FILED
SUPREME COURT
STATE OF WASHINGTON
8/11/2021 4:21 PM
BY ERIN L. LENNON
CLERK

No. 100074-0

SUPREME COURT
OF THE STATE OF WASHINGTON

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

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

Respondent,

v.

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

Petitioners.

PETITION FOR REVIEW

SCHIFF HARDIN LLP
Jay Williams, *PHV to be filed*
233 S. Wacker Dr., Suite 7100
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600
Email: jwilliams@schiffhardin.com

CORR CRONIN LLP
Michael A. Moore, WSBA # 27047
Victoria Ainsworth, WSBA #49677
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Tel: (206) 625-8600
Fax: (206) 625-0900
E-mail:mmoore@corrcronin.com
tainsworth@corrcronin.com

Attorneys for Petitioners

TABLE OF CONTENTS

Page(s)

A. IDENTITY OF PETITIONERS 1

B. DECISION BELOW 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

1. The Class Certification Proceedings 2

2. The Court of Appeals' Decision 8

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 9

1. The Court of Appeals' Decision Conflicts with This Court's Precedent in *Holmes v. Raffo*. 11

2. This Petition Involves Issues of Substantial Public Interest That Should Be Determined By This Court and Presents Significant Due Process Questions. 15

a. The Decision Is Unprecedented, Because Loss-Of-Use Claims Under the *Holmes* Standard Are Inherently Unsuitable for Class Certification. 15

b. The Decision Would Relieve Class Representatives of Their Obligation to Prove Liability on a Classwide Basis, and Deprive Defendants of Their Due Process Rights. 17

c. A Jury Award Based on the Cost of a Rental Car Would Bear No Relationship to Class Members' Inconvenience, and May Undercompensate Some of Them. 19

F. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Baldwin v. Silver,
165 Wn. App. 463, 269 P.3d 284 (2011) 18

Holmes v. Raffo,
60 Wn.2d 421, 374 P.2d 536 (1962) .... *passim*

Price v. City of Seattle,
No. C03-1365RSL, 2006 WL 2691402
(W.D. Wash. Sept. 19, 2006) 5, 9, 11, 16

Sherman v. Kissinger,
146 Wn. App. 855, 195 P.3d 539 (2008) 15

Steinman v. City of Seattle,
16 Wn. App. 853, 560 P.2d 357 (1977) 16

Straka Trucking, Inc. v. Estate of Peterson,
98 Wn. App. 209, 989 P.2d 1181 (1999) 2, 14

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011).. 19

RULES

CR 23 .... 3, 8

RAP 13.4(b)(1) 9

RAP 13.4(b)(3) 9

RAP 13.4(b)(4) 9

A. IDENTITY OF PETITIONERS

Petitioners are United Services Automobile Association, USAA Casualty Insurance Company, USAA General Indemnity Company, and Garrison Property and Casualty Insurance Company.

B. DECISION BELOW

Petitioners seek review of the published decision of Division II dated May 25, 2021 (the "Decision"). (App.1.) On July 12, 2021, the Court of Appeals denied Petitioners' motion for reconsideration. (App.18.)

C. ISSUES PRESENTED FOR REVIEW

The Court of Appeals affirmed the trial court's grant of class certification of an unprecedented loss-of-use ("LOU") class consisting of Petitioners' Washington auto insureds whose vehicles were damaged in accidents. In *Holmes v. Raffo*, 60 Wn.2d 421, 431-32, 374 P.2d 536, 542 (1962), this Court held that "where . . . a plaintiff has not rented a substitute automobile, he is nevertheless entitled to receive, as general damages in the event liability is established, such sum as will compensate him for his inconvenience," and while evidence of the cost of a substitute rental car is relevant and admissible, it cannot be the "measure of damages." Although it is undisputed that there will be no evidence of any class member's "inconvenience" at the classwide trial, the Court of Appeals upheld class certification on the ground that, under *Straka Trucking, Inc. v. Estate of*

Peterson, 98 Wn. App. 209, 211, 989 P.2d 1181 (1999), evidence of the cost of a substitute rental alone is sufficient for a jury to award "inconvenience" damages. The issues presented for review are as follows:

1. Whether the Decision of the Court of Appeals conflicts with this Court's decision in *Holmes v. Raffo*, when it is undisputed that at the classwide trial there will be no evidence of any class member's inconvenience, and the evidence of the alleged cost of a substitute rental car will therefore become the sole "measure of damages," contrary to *Holmes*.

2. Whether the Court of Appeals erred in upholding an LOU class, when it is undisputed that a trial based on the *Holmes* inconvenience standard cannot be certified given the inherently individualized inquiries required to determine whether any class member actually sustained inconvenience and, if so, how that inconvenience should be quantified.

3. Whether a classwide trial based on the *Straka* "cost of a substitute rental car" standard would violate the due process rights of the USAA Defendants and the class members, when such a trial would compensate class members who sustained no injury, and possibly undercompensate class members who did.

D. STATEMENT OF THE CASE

1. The Class Certification Proceedings

This case involves LOU benefits under the uninsured/underinsured

motorists physical damage coverage ("UMPD") of Petitioners' Washington auto policies. The class was first certified on December 30, 2016 based on the Court of Appeals' *Straka* standard; then vacated by the Court of Appeals due to the inadequacy of the original named plaintiffs, Marissa and David Turk;[1] then recertified by a new trial judge through the "substitution" of the new Plaintiff, Jarron Elter, without determining whether the *Holmes* or *Straka* LOU standard should apply, and without making any other CR 23 findings; and then affirmed by the Court of Appeals in the Decision. (App.1-4, 6-9.) The class is defined as follows:

> All USAA insureds with Washington policies . . . where USAA determined the loss to be covered under the Underinsured Motorist (UIM) [UMPD] coverage, and their vehicle suffered a loss requiring repair, or the vehicle was totaled, during which time they were without the use of their vehicle, for a day or more.
>
> Excluded from the proposed Class are . . . those who received payment for substitute transportation from USAA *during the entire period they were without the use of their vehicle.*

(App.6 (emphasis in trial court order).)

In obtaining class certification, Plaintiffs argued that the *Holmes* inconvenience standard did *not* apply and that the court should instead apply the "cost of a substitute rental car" test in *Straka*.[2] Plaintiffs proffered no

---

[1] The Court of Appeals accepted review in the first round because, among other reasons, the trial court had improperly used the *Straka* test, rather than the *Holmes* inconvenience standard, and class certification would be inappropriate under the *Holmes* standard. (3/10/17 Ruling of Commissioner Bearse at 9-15.)

