No. 100074-0
SUPREME COURT
OF THE STATE OF WASHINGTON

No. 53196-8-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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

v.

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

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

The responding party is JARRON ELTER, Individually, and as the representative of all Persons similarly situated per the December 30, 2016 class certification order.

II. RELIEF SOUGHT

Respondent respectfully requests that the Court deny acceptance of review.

III. INTRODUCTION

USAA's petition asks this Court to re-write Washington law, now sixty years old, to require proof of the value of "inconvenience" as a prerequisite to a recovery for compensation for loss of use. No policy reason or justification is offered for such a rule, and directly contrary to what USAA argues, *Holmes v. Raffo*, 60 Wn.2d 421, 374 P.2d 536 (1962), which substantially broadened the recovery for loss of use in the context of a tort claim for damage to an automobile – by removing

the requirement that special damages have been incurred though renting a replacement vehicle - did not require such proof. Nor have cases following *Holmes*, including *McCurdy v. Union Pac. RR Co.*, 68 Wn.2d 457, 413 P. 2d 617 (1966), the Pattern Jury Instruction (WPI 30.16), or RCW 4.56.250(1)(a). USAA's petition should be denied as it asks this Court to turn decades of established law on its head.

USAA's petition purports to ask this Court to determine whether the appellate decision conflicts with *Holmes v. Raffo*, "when it is undisputed that at the classwide trial there will be no evidence of any class member's inconvenience." (Pet. at 2). It then asserts that "inconvenience" is the "measure of damages in LOU cases." (*Id*. at 9). This is not only false, but if adopted would eviscerate sixty years of law (effectively writing loss of use out of tort and contract law in Washington) and lead to absurd results:

- First, *Holmes* does not say this. *Holmes* approved that portion of a jury instruction which provided as follows:

> If your verdict is in favor of plaintiffs, Frank S. Holmes and Neva A. Holmes, then in assessing the amount of recovery you will award them such sum as will reasonably compensate them for being deprived of the use of their automobile during the time necessarily consumed in repairing the damage proximately resulting from the accident.

60 Wn.2d at 432. Nowhere did the *Holmes* court require "proof of inconvenience." Instead, the Court observed "[p]roof of

> what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damage to the jury". *Id*.

- Second, the record in *Holmes* contained no evidence of the "inconvenience" suffered by Plaintiff: the testimony was simply *the period plaintiffs were without their vehicle* and *what it would have cost to rent a comparable vehicle. Id.* at 429. *Holmes*

remanded for trial based upon this evidence. *Id.* at 433.

- Third, adding a requirement of <u>proof</u> of the value or impact of "inconvenience" would preclude the right to compensation where it presently exists. Presumedly, (USAA never explains), one would need to demonstrate no other means of transportation together with resulting "inconvenience" (i.e., being required to take a cab to the store, a missed doctor's appointment, a missed wedding reception, or a missed evening out). The original Class Representative Marrisa Turk is apparently USAA's "poster child" as she "was a young, single woman who lived with her parents, in a household with multiple cars". *Id*. at 7. USAA's pitch is evidently that such a person is not entitled to compensation for the period they are without the use of their car, as they could have borrowed a car from someone else. *Holmes* does not require such proof,

nor does *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 989 P.2d 1181 (1999) require a plaintiff to not have the means to replace the vehicle or to rent a replacement as a prerequisite to compensation. 98 Wn. App. at 211.

- Fourth, USAA ends up chasing its own tail, as it does not take issue with the various ways of how damages are *measured*: i.e., through proof of 1) lost profit; (2) the cost of renting a substitute chattel; 3) rental value of the plaintiff's own chattel; or 4) interest. *Straka*, 98 Wn. App. at 211. USAA asks this Court to ignore this circuitous flaw, and instead adopt a new standard that would result in directed verdicts absent proof and valuation of some type of "inconvenience" even where, as in *Holmes* itself, the time a car was unusable, and the cost of a rental, is in evidence.

