d 903 (1965) | 1, 4, 8 |
| <i>Black v. State Farm Mut. Auto Ins. Co.</i> , 101 S.W.3d 427 (Tenn. Ct. App. 2002), <i>appeal denied</i> , 2003 Tenn. LEXIS 301 (Tenn. Mar. 17, 2003) | 2 |
| <i>Blakely v. State Farm Mut. Auto Ins. Co.</i> , 406 F.3d 747 (5th Cir. 2005) | 2 |
| <i>Camden v. State Farm Mut. Auto Ins. Co.</i> , 66 S.W.3d 78 (Mo. Ct. App. 2001) | 2, 14 |
| <i>Campbell v. Markel Am. Ins. Co.</i> , 822 So. 2d 617 (La. Ct. App. 2001), <i>writ denied</i> , 805 So. 2d 204 (La. 2002) | 2 |
| <i>Carlton v. Trinity Universal Ins. Co.</i> , 32 S.W.3d 454 (Tex. Ct. App. 2001), <i>petition denied</i> (Apr. 12, 2001) | 2, 5, 10 |
| <i>Cazabat v. Metro. Prop. & Cas. Ins. Co.</i> , No. KC99-544, 2001 R.I. Super. LEXIS 27 (R.I. Super. Ct. Feb. 23, 2001) | 17, 18 |
| <i>Culhane v. W. Nat'l Mut. Ins. Co.</i> , 205 S.D. 97, 704 N.W.2d 287 (2005) | 1, 3, 6, 11 |
| <i>Davis v. Farmers Ins. Co. of Ariz.</i> , 140 N.M. 249, 142 P.3d 17 (N.M. Ct. App. 2006), <i>cert.</i> <i>quashed</i> , 142 N.M. 436, 166 P.3d 1090 (2007) | 1, 11 |

| | |
|--|--------|
| <i>Defraites v. State Farm Mut. Auto. Ins. Co.</i> , 864 So. 2d 254 (La. Ct. App. 2004)..... | 17, 18 |
| <i>Driscoll v. State Farm Mut. Auto. Ins. Co.</i> , 227 F. Supp. 2d 696 (E.D. Mich. 2002)..... | 2 |
| <i>Farmers Ins. Exch. v. Benzing</i> , 206 P.3d 812 (Colo. 2009)..... | 18 |
| <i>Gen. Accident Fire & Life Assurance Corp. v. Judd</i> , 400 S.W.2d 685 (Ky. 1966)..... | 1 |
| <i>Given v. Commerce Ins. Co.</i> , 440 Mass. 207, 796 N.E.2d 1275 (2003)..... | 1 |
| <i>Gonzales v. Farmers Ins. Co. of Or.</i> , 345 Or. 382, 196 P.3d 1 (2008) | 1 |
| <i>Gonzales v. Farmers Insurance Co. of Oregon</i> , 210 Or. App. 54, 150 P.3d 20 (2006), <i>aff'd</i> , 345 Or. 382, 196 P.3d 1 (2008)..... | 2 |
| <i>Goodman v. Grange Mut. Cas. Co.</i> , 2002-Ohio-6971, No. 02AP-198, 2002 Ohio App. LEXIS 6780 (Ohio Ct. App. Dec. 17, 2002)..... | 2 |
| <i>Gov't Employees Ins. Co. v. Bloodworth</i> , No. M2003-02986-COA-R10-CV, 2007 Tenn. App. LEXIS 404 (Tenn. Ct. App. June 29, 2007)..... | 17 |
| <i>Hall v. Acadia Ins. Co.</i> , 2002 Me. 110, 801 A.2d 993 (2002)..... | 1, 5 |
| <i>Hyden v. Farmers Insurance Exchange</i> , 20 P.3d 1222 (Colo. Ct. App. 2000) | 3 |
| <i>In re NCAA I-A Walk-On Football Players Litig.</i> , No. C04-1254C, 2006 U.S. Dist. LEXIS 28824 (W.D. Wash. May 3, 2006)..... | 19 |