[2] In stark contrast, *before* class certification Plaintiffs argued that the *Holmes inconvenience standard* applied to their individual claims: "Ms. Turk is entitled

evidence of any putative class member's inconvenience under the *Holmes* standard. Nor did they contend that there could *ever* be any evidence of any class member's "inconvenience" presented at a classwide trial. Instead, according to Plaintiffs, the only "evidence" of the class members' alleged LOU at trial would be the cost of a rental vehicle. Indeed, Plaintiffs' expert, Bernard Siskin, admitted that his hypothetical damages model[3] could not take into account a class member's inconvenience. Dr. Siskin conceded that he could not construct a model (1) that would measure a class member's inconvenience; (2) that would identify insureds who did not suffer any compensable LOU (such as those who would not have used their vehicle anyway during the time it was being repaired, *see infra* p. 6); and (3) that could determine whether the alleged "lost time" a car spent in a repair shop was reasonable. (CP 454-459, 462-463, 465, 468-469, 476-478, 492-494.)

The plaintiffs argued for the *Straka* standard because an LOU class based on the *Holmes* inconvenience standard could not be certified, given the inherently individualized issues required to establish whether each class member actually sustained inconvenience, and how much. *See Price v. City*

---

to loss of use damages, not a rental vehicle." (CP 1139-1141; CP1140 ("[W]hen a Plaintiff does not rent a vehicle, she is nevertheless entitled to receive general damages for inconvenience.").) Yet for class certification, Plaintiffs argued that *Straka* applied—a clear concession that class certification was impossible under *Holmes*. Plaintiffs did not purport to embrace *Holmes* until the second appeal.

[3] Siskin did not actually create a damages model or do any statistical work. (CP 462-463, 493-494.)

of Seattle, No. C03-1365RSL, 2006 WL 2691402, at *8 (W.D. Wash. Sept. 19, 2006) (class certification improper in LOU cases).

The undisputed evidence was that the USAA Defendants consistently pay for loss of use. (CP 536-537 ¶¶ 7, 13-14.) These benefits can arise from an insured's Rental Reimbursement Coverage and UMPD Coverage. Rental Reimbursement pays for a rental (regardless of fault) for the time reasonably required to return the vehicle to use. Under UMPD, LOU benefits are extended when the other driver is at fault and is uninsured or underinsured. If the insured does not have Rental Reimbursement, but sustained LOU, Defendants extend LOU benefits under UMPD for the entire period of the loss, even if all or a portion of the LOU occurred before UMPD was opened. (CP 537 ¶ 14, 538-539 ¶¶ 19-23.)

These practices were confirmed by a claim file survey. The survey demonstrated that more than 43% of Defendants' insureds actually received a rental vehicle, and that another 36% were offered a rental, but declined; there was no affirmative evidence—of either an offer or lack of an offer—in the remaining 21%. Thus, approximately 80% (possibly more) of Defendants' insureds were offered a rental. (CP 544-545.)[4]

---

[4] In his response to the USAA Defendants' motion for reconsideration of the Decision, Plaintiff contended that the Court of Appeals "recognized" that the USAA Defendants did not routinely provide a rental car to their insureds. In fact, the Court of Appeals was noting the first trial court's findings, which were contrary to the undisputed record from the claim file survey. (App.3.)

Defendants also offered undisputed evidence that there are many situations in which an insured will not sustain *any* LOU at all—an issue that goes not merely to the *amount* of damages, but also to the *existence* of damages or injury, which is a liability issue. Insureds often do not suffer a loss of use after an accident, and therefore are not entitled to LOU benefits, for any number of reasons. For example, the insured can choose not to have the car repaired, and instead to pocket the money from Defendants; in that case, the insured retains (*i.e.*, does *not* "lose") the use of the car. (CP 606 ¶ 30.) Likewise, the insured could have several vehicles and not need a rental—like Mr. Turk, who decided against rental coverage because he had so many vehicles that he would not need a rental in case of an accident. (CP 617.) The insured could have free alternate transportation, such as a loaner from the repair shop. (CP 574.) The insured could be recovering from injuries sustained in the accident and be unable to drive; or the insured's license could have been suspended, leaving the insured legally unfit to drive; or the insured could be on vacation and not using the car while it is in the shop; or the insured might drive the car only on certain days (*e.g.*, weekends), and the car is in the shop only on the days the insured would not be using it, anyway. (CP 605 ¶ 28; CP 545 ¶ 52.) These are not hypothetical scenarios, but are corroborated by the USAA Defendants' claim file survey.

The inherently individualized nature of "inconvenience" was

demonstrated by the case of Ms. Turk, which showed that "inconvenience" is something that requires testimony from the individual insured as to how—if at all—he or she was actually inconvenienced, and it necessarily will vary from person to person. Ms. Turk was a young, single woman who lived with her parents, in a household with multiple cars; who worked with her mother; who was driven to and from work by her parents; and who complained that, because her car was in the shop, she could not run errands, get her hair done, or go to social events without getting rides from friends. (CP 610-616.) Ms. Turk's alleged inconvenience would not be typical to that of, say, a single parent with three children, one car, and a full-time job, or of a person (like Ms. Turk's father) with a garage full of cars.

Despite this undisputed evidence, the trial court certified a class based on the *Straka* LOU standard. As the Court of Appeals found: "[T]he plaintiffs requested certification based on the test for loss of use damages stated in *Straka . . . , not the inconvenience test in Holmes* . . . . The trial court adopted the *Straka* loss of use standard." (App.4 (emphasis added).)

The USAA Defendants moved for discretionary review of the class certification decision. The Court of Appeals granted review on the ground that the trial court had applied the wrong LOU standard (*Straka*), and that a class based on the correct LOU standard—the *Holmes* "inconvenience" standard—could not be certified. (3/10/17 Comm'r Ruling at 9-15.)

On December 11, 2018, the Court of Appeals vacated class certification on the grounds that the original named plaintiffs (the Turks) did not satisfy typicality or adequacy. (App.6-7.) On remand, the new trial judge recertified the class based solely on the substitution of Mr. Elter and his alleged adequacy and typicality. (App.8.) The court declined to make findings on the other CR 23 elements—including ruling on the key question whether the *Holmes* inconvenience standard applies—or to consider the undisputed evidence demonstrating that class certification would be impossible under *Holmes*. Thus, the class remained certified on the same bases as those of the original class certification: the *Straka* standard.

2. The Court of Appeals' Decision

The Court of Appeals granted Petitioners' motion for discretionary review and upheld class certification. The Court of Appeals correctly held that the *Holmes* "inconvenience" standard applies to the LOU claims of the class. (App.13.) The court also correctly ruled that the trial court's class certification order was not based on *Holmes*, but rather on the *wrong legal standard*: the *Straka* "cost of a substitute rental" standard. *See supra* p. 7. Yet the Court of Appeals upheld class certification—even though the trial court had applied the wrong LOU standard—because evidence of the cost of a substitute rental car (the *Straka* standard) will be admissible at trial. (App.12.) The Court of Appeals did not acknowledge that it was the only

appellate court to have ever certified an LOU class; nor did it discuss the authorities cited by the USAA Defendants—and by the Commissioner who originally concluded that review should be granted because a class based on the *Holmes* inconvenience standard could not properly be certified. (3/10/17 Comm'r Ruling at 9-15; *Price,* 2006 WL 2691402, at *8.)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Nearly 60 years ago, this Court established the *Holmes* "inconvenience" standard as the measure of general damages in LOU cases. The Court of Appeals' unprecedented Decision gutted that precedent and opened the floodgates to class actions that never have been certified before. Absent that departure from this Court's precedent, Plaintiff has no proof of liability or damages, and this action fails. This Court should grant review because (1) the Decision conflicts with *Holmes* (RAP 13.4(b)(1)), (2) the Petition involves an issue of substantial public interest that should be determined by this Court (RAP 13.4(b)(4)), and (3) a significant question of law under the Due Process Clauses of the United States and Washington Constitutions is involved (RAP 13.4(b)(3)).