The absurdity of USAA's argument is demonstrated by the fact that USAA itself uses *the cost of a rental car* to

determine the amount of loss in use. In granting class certification, the Superior Court expressly found based upon the admissions of USAA's witnesses that:

> Evidence of the value of a rental car therefore appears to be one method of showing the value of loss of use, particularly where here, in an insurance context, it is the method used by the insurer defendant, and Plaintiffs are simply seeking what they contend they would have been entitled to under the policy had the loss been properly assessed and paid at the time it occurred.

(CP912).

USAA's petition uses the word "inconvenience" 81 times, arguing that a damage award must be predicated upon each class members' individual "inconvenience." This is not the law. The Appellate Court's decision below is consistent with *Holmes*, *McCurdy, Straka,* and *DePhelps*[1]. USAA has failed to demonstrate any basis for acceptance of review under RAP 13(b).

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[1] *DePhelps v. Safeco Ins. Co. of America*, 116 Wn. App. 441, 65 P. 3d 1234 (2003)

IV. ARGUMENT AS TO WHY REVIEW SHOULD BE DENIED

1. The Appellate Court Correctly Applied Holmes and McCurdy.

USAA's petition conflates the distinction between liability and damages under *Holmes* within the context of loss of use, falsely asserting that proof of inconvenience is a prerequisite to establishing liability. First, as to liability, the vehicle owner must prove a wrongful act. 60 Wn.2d at 429-30. Concerning USAA's "wrongful act", Plaintiffs' Complaint alleges breach of contract[2] based upon USAA's systematic

[2]Breach of contract is established as follows: 1) That the Defendant entered into a contract with Plaintiff: 2) The terms of the contract; 3) That the Defendant breached the contract as claimed by the Plaintiff; and 4) That Plaintiff was damaged as a result of Defendant's breach. See *Washington Partem Jury Instruction* WPI 300.02. The purpose of damages in a breach of contract action is "not a mere restoration to a former position. as in tort, but the awarding of a sum which is the equivalent of performance of the bargain-the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled .... " *Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949).

failure to disclose and pay compensation to the Class Members for the loss of use of their vehicle. (CP at 187; 189 – 190; 192).

Next, upon proof of a "wrongful act" (here, a breach of contract), a plaintiff must present evidence of damages. *Holmes*, 60 Wn.2d at 431-32. The *Holmes* Court was required to consider the "perplexing problem" whether of proof of damages (i.e., the right to compensation for loss of use) should be "dependent upon the owner having hired a substitute automobile during the period when his automobile was being repaired." *Id*. The *Holmes* Court determined that it should not, as "we would be placing upon recovery a condition of financial

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As to damages, Plaintiff's Complaint does not seek <u>additional</u> damages for "inconvenience" beyond a rental car, instead alleging at ¶ 5.13 that

> USAA's records will also show the period that its insureds in the Class were without their vehicles, **as well as the average payment for a substitute automobile during the Class period**. As such both liability and damages can be shown on a Class wide basis with common evidence

CP 191. (Bolding added).

ability to hire another automobile to take the place of the injured automobile." *Id*. To do so would be to deny a plaintiff "compensation for his inconvenience resulting from the defendant's wrongful act." *Id*.; (citing *Pittari v. Madison Ave. Coach Co*., 188 Misc. 614, 68 N.Y.S.2d 741 (1947)).

Having determined the right to compensation for loss of use is not dependent upon the owner having hired a substitute automobile, the *Holmes* Court then considered the following jury instruction:

> If your verdict is in favor of plaintiffs, Frank S. Holmes and Neva A. Holmes, then in assessing the amount of recovery you will award them such sum as will reasonably compensate them for being deprived of the use of their automobile during the time necessarily consumed in repairing the damage proximately resulting from the accident. *That sum is the reasonable rental or use value of the automobile for the period of time just mentioned*. [Italics in original].

This Court rejected the last sentence on the basis that it constituted "an instruction for special damages." It reasoned that had the last sentence of the instruction been deleted, the

remainder could properly have been given as it applied to general damages." *Id*. at 432. The jury instruction with the last sentence deleted would have constituted the "appropriate language in a general damage instruction upon the remand for a new trial on this issue." *Id*.