| | |
|--|------------|
| <i>Johnson v. Ill. Nat'l Ins. Co.</i> , 818 So. 2d 100 (La. Ct. App. 2001), writ denied, 809 So. 2d 139 (La. 2002)..... | 2 |
| <i>Johnson v. State Farm Mutual Automobile Insurance Co.</i> , 157 Ariz. 1, 754 P.2d 330 (Ariz. Ct. App.), review denied, 1988 Ariz. LEXIS 89 (Ariz. June 1, 1988)..... | 2, 13 |
| <i>Kent v. Cincinnati Ins. Co.</i> , No. CA2001-04-100, 2001 Ohio App. LEXIS 5471 (Ohio Ct. App. Dec. 10, 2001)..... | 2 |
| <i>Lupo v. Shelter Mut. Ins. Co.</i> , 70 S.W.3d 16 (Mo. Ct. App. 2002)..... | 2 |
| <i>Manguno v. Prudential Prop. & Cas. Ins. Co.</i> , 276 F.3d 720 (5th Cir. 2002) | 2 |
| <i>Moeller v. Farmers Ins. Co. of Wash.</i> , 155 Wn. App. 133, 229 P.3d 857 (2010)..... | passim |
| <i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001)..... | 16, 19, 20 |
| <i>Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.</i> , 78 Wn. App. 707, 899 P.2d 6 (1995)..... | 16 |
| <i>O'Brien v. Progressive N. Ins. Co.</i> , 785 A.2d 281 (Del. 2001)..... | 1, 6, 7 |
| <i>O'Brien v. Progressive N. Ins. Co.</i> , Nos. 99C-05-033-FSS, 99C-07-325-FSS, 2000 Del. Super. LEXIS 443 (Del. Super. Ct. Dec. 18, 2000), aff'd, 785 A.2d 281 (Del. 2001)..... | 12 |
| <i>Oda v. State</i> , 111 Wn. App. 79, 44 P.3d 8 (2002)..... | 20 |
| <i>Pritchett v. State Farm Mut. Auto. Ins. Co.</i> , 834 So. 2d 785 (Ala. Civ. App. 2002)..... | 1, 5 |

| | |
|--|------------|
| <i>Ray v. Farmers Insurance Exchange</i> , 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593 (1988)..... | 2, 4 |
| <i>Rezevskis v. Aries Ins. Co.</i> , 784 So. 2d 472 (Fla. Ct. App. 2001), <i>review denied</i> , 828 So. 2d 388 (Fla. 2002)..... | 2 |
| <i>Schnall v. AT & T Wireless Servs., Inc.</i> , 168 Wn.2d 125, 225 P.3d 929 (2010)..... | 15 |
| <i>Schulmeyer v. State Farm Fire & Cas. Co.</i> , 353 S.C. 491, 579 S.E.2d 132 (2003) | 1 |
| <i>Schwendeman v. USAA Cas. Ins. Co.</i> , 116 Wn. App. 9, 65 P.3d 1 (2003)..... | 18 |
| <i>Siegle v. Progressive Consumers Ins. Co.</i> , 788 So. 2d 355 (Fla. Ct. App. 2001)..... | 2, 5 |
| <i>Siegle v. Progressive Consumers Ins. Co.</i> , 819 So. 2d 732 (Fla. 2002)..... | 1, 5 |
| <i>Sims v. Allstate Ins. Co.</i> , 365 Ill. App. 3d 997, 851 N.E.2d 701, <i>appeal denied</i> , 222 Ill. 2d 601, 861 N.E.2d 664 (2006)..... | passim |
| <i>Sitton v. State Farm Mut. Auto. Ins. Co.</i> , 116 Wn. App. 245, 63 P.3d 198 (2003)..... | 15, 16, 19 |
| <i>Smither v. Progressive Cnty. Mut. Ins. Co.</i> , 76 S.W.3d 719 (Tex. Ct. App. 2002), <i>review denied</i> , 2003 Tex. LEXIS 433 (Tex. Oct. 17, 2003)..... | 2 |
| <i>Spellman v. Sentry Ins.</i> , 66 S.W.3d 74 (Mo. Ct. App. 2001)..... | 2 |
| <i>State Farm Mut. Auto. Ins. Co. v. Mabry</i> , 274 Ga. 498, 556 S.E.2d 114 (2001)..... | 1 |
| <i>Townsend v. State Farm Mut. Auto. Ins. Co.</i> , 793 So. 2d 473 (La. Ct. App.), <i>writ denied</i> , 804 So. 2d 635 (La. 2001) | 2, 5 |

Wildin v. Am. Family Mut. Ins. Co.,
249 Wis. 2d 477, 638 N.W.2d 87 (Wis. Ct. App. 2001).....2, 7

STATUTES

ch. 46.71 RCW.....3

OTHER AUTHORITIES

Civil Rule 23(b)(3).....14

http://www.insurance.wa.gov/consumers/auto/total_loss.shtml.....4

I. INSURERS ARE NOT CONTRACTUALLY OBLIGATED TO REPAIR FIRST-PARTY INSUREDS' VEHICLES AND PAY DIMINISHED VALUE CLAIMS

A. Recent Decisions Show That a Substantial Majority of Modern Courts Reject Diminished Value Claims.

In the last decade, eight state supreme courts have refused to require insurers to pay first-party insureds for their cars' alleged post-repair diminished value.¹ Only two state supreme courts have allowed diminished value claims to survive dismissal or summary judgment.²

In the same time period, an overwhelming majority of intermediate appellate courts have denied diminished value claims.³ Excluding