The Decision nullifies *Holmes*. Under *Holmes*, evidence of the cost of a rental car is relevant as to whether a plaintiff sustained a compensable loss of use, but it is not the "measure of damages." *Inconvenience* is the measure of damages. This Court clearly distinguished between (1) special

damages—the cost of a substitute rental when the plaintiff *actually rented a car*—and (2) general damages for inconvenience, which apply when the plaintiff did not incur any special damages by renting a car, but *may* have suffered inconvenience as a result of the loss of use of the vehicle. To sustain a jury verdict on Plaintiff's LOU claims for inconvenience, there must be *evidence* of each and every class member's inconvenience.

In this case, however, there will be no evidence *at all* of any class member's inconvenience; the only "evidence" will be the cost of a substitute rental car, as determined by Plaintiff's damages expert using a purely hypothetical aggregate damages model he has yet to create. When the only evidence of LOU will be the cost of a substitute rental car, that standard necessarily becomes the "measure of damages," and any jury award will be for special damages that class members did not incur—which is precisely what *Holmes* prohibits. The Decision would allow for an award to class members who did not sustain any legally cognizable inconvenience injury, and it could undercompensate class members who did—a clear violation of the due process rights of the USAA Defendants and class members.

LOU claims under the *Holmes* standard are highly personal, individualized, and therefore inherently unsuitable for class certification. There is no dispute that whether a class member sustained any inconvenience at all (and, if so, how much) can be determined only by an

individualized inquiry—the very antithesis of classwide adjudication. For good reason, no court had ever certified an LOU class before this case. *See Price,* 2006 WL 2691402, at *8 (class certification improper in LOU case); 3/10/17 Comm'r Ruling at 9-15 (same).

The Court of Appeals' errors should be corrected now to prevent continued misapplication of this Court's precedent and to avoid years of additional, protracted litigation in this seven-year-old case—before the class is (improperly) notified of class certification, before additional judicial and party resources are expended on this complex case, and before a jury trial takes place based on a legal standard contrary to this Court's precedent.

1. The Court of Appeals' Decision Conflicts with This Court's Precedent in *Holmes v. Raffo.*

The Decision effectively eliminates this Court's *Holmes* standard in class actions. Although the Court of Appeals correctly held that "inconvenience" must be the "measure of damages" at a classwide jury trial (App.14), the court ruled that evidence of the cost of a substitute rental *alone* would be sufficient to establish inconvenience for all class members (*id.*).

It is undisputed that at a classwide jury trial here, there would be *no* evidence of any class member's "inconvenience" under *Holmes*. That there will be no evidence of class members' inconvenience is not surprising, given the individualized, personal nature of inconvenience. The only

"evidence" would be the alleged cost of a rental vehicle.

With no evidence of class members' inconvenience introduced at trial, the cost of a rental car would be not just "relevant and admissible evidence" of inconvenience. It would be the *only* evidence, and therefore would effectively become the "measure of damages."

This result contradicts *Holmes*, and conflates the *Holmes* distinction between special damages (the cost of a rental car when the plaintiff actually rents one) and general damages (the plaintiff's inconvenience when he or she does not rent a car). In *Holmes* this Court rejected a jury instruction that would have awarded the plaintiffs the cost of a rental car; the Court held that this was an improper instruction for special damages, rather than general damages for inconvenience. 60 Wn.2d at 432 ("This constitutes an instruction for special damages."). Although under *Holmes* the cost of a rental can be evidence of inconvenience, it cannot be the "measure of damages." Otherwise, the jury would be awarding special damages for the cost of a rental when the plaintiff did not actually incur any such special damages, rather than awarding general damages for inconvenience. *Id.*

The Court of Appeals erred by concluding that in *Holmes*, evidence of the cost of a rental car alone, without any evidence of inconvenience, was sufficient for a jury to render a verdict on "inconvenience." (App.12.) In *Holmes*, however, there *was* evidence of the plaintiffs' inconvenience. The

plaintiffs there testified that they were without the use of their car for more than one month; that they typically drove their car 2,000 miles each month; that they used their car for business and pleasure; and that during the month their car was being repaired, they "did without" the use of a car. *Holmes*, 60 Wn.2d at 429. Here, by contrast, no such inconvenience evidence would be presented at trial regarding the alleged injuries of the class members.

The Court of Appeals also erred by ruling that in *Holmes*, the cost of a rental alone "is sufficient for the jury to *award* loss of use damages." (App.12 (emphasis added).) In *Holmes* this Court did state that the cost of a rental was sufficient to "carry this item of damages to the jury," 60 Wn.2d at 432, but this Court did so in the context of ruling that the plaintiffs' failure to rent a car did not preclude them from asking the jury to award general damages for LOU. The full passage from *Holmes*, in context, is as follows:

> [T]he right to compensation for loss of use is not dependent upon the owner having hired a substitute automobile during the period when his automobile was being repaired. . . .
>
> . . .
>
> *We now hold that, where, as here, a plaintiff has not rented a substitute automobile, he is nevertheless entitled to receive, as general damages in the event liability is established, such sum as will compensate him for his inconvenience.* Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to a jury, but is not the measure of such damages. It is relevant evidence in determining the general damages for inconvenience resulting from loss of use of an automobile.

Id. at 431-32 (emphasis added).

Thus, this Court ruled that evidence of the cost of renting a car—even when the plaintiffs did not actually rent one—was sufficient to carry their LOU claim to the jury; in other words, the plaintiffs' failure to rent a car did not *disqualify* them from seeking LOU damages. But this Court clearly held that the cost of a rental could not be the *measure of damages*, and specifically rejected a proposed jury instruction that the cost of a rental was an appropriate "sum as will reasonably compensate" the plaintiffs. That, however, is precisely what would happen at a classwide trial here.

Finally, the Court of Appeals attempted to harmonize *Straka* with *Holmes* ("*Straka* is not necessarily inconsistent with *Holmes.*" (App.12)) by stating: "*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." (App.13.) This misconstrues *Straka* and *Holmes*. *Straka* did not even cite *Holmes*, or any Washington law, but rather listed in passing four potential types of LOU cited in a general remedies treatise. 98 Wn. App. at 211-13. *Straka* did not resolve how LOU damages are measured because it did not need to: the issue in *Straka* was whether LOU damages can be recovered at all when the vehicle was destroyed, as opposed to merely damaged; the rest of the opinion was therefore *dictum*. The supposed *Straka* standard ("the cost of a rental') is simply not consistent with *Holmes* when that standard becomes the "measure of damages," as it will be in this case.