Nowhere did the *Holmes* Court condone or require that a jury instruction include language to require a plaintiff to demonstrate or prove "inconvenience." Instead, it stated that one way to prove such loss is through evidence of "the reasonable rental or use value of the automobile." *Id*. In this case, the Appellate Court correctly observed the distinction between the requirement of proof of a wrongful act versus what proof may be considered in establishing the amount of compensation for loss of use. *Slip Opp*. at 11 – 12. The Appellate Court then correctly observed that *Straka* does not state "a different measure of damages", but states "one way a plaintiff can prove loss of use damages," that being; "by

submitting evidence regarding the cost of renting a substitute vehicle." *Id*. at 13.

The Appellate Court also correctly observed that under *Holmes*, (*Slip Opp*. at 12), "it is significant that . . . evidence of the cost of a rental vehicle is admissible at trial and is sufficient for the jury to award loss of use damages. 60 Wn.2d at 432." The Appellate Court correctly summarized *Straka*'s holding that one method of proving damages in a loss of use claim is through evidence of the cost of a rental. *Slip Opp*. at 13.

USAA's petition, which references the term "inconvenience" *81 times* in 18 pages, centers on the false premise that loss of use damages cannot be established without proof of "inconvenience." As the Appellate Court correctly observed, this premise is contradicted by *Holmes* and *Straka*: "[i]n other words, *Straka* stated that one method of proving loss of use damages is evidence of the cost of a rental, but it did not state that this was the sole method. 98 Wn. App. at 211." *Slip Opp*. at 13. USAA's argument is also inconsistent with

McCurdy, decided four years after *Holmes*, wherein the word "inconvenience" is nowhere found, but this Court (discussing *Holmes*) held that the reasonable "rental value of a motor vehicle" was recoverable during the period of repair. 68 Wn.2d 470.

The Appellate Court's reading of *Holmes'* and *Straka's* damages analysis also comports with the *Restatement (Second) of Torts* § 931 (1979) which provides as follows:

> If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for
> (a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and
> (b) harm to the subject matter or other harm of which the detention is the legal cause.

As comment (b) to § 931 explains,

> b. The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, ***at least*** **the rental value of the chattel or land during the period of deprivation.** This is true even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time or had a substitute that he used without additional expense

> to him. The use to which the chattel or land is commonly put and the time of year in which the detention or deprivation occurs are, however, to be taken into consideration as far as these factors bear upon the value of the use to the owner or the rental value. (Italics and Bolding added).

Holmes holds that proof of the cost of a rental is sufficient evidence to bring the item of damages to the jury. 60 Wn.2d at 432. *Straka* does not require such evidence, providing a list of how loss of use may be measured in the *disjunctive*: "'[l]oss of use may be measured by (1) lost profit, (2) cost of renting a substitute chattel, (3) rental value of the plaintiff's own chattel, or (4) interest.'" 98 Wn. App. at 211 (underlining added). In describing these four measures of damages, the *Straka* Court quoted Dobbs, *Law of Remedies: Damages - Equity - Restitution* §5.15(1), at 875 (2d ed. 1993)). In the sentence immediately after the quoted text, Dobbs observes that "In addition, some authority appears to allow damages based upon the unquantifiable inconvenience to the plaintiff, at least in the case of private motor vehicles." *Id*.;

(Underlining added). When the two sentences are read together it is clear that the various measures of loss of use are available separately. In other words, "inconvenience" can be sought, but so can the rental value of the automobile.

The Appellate Court correctly observed that *Straka* is consistent with *Holmes* in its description of the different *methods* of proving damages for loss of use. USAA's argument at p. 14 that "*Straka* did not resolve how LOU damages are measured because . . . the issue in Straka was whether LOU damages can be recovered at all when the vehicle was destroyed, as opposed to merely damaged" is false. The *Straka* court observed that "[i]n this case, we are concerned with loss of use before the tortfeasor pays, or, in alternative terms, with loss of use from the date of the accident to the date on which the tortfeasor pays (or tenders) the full value of the destroyed property." 98 Wn. App. at 213–14. *Straka* therefore makes clear that Loss of Use damages are available in instances where vehicles have been destroyed or declared total losses,

presenting no conflict with *Holmes* and no problem to class members in this case.