¹ See *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281 (Del. 2001); *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732 (Fla. 2002); *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243 (Ind. 2005); *Hall v. Acadia Ins. Co.*, 2002 Me. 110, 801 A.2d 993 (2002); *Given v. Commerce Ins. Co.*, 440 Mass. 207, 796 N.E.2d 1275 (2003); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003); *Culhane v. W. Nat'l Mut. Ins. Co.*, 205 S.D. 97, 704 N.W.2d 287 (2005); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003); see also *Gen. Accident Fire & Life Assurance Corp. v. Judd*, 400 S.W.2d 685 (Ky. 1966) (same outcome, more than 10 years ago); *Bickel v. Nationwide Mut. Ins. Co.*, 206 Va. 419, 143 S.E.2d 903 (1965) (same).

² See *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 503-08, 556 S.E.2d 114 (2001) (explaining that contract interpretation requiring insurers to pay for lost value "has stood for 75 years in Georgia and has become, therefore, part of the [insurance] agreement"); *Gonzales v. Farmers Ins. Co. of Or.*, 345 Or. 382, 388-93, 196 P.3d 1 (2008) (following decades-old decisions); see also *Moeller v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 133, 145 n.11, 229 P.3d 857 (2010) (noting *Gonzales* court "relied on established Oregon precedent," but citing no similar Washington precedent).

³ See *Davis v. Farmers Ins. Co. of Ariz.*, 140 N.M. 249, 142 P.3d 17 (N.M. Ct. App. 2006), cert. quashed, 142 N.M. 436, 166 P.3d 1090 (2007); *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785 (Ala. Civ. App.

(continued . . .)

decisions later reversed or overruled, and except for the decision at issue here, in the past 10 years only two intermediate appellate courts have reached the opposite conclusion. In *Gonzales v. Farmers Insurance Co. of Oregon*, 210 Or. App. 54, 60-65, 150 P.3d 20 (2006), *aff'd*, 345 Or. 382,

(. . . continued)

2002); *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355 (Fla. Ct. App. 2001), *approved*, 819 So. 2d 732 (Fla. 2002); *Rezevskis v. Aries Ins. Co.*, 784 So. 2d 472 (Fla. Ct. App. 2001), *review denied*, 828 So. 2d 388 (Fla. 2002); *Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 851 N.E.2d 701, *appeal denied*, 222 Ill. 2d 601, 861 N.E.2d 664 (2006); *Campbell v. Markel Am. Ins. Co.*, 822 So. 2d 617 (La. Ct. App. 2001), *writ denied*, 805 So. 2d 204 (La. 2002); *Johnson v. Ill. Nat'l Ins. Co.*, 818 So. 2d 100 (La. Ct. App. 2001), *writ denied*, 809 So. 2d 139 (La. 2002); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473 (La. Ct. App.), *writ denied*, 804 So. 2d 635 (La. 2001); *Lupo v. Shelter Mut. Ins. Co.*, 70 S.W.3d 16 (Mo. Ct. App. 2002); *Spellman v. Sentry Ins.*, 66 S.W.3d 74 (Mo. Ct. App. 2001); *Camden v. State Farm Mut. Auto Ins. Co.*, 66 S.W.3d 78 (Mo. Ct. App. 2001); *Goodman v. Grange Mut. Cas. Co.*, 2002-Ohio-6971, No. 02AP-198, 2002 Ohio App. LEXIS 6780 (Ohio Ct. App. Dec. 17, 2002); *Kent v. Cincinnati Ins. Co.*, No. CA2001-04-100, 2001 Ohio App. LEXIS 5471 (Ohio Ct. App. Dec. 10, 2001); *Black v. State Farm Mut. Auto Ins. Co.*, 101 S.W.3d 427 (Tenn. Ct. App. 2002), *appeal denied*, 2003 Tenn. LEXIS 301 (Tenn. Mar. 17, 2003); *Smither v. Progressive Cnty. Mut. Ins. Co.*, 76 S.W.3d 719 (Tex. Ct. App. 2002), *review denied*, 2003 Tex. LEXIS 433 (Tex. Oct. 17, 2003); *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454 (Tex. Ct. App. 2001), *petition denied* (Apr. 12, 2001); *Wildin v. Am. Family Mut. Ins. Co.*, 249 Wis. 2d 477, 638 N.W.2d 87 (Wis. Ct. App. 2001).

Earlier intermediate appellate court decisions denying diminished value claims include *Ray v. Farmers Insurance Exchange*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593 (1988), and *Johnson v. State Farm Mutual Automobile Insurance Co.*, 157 Ariz. 1, 754 P.2d 330 (Ariz. Ct. App.), *review denied*, 1988 Ariz. LEXIS 89 (Ariz. June 1, 1988).