Accordingly, under *Holmes* a jury cannot base an award of general damages—*i.e.*, inconvenience damages—solely on the cost of a rental car. But that is precisely what would happen here, because the only evidence that would be presented to the jury would be the alleged cost of a rental car. Plaintiff cannot meet his burden of proof on liability and damages in the absence of admissible evidence of the class members' "inconvenience." *E.g.*, *Sherman v. Kissinger*, 146 Wn. App. 855, 874, 195 P.3d 539, 548 (2008) ("[T]he plaintiff bears the burden of producing evidence to show which measure of damages applies."). A verdict on "inconvenience" cannot be sustained when there is no evidence of inconvenience.

2. This Petition Involves Issues of Substantial Public Interest That Should Be Determined By This Court and Presents Significant Due Process Questions.

a. The Decision Is Unprecedented, Because Loss-Of-Use Claims Under the *Holmes* Standard Are Inherently Unsuitable for Class Certification.

If the LOU claims here must be based on evidence of actual inconvenience to the insured (as they must), it is undisputed that class certification would be improper. LOU claims subject to the *Holmes* inconvenience standard cannot properly be certified given the numerous individual issues required to ascertain whether an insured sustained any inconvenience and, if so, the amount that would compensate the inured for those general damages. Indeed, *Holmes* noted the "difficulty of placing a

monetary value upon the use value to the owner." 60 Wn.2d at 431.

A purported "inconvenience" class trial would require, at a minimum, testimony from each class member that he or she suffered an actual loss of use—*i.e.*, was actually inconvenienced—as a result of required repairs to the car; that the class member would have used the car while it was being repaired; that the repair time for *collision-related* damage was reasonable; that the plaintiff was diligent in retrieving the car when repairs were complete; and that the plaintiff has evidence of "inconvenience" damages beyond the cost of a substitute rental. *Holmes*, 60 Wn.2d at 430 ("Damages to compensate for this loss may only take into account the reasonable time in which the automobile should have been repaired."); *Steinman v. City of Seattle*, 16 Wn. App. 853, 856, 560 P.2d 357, 359 (1977) (plaintiff must prove that he would have used equipment at time it was under impound). Furthermore, the plaintiff must have been diligent in retrieving the car when repairs were complete. So, for example, in *Price,* where plaintiffs sued Seattle seeking LOU damages for the time their vehicles were illegally impounded, the court held that certification was improper because, even though the City had unlawfully impounded the vehicles, each class member would need to prove that he or she promptly redeemed the vehicle; the court would not presume that fact. *Price*, 2006 WL 2691402, at *5 ("Plaintiffs offer no plan to prove the reasonableness of

time for which they are claiming loss of use damages . . . .").

Because evidence of inconvenience necessarily will vary from person to person, an LOU inconvenience class cannot be certified:

> [L]oss of use damages cannot be fairly determined on a classwide basis by simply aggregating the amount of money that each class member would have paid to rent comparably-sized vehicles. Instead, determining loss of use damages for class members would require consideration of individual issues and cannot reasonably be proved on a classwide, formulaic basis.

Id. at *6. Indeed, Plaintiff's own damages expert, Dr. Siskin, conceded that inconvenience was an individualized issue and that he could not create any statistical model to determine inconvenience: "That type of loss would be individualized and I don't see how it would show up in a claim form and I don't see how you could get that." (CP 462.)

The Decision did not discuss *Price* or any other cases addressing whether class certification is proper for LOU claims. The Decision is unique and contrary to Washington law, and requires review by this Court.

b. The Decision Would Relieve Class Representatives of Their Obligation to Prove Liability on a Classwide Basis, and Deprive Defendants of Their Due Process Rights.

The Decision also would eliminate the fundamental requirement that a plaintiff sustain an actual injury—here, a cognizable loss of use that resulted in inconvenience.[5] At a classwide trial, some class members who

[5] Plaintiff's contract claim requires him to prove—for each class member—not only a breach of contract, but injury proximately resulting from that breach. *See,*

suffered no inconvenience at all—and who therefore sustained no actual injury—would be awarded damages based only on evidence of the cost of a substitute rental car that they did not incur. Underlying the *Holmes* inconvenience standard is the principle that when a plaintiff does not actually rent a substitute vehicle, and therefore has no special damages, the loss of a vehicle does not create a viable claim for general damages absent a legally cognizable injury: inconvenience. But under the Court of Appeals' Decision, a party who did not suffer any inconvenience, and who therefore sustained no damages, would still collect damages based on the cost of a rental—a result flatly prohibited by *Holmes*.

Plaintiff did not dispute the many situations in which persons do not sustain a compensable loss of use after an accident, and therefore would not be entitled to payment for LOU. Indeed, according to the undisputed results of the claim file survey, at least 80% of the class members (probably more) did not sustain any compensable LOU. *See supra* p. 5.

In an individual LOU trial (as in *Holmes*), the jury would be able to evaluate the specific evidence relating to the individual plaintiff's claim (including testimony from the plaintiff) and determine (1) whether the plaintiff sustained an actual injury and suffered inconvenience from the loss

---

e.g., *Baldwin v. Silver*, 165 Wn. App. 463, 473, 269 P.3d 284, 289 (2011).

of use of the vehicle (the liability question) and, if so, (2) the amount of such inconvenience (the damages question). It is undisputed that this evaluation cannot happen in a classwide trial. But the *Holmes* inconvenience standard cannot be changed merely because the claims are brought in the context of a class action. The class action device does not alter the elements of a plaintiff's claims, and it cannot "abridge, enlarge, or modify any substantive right." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). The key liability and damages questions in LOU claims cannot validly be determined on a classwide basis; to do so would deprive Defendants of due process. For that reason, LOU class actions are inherently unsuitable for class certification.

c. A Jury Award Based on the Cost of a Rental Car Would Bear No Relationship to Class Members' Inconvenience, and May Undercompensate Some of Them.

A jury award based exclusively on purported aggregate evidence of the cost of a rental car not only will pay class members who sustained no inconvenience and therefore had no compensable injury. It also may *undercompensate* some class members for their actual inconvenience. Plaintiff presented no evidence that the cost of a substitute rental appropriately compensates for an insured's inconvenience. It simply does not follow that an insured who rarely drives will sustain LOU damages based on the cost of a rental for the entire time that the car was in the shop.

For example, a person whose car was in the shop for fourteen days, but who normally would have used the car for only one of those days, was not "inconvenienced" for fourteen days' worth of a rental car, yet that is precisely what that person would be awarded at the classwide trial here. It also does not follow that an insured who needs to drive frequently will be adequately compensated by this same formula.