Neither *Holmes* nor *Straka* support USAA's contention that its insureds must present evidence of "inconvenience" in the first instance to be then somehow valued by a trier of fact. Nor, as noted earlier, does *McCurdy,* (supra), decided four years after *Holmes*, which does not mention "inconvenience" while quoting and discussing *Holmes*, stating instead that the "recovery may be had for the loss of use or rental value of a motor vehicle is generally held to be that which is reasonably required for the making of repairs or that within which the vehicle could be repaired with ordinary diligence." *Id*. at 470.

That *evidence* of the cost of a rental car can be submitted to support loss of use is also consistent with that of other Washington Courts. For example, in *DePhelps*, 116 Wn. App. 441, the court stated that "[a] claim of loss of use of a car was insufficient to sustain an award of damages absent any proof of the value of such use per day or week, or the cost to rent

another car for the same uses during the same time." *Id*. at 1239 (citing *Norris v. Hadfield*, 124 Wn. 198, 203, 213 P. 934 (1923)).

USAA argues at page 9 that "inconvenience is the measure of damages." There is no support in *Holmes*, *Straka McCurdy* or *DePhelps* for this contention. While *Holmes* treats rental value as such "evidence," nothing in the opinion requires a showing of "inconvenience" as a prerequisite to recovery. Moreover, nothing in the pattern jury instruction (WPI 30.16)[3] requires a showing of "inconvenience," nor can this be reconciled with RCW 4.56.250(1)(a), which specifically defines economic (not consequential) damages to include "loss of use of property." As Dobbs observes, "[a]lthough the reasonable cost of a substitute [chattel] is the measure of the loss of use in the eyes of some courts, in others it is merely evidence of the

[3] "Reasonable compensation for any loss of use of any damaged property during the time reasonably required for its [repair] [replacement]." WPI 30.16

rental value of the plaintiff's own chattel, or evidence of his inconvenience." *Id*. at §5.15(2), at p. 879.

2. No Public Interest or Due Process Issues Are Presented.

a. Certification Was Appropriate

As shown above, and in section b, infra, *Holmes* does not make this case unsuitable for class certification. The Appellate Court properly upheld the certification of this matter as a class action. (*Slip Opp*. at 13 – 16). The Appellate Court analyzed and determined the grant of class certification was well within the "manifest abuse of discretion". (*Slip Opp*. at 13; citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995)).

First, as to CR 23's commonality requirement, the Appellate Court correctly determined that adherence to *Holmes* does not defeat commonality, correctly noting that USAA's common failure to pay compensation for loss of use satisfies the requirement. *Slip Opp*. at 14. Contrary to USAA's

repeated arguments, the Appellate Court correctly refused to blur the distinction between liability and damages, observing that "the fact that the individual loss of use damages vary in amount does not defeat commonality." *Id*.; (citing *Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 519, 415 P.3d 224 (2018)).

Second, the Appellate Court also correctly determined that predominance requirement had been satisfied, noting that the difference in the amount of class members' loss of use damages "does not defeat the point that USAA did not pay its insureds loss of use damages." (*Id*. at 15; (citing Chavez, 190 Wn.2d at 518-19)).

Third, the decision correctly determined that superiority[4] had been established, noting that in a class size ranging between 6,000 and 11,000 USAA insures who were not paid loss of use

[4] USAA's petition does not argue, as it did to the Appellate Court, that the Superior Court erred in certifying the class without being presented a "valid trial plan."

under their Underinsured Motorist Property Damage ("UMPD") coverage, a class action would be "a fair and efficient adjudication of the action, superior to conducting individualized inquiries." *Id*. at 16.

USAA has consistently blurred/conflated the distinction between a) its liability for breach of contract (its "wrongful conduct) in failing to disclose coverage for, and then pay loss of use, under its UMPD coverage, and b) the Class Members' resulting damages. The Appellate Court correctly recognized this basic distinction. Nothing about this case demonstrates its unsuitability as a class action. As the Appellate Court correctly determined, the grant of class certification was well within the Superior Court's discretion.

b. The Appellate Decision Does Not Relieve Plaintiffs of the Obligation to Prove Liability

Holmes requires that a vehicle owner prove a wrongful act to establish compensation for loss of use damages. 60 Wn.2d at 429-30. Here, the alleged "wrongful act" is USAA's

common breach of contract: "[w]hether USAA breached its contracts of insurance with the Class by failing to pay loss of use damages." CP 190 (Complaint at ¶5.7). This issue is common to all class members since the same UMPD insuring agreement language applies to all class members, and USAA's obligations under the insuring agreement are identical to each class member. The determination of USAA's liability will result therefrom.