Federal courts also have denied diminished value claims. See *Blakely v. State Farm Mut. Auto. Ins. Co.*, 406 F.3d 747 (5th Cir. 2005) (applying Mississippi law); *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720 (5th Cir. 2002) (applying Louisiana law); *Driscoll v. State Farm Mut. Auto. Ins. Co.*, 227 F. Supp. 2d 696 (E.D. Mich. 2002) (applying Michigan law). Farmers Insurance Company of Washington ("Farmers") and Farmers Insurance Exchange ("FIE") are unaware of any contrary federal court rulings.

196 P.3d 1 (2008), the intermediate court considered itself bound by decades-old Oregon Supreme Court precedent,⁴ while in *Hyden v. Farmers Insurance Exchange*, 20 P.3d 1222 (Colo. Ct. App. 2000), the intermediate court rendered a “decision [that] has been rejected, distinguished, or not followed by virtually all jurisdictions that have analyzed it.” *Culhane v. W. Nat’l Mut. Ins. Co.*, 205 S.D. 97, 704 N.W.2d 287, 298 n.8 (2005).

B. The Court of Appeals’ Ruling Eliminates the Insurer’s Repair Option, Is Contrary to the Contract Language and Mischaracterizes Moeller’s Claim.

1. The Ruling Eliminates the Insurer’s Repair Option.

Attempting to avoid the clear weight of authority rejecting diminished value claims, the court of appeals tried to distinguish Moeller’s claim from the diminished value claims asserted in other cases. *Moeller v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 133, 229 P.3d 857 (2010). The court stated that instead of seeking “stigma damages,” Moeller seeks compensation for the loss allegedly incurred when an insured car has “been repaired,” but “there remains damage that cannot be repaired”

⁴ Unlike Oregon, Washington has no precedent equating “repair” with restoration of pre-loss condition and value. State laws defining and setting standards for automotive repairs say nothing about restoring value. *See, e.g.*, ch. 46.71 RCW.

155 Wn. App. at 142-43, 229 P.3d 857. With its acceptance of Moeller's claim, the court set aside the long-held understanding of insurers, courts and commentators alike that a car damaged in an accident either is repairable or is a total loss. *See, e.g., Bickel v. Nationwide Mut. Ins. Co.*, 206 Va. 419, 143 S.E.2d 903, 905 (1965) (explaining that "when a damaged automobile cannot be repaired it is a total loss," but if the car "is not a total loss and can be repaired, the liability of the insurer is to pay only the cost of repairs, less the ... deductible"); *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593, 597 (1988) (explaining insurer can repair a damaged car if repairs will place car substantially in its preaccident condition, but otherwise car must be deemed total loss; quoting 15 *Couch on Insurance* § 54:29, at 432 (2d ed. 1983): "Where the insurer, in the exercise of its option to repair, restores the automobile to its normal running condition, there is by hypothesis no total loss of the insured vehicle."); Washington State Office of the Insurance Commissioner, "What happens if my car gets totaled?" http://www.insurance.wa.gov/consumers/auto/total_loss.shtml (last visited Aug. 31, 2010) ("Total loss occurs when your car is not repairable").

In the past, when an insurer exercised its option to repair an insured's damaged vehicle and paid for workmanlike repairs that returned

the car to a good and usable condition, it was commonly understood that the insurer had met its repair obligation. See *Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 360 (Fla. Dist. Ct. App. 2001) (“[T]o ‘repair’ is to ‘restore to a good condition[.]’” (citation omitted)), *approved*, 819 So. 2d 732, 739 (Fla. 2002) (referring to repairing car’s “function and appearance, commensurate with the condition of the auto prior to the loss”); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So. 2d 473, 478 (La. Ct. App. 2001) (“[T]he generally prevailing meaning of ‘repair’ is ‘to fix anything that is broken.’” (citation omitted)); *Hall v. Acadia Ins. Co.*, 2002 Me. 110, 801 A.2d 993, 995 (2002) (“The act of repairing an object typically focuses upon restoring the object’s function and purpose”); *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 464 (Tex. Ct. App. 2000) (“‘[R]epair’ means ... ‘to bring back to good or usable condition.’” (brackets and citation omitted)). Improper, faulty or inferior repairs did not satisfy this obligation, but the requisite standard of repair was met when a car was put back in working condition and returned to substantially the same form as before the accident. See, e.g., *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So. 2d 785, 795 (Ala. Civ. App. 2002) (insurer electing repair must “return the damaged automobile to substantially the same physical and operating condition as it occupied

before the collision that caused the damage”); *Culhane*, 2005 S.D. 97, 704 N.W.2d at 294 (concluding that repair option can be exercised if damaged car can be restored to “substantially the same condition”). Rejecting this common understanding, the court of appeals held that an insurer has both “repaired” and “not repaired” a damaged car if, after repairs are performed and the car is returned to good and working condition, there remains some invisible, non-repairable damage such as “weakened metal” or “stressed, but working parts.” In that case, according to the court of appeals, the insurer must pay for the repairs *and* pay for the car’s diminished value. 155 Wn. App. at 146, 229 P.3d 857.