Accordingly, although the cost to rent a replacement car is *a* relevant consideration in calculating an amount that will compensate for inconvenience, *Holmes* dictates fair compensation for the *actual inconvenience* sustained—if any—not merely the cost of a rental car. A classwide trial here would violate that principle.

F. CONCLUSION

Petitioners respectfully request that the Court grant review, reverse the Decision, vacate class certification, and remand for further proceedings on Plaintiff's individual claims only.

DATED: August 11, 2021

Respectfully submitted,

s/ Michael A. Moore

Michael A. Moore, WSBA # 27047
CORR CRONIN LLP
Victoria Ainsworth, WSBA # 49688
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051
Tel: (206) 625-8600
Fax: (206) 625-0900
E-mail: mmoore@corrcronin.com
tainsworth@corrcronin.com

SCHIFF HARDIN LLP
Jay Williams, *PHV to be filed*
233 S. Wacker Dr., Suite 7100
Chicago, Illinois 60606
Tel: (312) 258-5500
Fax: (312) 258-5600
Email: jwilliams@schiffhardin.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

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

2. On August 11, 2021, I caused a true and correct copy of the foregoing document to be served upon the following in the manner indicated below:

Stephen M. Hansen
Law Offices of Stephen M. Hansen, PS
1821 Dock Street, Suite 103
Tacoma, WA 98402
steve@stephenmhansenlaw.com

Attorneys for Respondent

Via E-Mail

Scott P. Nealey
Law Office of Scott P. Nealey
71 Stevenson, Suite 400
San Francisco, CA 94015
snealey@nealeylaw.com

Attorneys for Respondent

Via E-Mail

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

DATED: August 11, 2021, at Seattle, Washington.

s/ *Christy A. Nelson*
Christy A. Nelson

FILED
SUPREME COURT
STATE OF WASHINGTON
8/11/2021 4:21 PM
BY ERIN L. LENNON
CLERK

Filed
Washington State
Court of Appeals
Division Two

May 25, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JARRON ELTER, individually, and as the representative of ALL PERSONS similarly situated, Respondent(s), v. UNITED SERVICES AUTOMOBILE ASSOCIATION, USAA CASUALTY INSURANCE COMPANY, USAA GENERAL INDEMNITY COMPANY, and GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, Petitioners.	No. 53196-8-II PUBLISHED OPINION

SUTTON, J. — This case involves the measure of loss of use benefits payable for property damage to insured vehicles under the uninsured/underinsured motorist coverage of auto insurance policies issued by United Services Automobile Association, USAA Casualty Insurance Company, USAA General Indemnity Company, and Garrison Property and Casualty Insurance Company (collectively USAA).

David and Marissa Turk filed a class action lawsuit against USAA, claiming that USAA had breached its insurance policies regarding the payment of loss of use benefits, and the trial court certified the class. After this court reversed[1] the class certification because the Turks were not

[1] *Turk v. United Serv. Auto. Ass'n*, noted at 6 Wn. App. 2d 1033, 2018 WL 6523324 (Dec. 11, 2018).

proper class representatives, the trial court entered an order substituting Jarron Elter as class representative and left the original certification order intact. USAA appeals, claiming that the substitution was improper and that the class was improperly certified under CR 23.

We hold that the trial court did not err by substituting Elter as the class representative and that the class was properly certified under CR 23. We also clarify the proper standard for the measurement of loss of use damages. Thus, we remand for further proceedings consistent with this opinion. Nothing in this decision prevents the trial court from revisiting various CR 23 requirements in the future, including typicality or other requirements of Elter as a class representative, if further factual developments warrant reconsideration.

FACTS

In November 2013, Marissa Turk was rear-ended by an uninsured driver, causing her to rear-end the vehicle in front of her. *Turk*, 6 Wn. App. 2d 1033at *1. At the time of the accident, Marissa had automobile insurance through USAA, which included uninsured/underinsured motorist (UIM) coverage. *Turk*, 6 Wn. App. 2d 1033 at *1. USAA's policy provided coverage for property damage caused by a UIM driver and for loss of use during the period of repair. *Turk*, 6 Wn. App. 2d 1033 at *1.

Marissa was without the use of her vehicle while her vehicle was being repaired. *Turk*, 6 Wn. App. 2d 1033 at *1. In 2014, the Turks filed a class action lawsuit against USAA for breach of contract based on USAA's failure to pay loss of use damages under its UIM coverage.

I. 2016 CLASS CERTIFICATION

In May 2016, the Turks moved for certification of a class to include:

> All USAA insureds with Washington policies issued in Washington State, where USAA determined the loss to be covered under the [UIM] coverage, and their vehicle suffered a loss requiring repair, or the vehicle was totaled, during which time they were without the use of their vehicle, for a day or more.

CP at 401-02. After extensive and supplemental briefing, review of the pleadings and evidence presented by USAA including a spreadsheet of potential class members, and arguments over four days, the trial court determined that the Turks had met their burden, granted the motion for class certification, and entered findings of fact.

The court's findings addressed the CR 23(a) requirements of numerosity, commonality, typicality, adequacy of representation, and the CR 23(b)(3) requirements of predominance, superiority, and manageability:

> Plaintiffs allege that USAA sold automobile insurance policies providing first party UIM PD coverage to [them] (and members of the proposed class) that had an identical insuring agreement in Part C of the [UIM policy][.]
>
> USAA admits that it has an obligation to pay for loss of use under this common policy language.
>
> Plaintiffs admit that *at times* USAA will provide a rental vehicle for "loss of use." They note that when this is done, this is recorded in USAA's electronic claims data and the claims files and [is] coded as such. However, they contend that USAA routinely failed to compensate its insureds for loss of use and loss of use damages, even though USAA admits that it is part of the coverage. USAA, in turn, asserts that it routinely discloses and pays the loss. The data provided by USAA in its Turk 500 Claim File Review Master Spreadsheet, suggests that there is no evidence, for a large part of the [p]roposed [c]lass, that the insureds received either disclosure of coverage for loss of use, (and, as such, did not know they could make a claim), or that the loss was every [sic] paid.
>
> . . . .
>
> The parties also strongly dispute the legal standard that applies to the loss. USAA contends . . . that only the value of "actual inconvenience" is recoverable,

> and argues that the value of a rental car is not a permissible way of valuing the loss under the policy.

Clerk's Papers (CP) at 910-11 (footnote omitted).

At that time, the plaintiffs requested certification based on the test for loss of use damages stated in *Straka Trucking, Inc. v. Estate of Peterson*, 98 Wn. App. 209, 211, 989 P.2d 1181 (1999), not the inconvenience test in *Holmes v. Raffo*, 60 Wn.2d 421, 431, 374 P.2d 536 (1962). The trial court adopted the *Straka* loss of use standard, under which loss of use may be measured by (1) lost profits, (2) the cost of renting a substitute vehicle, (3) the rental value of the plaintiff's car, or (4) interest. The court ruled that evidence of the value of a rental car is one method of measuring loss of use.