Ignoring the above, USAA improperly conflates liability, based upon the contractual obligation under the insuring agreement to "pay compensatory damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle" (CP184), with the resulting damages (i.e., the amount of compensation due to each Class Member) in the event liability is established on the merits.

If the Class Members prove USAA's liability, they must then prove their damages. Here, as in *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013), damages will be

calculated based on the unpaid loss of use compensation resulting from USAA's unlawful practices. 716 F.3d at 514. Consistent with *Leyva*, the Plaintiff would show (when the matter reaches its merits) that Class Members' damages stemmed from the USAA's wrongful conduct (breach of contract) which created the legal liability.

The damage calculation is *separate* and *distinct* from USAA's liability to its insureds. Nothing in the Appellate Court decision relieves a Plaintiff, individually or through representative evidence on behalf of a class, from the requirement of proving *damages* (i.e., non-compensation) for loss of use. At the class certification hearing, Plaintiff demonstrated that proof of damages could be made from USAA's own records: the Trial Court, in support of its findings of CR23 numerosity, predominance and manageability, relied upon the information *gathered by USAA* in its sample of 500 UMPD claims files (Exhibits 1 and 2 in the designation of

Clerks Papers) which was then analyzed by Plaintiff's expert (CP766-771) *and shown to the Court* during oral argument.

The Superior Court noted in certifying the class that "[t]he data contained in this Spreadsheet was extensively discussed at the hearing as it related to the issues of ascertainability, the ability to address damages, and any affirmative defenses using common evidence." CP908-9. The Superior Court expressly found that the data USAA compiled in the sample of 500 claims demonstrated how CR 23's numerosity (CP912-913), predominance (CP916-917) and superiority/manageability (CP917-918) requirements were met, finding:

> Plaintiff has further presented the Court – again using the claims data that USAA itself gathered – with what appears to workable methods of determine the amount of loss on a class-wide basis for loss of use on both totaled and repairable vehicles. Using data on similarly situated individuals to value the loss for others, as Plaintiffs propose, has been accepted in Washington and Federal Law as a method to determine damages. *Moore v. Health Care Auth.*, 181 Wn.2d 299, 332

> P.3d 461 (2014); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016).

(CP917). Critically, as to damages, the Superior Court found that

> it appears that this information can be used to determine not only damages, but also to identify those members of the Class to which USAA's asserted affirmative defenses apply, and the likely impact of these defenses on class-wide damages. As such, it appears that as in *Moeller*, this matter can be tried with common evidence, while allowing USAA to fully present any valid defenses in a single proceeding.

Id.

Consistent with the above, Plaintiff has proposed presenting evidence of damages using USAA's own records which show whether Class Members were compensated for loss of use during the time they were without their vehicles – *because they were provided a rental car as they had paid for* <u>*additional*</u> *rental car coverage* – or were still owed under UMPD for loss of use. Per this proposal, the *amount* of damages owed would be a product of the number of days

without compensation times rental value. USAA's own records ironically contain the rental value information because USAA had provided paid those who had paid extra for *additional* rental reimbursement coverage. As the Appellate Court correctly noted, this is sufficient under *Holmes* to allow the issue to proceed to the jury: "evidence of the cost of a rental vehicle is admissible at trial and is sufficient for the jury to award loss of use damages. 60 Wn.2d at 432." (Slip op. at 12).[5]

The advent of a Class Member having no damages can be determined from USAA's own records, with proof available to

[5] USAA's citation at p. 16 to *Steinman v. City of Seattle*, 16 Wn. App. 853, 560 P.2d 357 (1977) for the proposition that a class member would be required to "prove that he would have used equipment at time it was under impound" is at best a bad analogy and at worst disingenuous. This holding from *Steinman* pertains to the Plaintiff's claims for lost profits resulting from the impound of certain construction equipment where the court determined that the evidence supporting the claim was too remote/speculative and therefore properly excluded. 16 Wn. App. at 857. Plaintiffs herein do not seek such additional damages, but only the cost of a rental car that was not provided by USAA.