The repair standard applied by the court of appeals has been widely rejected. In *O’Brien v. Progressive Northern Insurance Co.*, 785 A.2d 281, 286 (Del. 2001), the Delaware Supreme Court affirmed the dismissal of a diminished value action although it was assumed the plaintiffs would be able to prove their allegation that “even after all of the repairs had been made to plaintiffs’ vehicles, physical damage, including evidence of repair, remained.” The court held that the term “repair,” as used in an insurance policy, “does not require the insurer to restore the vehicle to factory condition or even to the condition of the vehicle before the accident.” *Id.* at 290. Instead, an insurer meets its repair obligation

when a vehicle is “returned to substantially the same form as before the accident.” *Id.*

In *Wildin v. American Family Mutual Insurance Co.*, 249 Wis. 2d 477, 638 N.W.2d 87 (Wis. Ct. App. 2001), the court upheld dismissal of a diminished value complaint despite the plaintiff’s allegation that the damage to her car’s frame was such that no repair could have restored the car to its pre-loss condition. The plaintiff did not argue that any repair was not done that could have been done or that the repaired car was not fully functioning. The court concluded that the policy gave the insurer the right to pay the plaintiff’s loss by repairing the car even if all possible repairs did not restore the car’s pre-collision market value.

In *Sims v. Allstate Insurance Co.*, 365 Ill. App. 3d 997, 851 N.E.2d 701, *appeal denied*, 222 Ill. 2d 601, 861 N.E.2d 664 (2006), the court rejected the plaintiffs’ claim that when an insurer elects to repair a damaged car, it must also pay for the car’s diminished value if the car cannot be repaired so that there is no remaining physical damage and no loss in value. Finding no ambiguity in the policy, which had provisions essentially identical to the provisions in Moeller’s policy, the court ruled that the policy “does not contemplate the repair or replacement of property

or parts plus an additional payment of money for unrepairable diminished value.” *Id.* at 1004, 851 N.E.2d at 707.

In *Bickel*, 206 Va. 419, 143 S.E.2d at 906, the plaintiffs argued that despite repairs they conceded were “the best job possible,” their car was “not restored to its market value before the accident, which shows that the car could not be repaired properly.” Observing that the plaintiffs had not asked that any additional repairs be made or that any defective repairs be corrected, the court held that awarding plaintiffs the difference in the market value of the car before and after the accident “would be arbitrarily reading out of the policy the right of [the insurer] to make repairs or replace the damaged part with materials of like kind and quality.” *Id.*

Moeller does not complain that additional repairs to his car should have been performed, or that the repairs to his car were performed improperly. Nor does he claim that his car was not functioning when it was returned or that it should have been treated as a total loss. Nonetheless, he argued, and the court of appeals ruled, that although repairs returned his car to good and working condition, Farmers should be required to pay an additional sum to him because his car was “not repaired.” This ruling destroys the long-held common understanding of

the acceptable standard of repair⁵ and eliminates the repair option for insurers because of the uncertainty as to whether cars can ever be repaired to a standard that precludes claims for alleged non-repairable damage.

2. The Court of Appeals' Ruling Is Contrary to the Express Language of Moeller's Policy.

After setting aside the common understanding of what it means to repair a damaged vehicle, the court of appeals compounded its error by misinterpreting the policy. It held that Farmers should be required to both repair *and* pay for the diminished value of an insured's car if, at trial, Moeller proves that non-repairable damage remains after repairs and that such damage causes the insured's car to "suffer 'diminished value.'" *Moeller*, 155 Wn App. at 142, 229 P.3d 857. The court made this leap by ignoring the policy's Payment of Loss provision and giving the unambiguous Limits of Liability provision "a meaning never intended." *Sims*, 365 Ill. App. 3d 997, 851 N.E.2d at 706.

As did the Allstate policy in the *Sims* case, Moeller's policy contained a Payment of Loss provision permitting his insurer to pay his "loss in money or repair or replace damaged or stolen property." CP 20.

⁵ The court of appeals' ruling also means that car repairs that were performed eight to 17 years ago and that Moeller and thousands of insureds acknowledged were good and acceptable may now be determined to have been insufficient to meet Farmers' repair obligation because the cars, which were used for years after the repairs were performed, should have been declared total losses.