As to the CR 23(a) requirements, the trial court found that the numerosity requirement was easily met as the proposed class was as few as 6,000 people and as many as 11,000 people. The court also found that the commonality requirement was met because a common fact pattern existed based on common policy language, and common questions for each proposed class member as to whether the policy holders were advised about loss of use and what happened for those who were advised. The court noted that these same issues justified certification in *Moeller v. Farmers Ins. Co. of Washington*, 155 Wn. App. 133, 149, 229 P.3d 857, (2010), *affirmed*, 173 Wn.2d 264, 267 P.3d 998 (2011).

The trial court found that the typicality requirement was met because the claims of the representative parties were typical of the potential claims of the class members as a whole. The same alleged unlawful conduct affected the named plaintiffs and the class members and "varying fact patterns in the individual claims will not defeat the typicality requirement." CP at 915 (citing

Smith v. Behr Process Corp., 113 Wn. App. 306, 320, 54 P.3d 665 (2002)). The court noted that the method to determine the period for which loss of use was owed may vary based upon whether the class member's car "was drivable, or whether it was totaled or repaired." CP at 915.

The trial court found that the class representative fairly and adequately protected the interests of the class, and that this fourth requirement was not disputed. But it also found that USAA had challenged the adequacy of the Turks as named plaintiffs.

As to the CR 23(b)(3) requirements, the court found that common questions of law and fact predominated. Those questions were whether loss of use was disclosed by USAA and paid, and if not, what amount of damages was owed for loss of use under the policy. The trial court noted that in a similar case, *Moeller*, the court found that the predominance requirement was met where the "'[c]lass [m]embers shared the same insurance policy, potentially suffered damage, and were allegedly harmed by [the insurer's] course of conduct.'" CP at 916 (quoting *Moeller*, 155 Wn. App. at 150).

The trial court found that these common questions could be addressed by common evidence that was provided in the sample of claims USAA had compiled. The court also noted that using data on similarly situated individuals to determine the loss of use damages for other class members, as the plaintiffs proposed, "has been accepted in Washington and [f]ederal [l]aw as a method to determine damages." CP at 917 (citing *Moore v. Health Care Auth*., 181 Wn.2d 299, 332 P.3d 461 (2014); *Tyson Foods, Inc. v Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036, 194 L. Ed. 2d 124 (2016)). The court then found that "[a]s such, the ability to determine damages using common evidence predominates as well, further supporting [c]lass [c]ertification." CP at 917.

Finally, the trial court determined that a class action was a superior and manageable method to present the claims and USAA's defenses given the difficulties that may present to USAA to access data of the potential class members based on its sample information: "In this case, [c]ertification achieves the economy of time, effort, and expense that CR 23 is designed to provide." CP at 919.

The court's certification order defined the class as: "All USAA insureds with Washington policies issued in Washington State, where USAA determined the loss to be covered under the [UIM] coverage, and their vehicle suffered a loss requiring repair, or the vehicle was totaled, during which time they were without the use of their vehicle, for a day or more." CP at 907. Excluded from the class were those "who received payment for substitute transportation from USAA during the entire period they were without the use of their vehicle." CP at 908 (emphasis omitted).

On the same day, the court granted partial summary judgment to the Turks, dismissing USAA's affirmative defense that it had a valid release of liability from the Turks.

II. APPELLATE COURT REVERSAL AND VACATION OF CLASS CERTIFICATION ORDER

USAA sought discretionary review and a commissioner of this court granted review of the class certification order, finding that the trial court had committed probable error that substantially altered the status quo by certifying the class. Ruling Granting Review, *Turk v. United Serv. Auto. Ass'n*, No. 50067-1 (Wash. Mar. 10, 2017.

In an unpublished opinion, we held that:

> [w]e reverse the trial court's order granting partial summary judgment to the Turks because a genuine issue of material fact exists as to the scope of the release as intended by the parties. We also reverse the trial court's class

> certification order because neither David nor Marissa Turk has a claim typical of the class and neither is an adequate class representative. We remand to the trial court for further proceedings consistent with this opinion.

Turk, 6 Wn. App. 2d 1033 at *9. Based on this holding, we declined to address USAA's other arguments, including that the purported class failed to meet other CR 23 requirements. *Turk*, 6 Wn. App. 2d 1033 at *6, n.4. Because we reversed the certification order for lack of typicality and adequacy of representation, we did not reach the other CR 23 questions. *Turk*, 6 Wn. App. 2d 1033 at *6, n.4.

III. Trial Court's Proceedings on Remand

On remand, the Turks moved for leave to substitute Elter as the class representative and filed two supporting declarations.

Elter's supporting declaration stated that in 2016, his vehicle was damaged while parked in front of his home by a hit-and-run motorist. At the time of the accident, Elter had automobile insurance through USAA, including UIM coverage. His UIM policy included coverage for property damage in the event a UIM driver was at fault. His UIM policy also included coverage for loss of use of his vehicle during the period of its repair.

Following the accident, Elter was without use of his vehicle for 25 days while it was being repaired. He requested compensation for the loss of use in the amount of $25/day for 25 days, the per day loss of use amount provided for under the policy, totaling $625. USAA refused to pay the amount demanded and instead stated that it would only pay a total of $200 for rental reimbursement. Elter conceded that he was paid $200 as rental reimbursement, even though he did not rent a car.

In response, USAA argued that Elter's declaration did not meet the typicality or adequacy CR 23(a) requirements, and thus, he was not a proper substitute class representative. USAA further argued that because we had reversed and vacated the class certification order, the trial court on remand was required to recertify the class by reanalyzing all CR 23 requirements.

The trial court granted the Turks' motion and substituted Elter as the class representative and otherwise left intact the prior class certification order. The court explained:

> The class certification was reversed because of the atypical representative. And by substituting, I am addressing that issue.
>
> . . . .
>
> I am not being told by the [C]ourt of [A]ppeals to do anything other than fix this representation issue[.]
>
> . . . .
>
> The class exists as it did before the [C]ourt of [A]ppeals' ruling now that I have changed the substituted representative.
>
> . . . .
>
> [T]he [C]ourt of [A]ppeals only identified one problem with the class certification . . . and I'm trying to correct that.

Verbatim Report of Proceedings (VRP) (March 15, 2019) at 14-17.

IV. Ruling Granting Discretionary Review

USAA then sought discretionary review of the trial court's order substituting Elter as class representative. We accepted review to:

> [A]ddress as a threshold issue whether the March 15, 2019[,] order substituting the class representative was proper under CR 23. If the trial court did not err in substituting Mr. Elter, the court will address whether the class was properly certified under CR 23.

Order Granting Motion to Modify, (Oct. 18, 2019).

ANALYSIS

I. THE COURT'S SUBSTITUTION OF THE CLASS REPRESENTATIVE WAS PROPER

USAA first argues that the trial court erred by simply substituting Elter as the new representative for the old representative without requiring the plaintiffs to file an amended complaint. USAA claims that the substitution of the named plaintiff is permissible only if the class has already been certified and that the substitution was improper here because we vacated the previous class certification. We disagree.