USAA as an affirmative defense. (CR 8(c)). The Superior Court expressly found that such affirmative defenses could be proved from USAA's own records, and nothing in the appellate decision would preclude USAA from affirmatively bringing forth proof in support of such affirmative defenses.

c) Due Process Rights Are Not Adversely Affected

In certifying the class, the Superior Court specifically found that USAA's own records

> can be used to determine not only damages, but also to identify those members of the Class to which USAA's asserted affirmative defenses apply, and the likely impact of these defenses on class-wide damages. As such, it appears that as in Moeller, this matter can be tried with common evidence, while allowing USAA to fully present any valid defenses in a single proceeding.

CP 1425. USAA's petition ignores this specific finding and cites no case law in support of its contention that its due process rights would somehow be adversely affected. USAA instead presents the argument conflating the distinction between liability and damages.

d) Potential "Under Compensation" Does Not Defeat Class Certification

Without citation to any authority, USAA presents the hypothetical argument beginning at p. 19 that a jury award based on "aggregate" evidence also may possibly "undercompensate" some class members for their actual inconvenience. As the Appellate Court correctly recognized, when common issue of law or fact are present to support a class action, the *amount* of damages due to class members will invariably be individual question which does not defeat class action treatment. (*Slip Opp*. at 15; (citing *Chavez* at 5-18-19); *see also Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975); *Yokoyama v. Midland Nat. Life Ins. Co*., 594 F.3d 1087, 1094 (9th Cir. 2010); *Leyva*, 716 F.3d at 513; *Vaquero v. Ashley Furniture Industries, Inc*., 824 F. 3d 1150, 1155 (9th Cir. 2016) ("We have repeatedly confirmed the *Yokoyama* holding that the need for individualized findings as to the amount of damages does not defeat class certification"); and *Achziger v. IDS Prop.*

Cas. Ins. Co., 772 F. App'x 416, 419 (9th Cir. 2019) (the speculative possibility that a few class members will be undercompensated does not outweigh the actuality that most class members will receive no relief in the absence of a class action) (*citing Moeller v. Farmers Ins. Co. of Wash*., 155 Wn. App. 133, 229 P.3d 857, 865 (2010), aff'd, 173 Wn.2d 264, 267 P.3d 998 (2011) ("Because each claim has a *de minimis* value, individuals are unlikely to pursue separate actions.")).

Here, Plaintiff alleges that USAA's deliberate policy deprived the class members of compensation for loss of use of their vehicles. Plaintiff alleges that USAA's wrongful conduct (i.e., breach of contract) caused the class members' injury. USAA either paid (*under the separate rental reimbursement coverage*) or did not pay the loss of use compensation due to its insureds. No other factor could have contributed to the alleged injury. Therefore, even if the measure of damages proposed here were imperfect, it cannot be disputed that the damages (if any are proved) stemmed from Defendant's actions. See

Vaquero, 824 F.3d at 1154–55. USAA cites no case law inapposite to the above cases, nor does it distinguish why the above rules should not apply to this case.

V. CONCLUSION

USAA has failed to demonstrate that review is warranted under RAP 13(b). This Court should DENY its petition.

RESPECTFULLY SUBMITTED September 28, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to RAP 18.17, the foregoing Petition for Review was produced using word processing software and the number of words contained in the document, exclusive of words contained in the appendices, the title sheet, the table of contents, the table of authorities, the certificate of compliance, the certificate of service, signature blocks, and pictorial images (*e.g.*, photographs, maps, diagrams, and exhibits) is 4,681.

DATED September 28, 2021.

STEPHEN M. HANSEN WSBA #15642

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 28th day of September, 2021, I filed the above document with the Washington State Appellate Courts' Portal and [X] e-mailed [ ] mailed via regular U.S. mail [ ] faxed [ ] delivered by legal messenger a true and correct copy of this document to:

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LAW OFFICES OF STEPHEN M. HANSEN

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