See also Sims, 365 Ill. App. 3d 997, 851 N.E.2d at 706. This provision gave Farmers the contractual right to choose repair as the means by which it would satisfy its contractual obligation to pay Moeller's loss. There is no dispute that Farmers paid for the car's repair and that the repairs were performed competently. But because Moeller now claims that Farmers did not repair allegedly non-repairable damage, the court of appeals ruled that Farmers could be held to have breached its insurance contract because it did not compensate Moeller for his car's alleged post-repair loss of value. In effect, the court interpreted the policy's repair option as providing coverage for what the court described as non-repairable damage. *But see, e.g., Carlton*, 32 S.W.3d at 464 ("Ascribing to the words 'repair or replace' an obligation to compensate the insured for things which ... cannot be 'repaired' or 'replaced' would violate the most fundamental rules of contract construction.").

To arrive at this misinterpretation of the policy, the court of appeals ignored the disjunctive terms of the Payment of Loss provision and focused on the policy's Limits of Liability provision, with its reference to the "cost to repair or replace damaged ... property with other of like kind and quality." *Moeller*, 155 Wn. App. at 144-46, 229 P.3d 857. The court accepted Moeller's argument that the "like kind and

quality” clause requires restoration of a damaged car’s “*appearance, function, and value*,” 155 Wn. App. at 145, 229 P.3d 857 (emphasis added), although that argument has been rejected by almost all of the courts that recently have examined identical or similar limits of liability provisions. See discussion at pages 6-13 of Farmers and FIE’s Petition for Review. As these courts explain, the “like kind and quality” provision is not ambiguous. It means that if an insurer elects to repair a car and must replace parts in doing so, then the replacement parts must be of “like kind and quality.” Alternatively, if the insurer elects to replace a damaged car, then the replacement car must be of “like kind and quality.” But the phrase does *not* mean that an insurer that repairs a car must also pay for any post-repair diminished value. See, e.g., *Davis v. Farmers Ins. Co. of Ariz.*, 140 N.M. 249, 255, 142 P.3d 17 (N.M. Ct. App. 2006), *cert. quashed*, 142 N.M. 436, 166 P.3d 1090 (N.M. 2007).

Changing the word “or” in the Payment of Loss provision to the word “and,” the court of appeals rewrote the insurance contract to import into the policy the tort concept of making an injured person whole. *But see, e.g., Culhane*, 205 S.D. 97, 704 N.W.2d at 296-97 (explaining that insurer’s obligation to indemnify its insured is not governed by tort principles, but is limited by terms of contract). If the decision is upheld,

Farmers and other insurers electing to exercise identical or similar repair options will be required to repair cars *and* pay money, despite contract language to the contrary.

The court of appeals misinterpreted common policy provisions.

The proper interpretation was stated clearly by the *O'Brien* trial court:

[I]n the context of a collision or other typical damage, what constitutes repair is clear. It is the best a repair shop can do. If the vehicle cannot be repaired, then it must be replaced or the carrier must pay cash under the policy's terms. But the carrier is not contractually bound to repair a collision-damaged vehicle as best as possible and then pay money to cover what cannot be repaired.

O'Brien v. Progressive N. Ins. Co., Nos. 99C-05-033-FSS, 99C-07-325-FSS, 2000 Del. Super. LEXIS 443, at *15 (Del. Super. Ct. Dec. 18, 2000), *aff'd*, 785 A.2d 281 (Del. 2001).

3. The Court of Appeals Mischaracterized Moeller's Claim.

Declaring that "Moeller does not seek stigma damages," the court of appeals tried to draw a distinction between "stigma damages" and "diminished value" damages. *Moeller*, 155 Wn. App. at 142, 229 P.3d 857. According to the court, "stigma damages" are attributable to the "intangible taint" that can affect cars involved in accidents, while a car "suffers 'diminished value'" if it sustains "damage that cannot be

repaired,” such as “weakened metal” or “stressed, but working, parts.”

Moeller, 155 Wn. App. at 142, 143, 146, 229 P.3d 857.

To conclude that Moeller “does not seek stigma damages,” the court of appeals had to ignore Moeller’s representations about how he planned to prove his diminished value claim. Moeller told the trial court he intended to prove that diminished value “exists” by comparing the prices paid at car auctions for “wrecked and repaired cars” to the prices paid for “unwrecked” cars. RP 48-49. He said nothing about proving that “remaining, irreparable physical damage,” *Moeller*, 155 Wn. App. at 142, 229 P.3d 857, was the reason for any price differential. Moreover, he proposed no method of distinguishing between purchase prices (a) based on alleged non-repairable damage, (b) based on consumer perceptions that damaged and subsequently repaired cars are less valuable than ones that have never been damaged, or (c) based on some combination of both.⁶

Moeller’s failure to address the reason for any price differential between “wrecked and repaired” and “unwrecked” cars is not surprising. His diminished value claim is nothing more than a repackaged version of

⁶ *Cf. Johnson v. State Farm*, 157 Ariz. at 2, 754 P.2d 330 (affirming denial of diminished value claim despite uncertainty as to whether post-repair decrease in value of plaintiff’s car was “the result of telltale signs of repairs to the vehicle or the result of market psychology since some people will not purchase a vehicle that has been involved in an accident or some combination of the two”).

his stigma damages claim.⁷ That his claim rests on stigma was made abundantly clear when Moeller told the trial court that to prove diminished value “exists,” in addition to presenting his damage model, he would introduce “consumer perception evidence.” RP 238, 242, 248-49.⁸ Moeller said nothing about excluding “consumer perception evidence” based solely on consumer preference for cars that have never undergone repairs.