A. LEGAL PRINCIPLES

We review a trial court's decision regarding class certification for a manifest abuse of discretion. *Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 515, 415 P.3d 224 (2018). "[A] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds." *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). "Because CR 23 is identical to its federal counterpart, Fed. R. Civ. P. 23, federal cases interpreting the analogous federal provision are highly persuasive." *Schwendeman v. USAA Cas. Ins. Co.,* 116 Wn. App. 9, 19 n.24, 65 P.3d 1 (2003).

CR 23 does not require that a class representative sue individually. *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 283 (S.D. Ohio 1997). CR 23(a) "does not explicitly require that a class representative must be a named plaintiff in the action." *Peterson v. Alaska Commc'ns Sys. Group, Inc.,* 328 F.R.D. 255, 268 (D. Alaska 2018) (quoting *Morales v. Stevco, Inc.*, No. 1:09-cv-704, 2011 WL 5511767, at *8 (E.D. Cal. Nov. 10, 2011)). Further, "[c]ourts that have

considered the rare circumstance of whether to appoint a non-named plaintiff as an additional class representative have not . . . required the pleadings to be amended." *Peterson,* 328 F.R.D. at 268.

"A class is always subject to later modification or decertification by the trial court, and hence the trial court should err in favor of certifying the class." *Moeller*, 173 Wn.2d at 278; *see also Chavez*, 190 Wn.2d at 515.

B. APPLICATION

The trial court was required to take the substantive allegations in the complaint as true, including the allegations in Elter's declaration filed in support of the motion for substitution. *Smith*, 113 Wn. App. at 320 n.4. Thus, the court properly relied on Elter's declaration and the allegations in the complaint to determine whether Elter was an appropriate class representative.

Elter stated in his declaration that he was insured by USAA, his vehicle was damaged in 2016, and USAA accepted his "UM/UIM property damage claim and ultimately paid [him] for the total loss value of the vehicle." CP at 963-64. He was without his vehicle for 25 days while it was being repaired. He requested compensation for the loss of use of his vehicle under his policy in the amount of $635 ($25 per day for 25 days). USAA refused to pay that amount. USAA stated that it would only pay $200 for rental reimbursement.

In considering the motion for substitution, the trial court reviewed the class definition:

> All USAA insureds with Washington policies issued in Washington State, where USAA determined the loss to be covered under the Underinsured Motorist (UIM) coverage, and their vehicle suffered a loss requiring repair, or the vehicle was totaled, during which time they were without the use of their vehicle, for a day or more.

CP at 907. The class definition excluded "USAA employees, and those who received payment for substitute transportation from USAA during the entire period they were without the use of their vehicle." CP at 908 (emphasis omitted).

Here, the trial court found that the allegations in the complaint and Elter's declaration confirmed that Elter met the requirements for a class member. Elter was insured by USAA and had UIM coverage. Elter "suffered a loss requiring repair" when he was without his vehicle for 25 days. CP at 907, 964. Elter has a claim that he did not receive adequate payment for substitute transportation because USAA refused to pay more than $200 for rental reimbursement. Accordingly, the court was well within its discretion to substitute one class representative for another, and substitution was proper even without an amended complaint. The Turks' complaint is still active and the Turks remain named plaintiffs.

USAA argues that substitution of the class representative cannot occur until the class is certified. But the unpublished opinions that USAA cites do not support such a rule.

We hold that the trial court's order granting substitution of Elter as the class representative was proper and the court did not err.

II. Damages For Loss of Use

The parties dispute the applicable measure for loss of use damages. USAA argues that the trial court erred by adopting the *Straka* test for the measure of damages rather than the *Holmes* test. Elter argues that the court correctly applied the *Straka* test for loss of use damages and that the *Holmes* test for damages is consistent with *Straka*.

In *Holmes*, our Supreme Court noted the rule that "the owner may recover, as general damages, the use value of which he is deprived because of the defendant's wrongful act." 60 Wn.2d at 429-30. The court held:

> [W]here, as here, a plaintiff has not rented a substitute automobile, he is nevertheless entitled to receive, as general damages in the event liability is established, such sum as will compensate him for his inconvenience. Proof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury, *but is not the measure of such damages*. It is relevant evidence in determining the general damages for inconvenience resulting from loss of use of an automobile.

60 Wn.2d at 431-32 (emphasis added). As a result, the court affirmed the trial court's refusal to give a jury instruction stating that the amount of loss of use damages is "the reasonable rental or use value of the automobile." *Holmes*, 60 Wn.2d at 432 (emphasis omitted).

The court in *Holmes* made it clear that the cost of renting a substitute vehicle was not the measure of loss of use damages. 60 Wn.2d at 432. Instead, the measure is the amount that will compensate the plaintiff for the inconvenience of not having an automobile. *Holmes*, 60 Wn.2d at 432. However, it is significant that under *Holmes*, 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.

Without mentioning *Holmes*, the court in *Straka* quoted a secondary source stating, "'Loss 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 (emphasis added) (quoting Dan B. Dobbs, LAW OF REMEDIES: DAMAGES - EQUITY - RESTITUTION § 5.15(1), at 875 (2d ed. 1993)). The trial court adopted this statement. CP at 912.

Straka is not necessarily inconsistent with *Holmes*. In *Holmes*, our Supreme Court directly addressed the appropriate measure of damages for the loss of use of a vehicle: "[S]uch sum as will

compensate him for his inconvenience." 60 Wn.2d at 431. *Straka* can be interpreted not as stating a different measure of damages, but as stating one way that a plaintiff can prove loss of use damages is by submitting evidence regarding the cost of renting a substitute automobile. 98 Wn. App. at 211. As such, *Straka* did not contradict the statement in *Holmes* that "[p]roof of what it reasonably would have cost to hire a substitute automobile is sufficient evidence to carry this item of damages to the jury." 60 Wn.2d at 432. In 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.

On remand, the trial court must rely on *Holmes* for determining the proper measure of damages for loss of use. But applying *Holmes* also means recognizing that evidence regarding the costs of a rental automobile is relevant and admissible to prove loss of use damages.

III. THE CLASS WAS PROPERLY CERTIFIED UNDER CR 23

We review a trial court's class certification decision for a manifest abuse of discretion. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). We will uphold the trial court's decision if the record shows that the court considered the CR 23 criteria and that the court's decision is based on tenable grounds and is not manifestly unreasonable. *Lacey*, 128 Wn.2d at 47.

CR 23 governs class actions. To certify a class, the plaintiff must

> meet the requirements of CR 23(a): numerosity, commonality, typicality, and adequacy of representation. Once those have been met, [they] must further satisfy the tougher standard of CR 23(b)(3) and prove that common legal and factual issues predominate over individual issues and that a class action is an otherwise superior form of adjudication.

Schnall v. AT&T Wireless Serv., Inc., 171 Wn.2d 260, 269, 259 P.3d 129 (2011) (emphasis omitted).