Moeller’s claim is indistinguishable from the diminished value claims asserted by other insureds. Recent state and federal decisions have almost unanimously rejected these claims. The court of appeals’ contrary ruling was based on flawed reasoning and should be reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN CERTIFYING THIS CASE AS A CLASS ACTION

The court of appeals also erred in upholding the trial court’s certification of a CR 23(b)(3) class. To certify a CR 23(b)(3) class, a trial court must find “that common legal and factual issues *predominate* over

⁷ In his Third Amended Class Action Complaint, Moeller alleges that Farmers and FIE “knowingly ignore[] that which every one [sic] knows from experience and common sense: the fact that damaged automobiles, by the very nature of their damage and subsequent repair, are worth less than similar automobiles which have not been damaged.” CP 431. *See Camden*, 66 S.W.3d at 80 (stigma case where plaintiff made same allegation).

⁸ *See also* RP 248 (where Moeller states “this is just the type of consumer perception evidence that is out there that the plaintiffs in this case ... would be presenting”).

individual issues and that a class action is an otherwise superior form of adjudication.” *Schnall v. AT & T Wireless Servs., Inc.*, 168 Wn.2d 125, 134, 225 P.3d 929 (2010). It was manifestly unreasonable for the trial court to have found that these requirements were met and to have approved a trial plan permitting Moeller to seek a class-wide award of alleged aggregate damages without requiring that he first prove Farmers’ liability to every member of the class. The court disregarded Moeller’s admission that not everyone in the class suffered damage caused by Farmers’ failure to tender a diminished value payment,⁹ and failed to acknowledge that this admission means Moeller cannot establish class-wide liability. Moeller’s plan to obtain a class-wide award of damages (i.e., an alleged aggregation of the damages sustained by individual class members) violates due process because it would allow damages to be awarded before individual class members prove they suffered damage caused by Farmers or FIE. *See Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 258 & n.33, 63 P.3d 198 (2003) (holding that class

⁹ At the hearing on his motion for class certification, Moeller admitted that a car suffers no diminished value if it is damaged in an area that previously had been damaged. RP 77. Moeller’s statistician, Bernard Siskin, made the same admission and further admitted that if an accident-damaged car had previously suffered “frame/structural” damage, the subsequent accident would “not result in any additional loss in value.” CP 246-3. If a class member’s car did not suffer diminished value, the class member cannot have been damaged by Farmers’ failure to tender a diminished value payment.

plaintiffs' trial plan violated due process because it contemplated award of class-wide damages before individual claimants were required to prove causation and damage); *cf. Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-89 (3d Cir. 2001) (in putative class action for broker-dealers' breaching of duty of best execution, holding that plaintiffs' claimed ability to calculate class damages did not exempt plaintiffs from first proving each class member suffered economic injury).

Here, as in *Sitton*, the claims at issue are breach of contract, insurance bad faith and violation of the Washington Consumer Protection Act. *Compare* CP 427-39, *with Sitton*, 116 Wn. App. at 249, 63 P.3d 198. To establish liability for these contract, tort and statutory claims, Moeller is required to prove duty, breach, causation and damage. *See Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712-13, 899 P.2d 6 (1995); *see also Sitton*, 116 Wn. App. at 258, 63 P.3d 198 (acknowledging claimants were required to prove causation and damages).

Moeller must prove the elements of the claims for himself and for every class member before aggregated damages can be awarded. *Sitton*, 116 Wn. App. at 258-60, 63 P.3d 198. But Moeller admittedly cannot

prove damage or causation for every class member.¹⁰ Under these circumstances, where individualized proofs of the pre-accident and post-repair values of each damaged car will be required to ascertain which of the thousands of class members¹¹ actually suffered damage caused by Farmers' failure to tender a diminished value payment, and how much damage each class member sustained, no reasonable person could have found that common issues predominate over individual ones or that a class action is superior to other methods of adjudicating the dispute. *See*

¹⁰ Moeller admits that cars with prior structural/frame damage and/or prior damage in the same area suffered no diminished value when they were damaged in the accident giving rise to the insurance claim. *See* discussion in note 9, *supra*. There may also be other class members whose cars suffered no post-repair diminution in value because, for example, the pre-accident values of those cars, based on condition and other indicia of value, were less than the post-repair values of those cars. *See Gov't Employees Ins. Co. v. Bloodworth*, No. M2003-02986-COA-R10-CV, 2007 Tenn. App. LEXIS 404, at *141-42 & n.36 (Tenn. Ct. App. June 29, 2007) (acknowledging that "[a] number of individual factors must be considered to determine whether any particular vehicle actually sustained" post-repair diminution in value, and noting that plaintiff's proposed evidence (same as Moeller's proposed evidence) "ignores the possibility that the pre-accident value of a vehicle, based on its condition, which could include prior unrepaired panel or frame damage, may be increased after repair"); *Defraites v. State Farm Mut. Auto. Ins. Co.*, 864 So. 2d 254, 262-63 (La. Ct. App. 2004) (same); *Cazabat v. Metro. Prop. & Cas. Ins. Co.*, No. KC99-544, 2001 R.I. Super. LEXIS 27, at *22-23 (R.I. Super. Ct. Feb. 23, 2001) (same); *see also* CP 428 (Moeller's description of diminished value as "the difference between the pre-loss value of the insured automobile and its value after it is repaired and returned"). When a class member's car suffered no diminished value, there cannot have been any damage caused by Farmers' failure to tender a diminished value payment.

¹¹ *See* CP 246-5 (reflecting Moeller's estimate of 42,544 claims within scope of class).

Defraites v. State Farm Mut. Auto. Ins. Co., 864 So. 2d 254, 262 (La. Ct. App. 2004) (concluding the trial court abused its discretion in certifying a class of third-party diminished value claimants, observing there is no presumption of diminution in value in auto tort cases and court would have “to examine each putative class member’s claim and make separate, fact-based determinations on . . . whether a diminution in value in the vehicle occurred”); *Cazabat v. Metro. Prop. & Cas. Ins. Co.*, No. KC99-544, 2001 R.I. Super. LEXIS 27, at *23 (R.I. Super. Ct. Feb. 23, 2001) (refusing to certify diminished value class action brought by first-party insured on behalf of thousands of other first-party insureds, concluding that individual facts needed to determine breach of contract claim predominated); *see also Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 65 P.3d 1 (2003) (affirming denial of class certification in case brought by insureds alleging insurer breached insurance contract, violated CPA and committed insurance bad faith by designating use of non-OEM (original equipment manufacturer) parts in car repairs; concluding that plaintiff failed to satisfy predominance and superiority requirements because determining whether each use of non-OEM part complied with contractual and statutory obligations would require individualized proof with respect to each vehicle repaired); *Farmers Ins. Exch. v. Benzing*, 206

P.3d 812 (Colo. 2009) (upholding trial court's decertification of class of insurance purchasers suing insurer for violation of state CPA, breach of contract and insurance bad faith, finding that plaintiff could not prove causation on class-wide basis and that thousands of "mini-trials" would be necessary to determine if defendants' alleged actions caused injury to any of insureds); *cf., e.g., Newton*, 259 F.3d at 190-92 (determining that where it was "clear that at least some of the plaintiffs have not suffered economic injury," individual questions predominated over common ones and that establishing proof of class members' injuries and litigating defenses available to defendants would present trial court with "insurmountable manageability problems"); *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 U.S. Dist. LEXIS 28824, at *34-35 (W.D. Wash. May 3, 2006) (concluding that individualized determinations required to prove antitrust injury and damages provided "insurmountable barrier to class certification").

Moeller cannot avoid violating Farmers' due process rights merely by "lop[ping] ... off" some percentage amount from his class-wide damages calculation to account for the members of the class who suffered no damage. RP 77. As the *Sitton* court pointed out, "[t]he harm alleged is individual to each insured," and Farmers is entitled to require

individualized proof of causation and damage before an aggregate amount of damages is determined. 116 Wn. App. at 258-60, 63 P.3d 198; *see also Newton*, 259 F.3d at 188 (observing that “even if plaintiffs could present a viable formula for calculating damages ... defendants could still require individualized proof of economic loss”); *cf. Oda v. State*, 111 Wn. App. 79, 96 n.8, 44 P.3d 8 (2002) (pointing out that liability phase of class action for gender discrimination would not be confined to statistical analysis but would entail individual factfinding).

The trial court abused its discretion in granting class certification when the method of proof outlined by Moeller established that he would be seeking an award of class damages without first proving causation and damage on the part of all class members. The court of appeals erred in upholding the class certification order. The rulings of both courts should be reversed.

DATED: September 3, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I certify that on September 3, 2010, I caused copies of the foregoing **PETITIONERS' SUPPLEMENTAL BRIEF** to be sent via U.S. Mail, first class, postage prepaid, to the following counsel at the following addresses:

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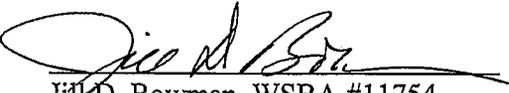
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