CR 23 must be liberally interpreted. *Moeller*, 173 Wn.2d at 278. Therefore, "the trial court should err in favor of certifying the class." *Moeller*, 173 Wn.2d at 278. Further, "[a] class is always subject to later modification or decertification by the trial court." *Moeller*, 173 Wn.2d at 278.

USAA claims that class certification is improper because under *Holmes*, there would need to be testimony from each class member and damages would vary from insured to insured. USAA argues that the commonality, predominance, and superiority requirements in CR 23 were not satisfied.[2] Br. of App. at 44, 49. We disagree.

A. CHALLENGED CR 23(a) REQUIREMENT: COMMONALITY

USAA argues that because the plaintiff class cannot meet the commonality requirement under CR 23 that class certification is improper. We disagree.

The allegations establish that USAA did not pay loss of use damages to its insureds who declined a rental car, such as Elter. This common course of conduct is sufficient to satisfy the commonality requirement of CR 23(a).

USAA argues that it is "undisputed" that under the *Holmes* standard, class certification is improper because there would need to be testimony from each class member and damages necessarily would vary from insured to insured. However, the fact that the individual loss of use damages vary in amount does not defeat commonality. *See Chavez*, 190 Wn.2d at 519 ("[I]t is not

---

[2] USAA also argues that "ascertainability" was not satisfied. But CR 23 does not list an "ascertainability" requirement.

necessary to prove each plaintiff's damages on an *individual* basis; it is possible to assess damages on a class-wide basis using representative testimony."). "That class members may eventually have to make an individual showing of damages does not preclude class certification." *Smith*, 113 Wn. App. at 323

The plaintiffs have demonstrated that the class members share common issues of law and fact. Accordingly, the trial court did not err by finding commonality was met.

B. CHALLENGED CR 23(b)(3) REQUIREMENTS

1. Predominance

USAA next argues that because the plaintiff class cannot meet the CR 23 predominance requirement, class certification is improper. We disagree.

The predominance requirement is similar to, but more stringent than, the commonality requirement. "The difference is that CR 23(a) is satisfied by the mere existence of a common legal or factual issue, whereas CR 23(b)(3) requires that common legal and factual issues predominate over any individual issues." *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 825, 64 P.3d 49 (2003). "[T]he predominance requirement is not defeated merely because individual factual or legal issues exist; rather, the relevant inquiry is whether the issue shared by the class members is the dominant, central, or overriding issue shared by the class." *Miller*, 115 Wn. App. at 825.

Here, the difference in the amount of loss of use damages owed to the individuals does not defeat the point that USAA did not pay its insureds loss of use damages. *See Chavez*, 190 Wn.2d at 518-19. The plaintiff class members have demonstrated that common issues predominate over individual issues. Accordingly, the trial court did not err by finding that the predominance requirement was met.

2. Superiority

USAA next argues that the trial court erred in finding that the superiority requirement was met without requiring the plaintiffs to submit a "valid trial plan" for the class action. We disagree because CR 23 does not require a "valid trial plan" prior to the threshold ruling certifying a class.

CR 23(b)(3) instructs the trial court to decide whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule further directs the trial court to consider factors including:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

CR 23(b)(3). The rule does not require that a valid trial plan be filed prior to class certification. "This is a highly discretionary determination that involves consideration of all the pros and cons of a class action as opposed to individual lawsuits." *Miller*, 115 Wn. App. at 828.

Here, the trial court considered the CR23(b)(3) factors and determined that the class was as potentially small as 6,000 people or as large as 11,000 people, and that a class action was a fair and efficient adjudication of the action, superior to conducting individualized inquiries. On this record, we hold that the trial court did not err by finding that the superiority requirement was met.

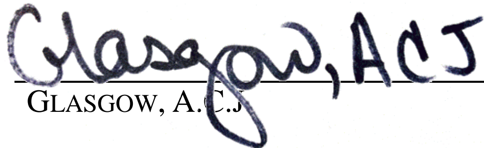
CONCLUSION

We hold that the trial court did not err by substituting Elter as the class representative and that the class was properly certified under CR 23. We also clarify the proper standard for the measurement of loss of use damages. Thus, we remand for further proceedings consistent with

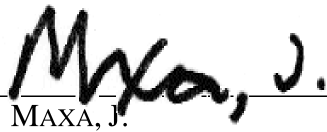
this opinion. Nothing in this decision prevents the trial court from revisiting typicality or other requirements of Elter as a class representative, if further factual developments warrant reconsideration.

SUTTON, J.

We concur:



GLASGOW, A.C.J.



MAXA, J.

Filed
Washington State
Court of Appeals
Division Two

July 12, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JARRON ELTER, individually, and as the representative of all Persons similarly situation,

Respondent,

v.

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

Appellants.

No. 53196-8-II

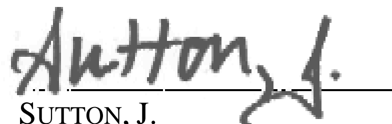
ORDER DENYING
MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the Court's May 25, 2021 opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. GLASGOW, MAXA, SUTTON

FOR THE COURT:



SUTTON, J.

CORR CRONIN MICHELSON BAUMGARDNER FOGG &

August 11, 2021 - 4:21 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Jarron Elter, Respondent v. USAA Casualty Insurance, et al., Petitioners (531968)

The following documents have been uploaded:

- PRV_Other_20210811161633SC483486_3328.pdf
  This File Contains:
  Other - Appendix to Petition for Review
  The Original File Name was 2021 08 11 Appendix to Petition for Review.pdf
- PRV_Petition_for_Review_20210811161633SC483486_2050.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2021 08 11 Petition for Review.pdf

A copy of the uploaded files will be sent to:

- cnelson@corrcronin.com
- dpatterson@corrcronin.com
- jwilliams@schiffhardin.com
- snealey@nealeylaw.com
- steve@stephenmhansenlaw.com
- tainsworth@corrcronin.com

Comments:

Sender Name: Michael Moore - Email: mmoore@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-621-1502

Note: The Filing Id is 20210811161633SC483486

CORR CRONIN MICHELSON BAUMGARDNER FOGG &

August 11, 2021 - 4:21 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Jarron Elter, Respondent v. USAA Casualty Insurance, et al., Petitioners (531968)

The following documents have been uploaded:

- PRV_Other_20210811161633SC483486_3328.pdf
  This File Contains:
  Other - Appendix to Petition for Review
  The Original File Name was 2021 08 11 Appendix to Petition for Review.pdf
- PRV_Petition_for_Review_20210811161633SC483486_2050.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2021 08 11 Petition for Review.pdf

A copy of the uploaded files will be sent to:

- cnelson@corrcronin.com
- dpatterson@corrcronin.com
- jwilliams@schiffhardin.com
- snealey@nealeylaw.com
- steve@stephenmhansenlaw.com
- tainsworth@corrcronin.com

Comments:

Sender Name: Michael Moore - Email: mmoore@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-621-1502

Note: The Filing Id is 20210811161633SC483486