

NO. 84500-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2011 FEB 25 A 11: 20
BY RONALD R. CARPENTER

~~CLERK~~

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

Plaintiff/Respondent,

v.

FARMERS INSURANCE EXCHANGE, and FARMERS
INSURANCE COMPANY OF WASHINGTON,

Defendant/Petitioners.

ANSWER TO SUPPLEMENTAL BRIEF OF AMICUS NAMIC

MASTERS LAW GROUP, P.L.L.C.
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorney for Plaintiff/Respondent

**FILED AS
ATTACHMENT TO EMAIL**

TABLE OF CONTENTS

ANSWER.....	1
CONCLUSION	4

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Am. Mfrgs. Mut. Ins. Co. v. Schaefer</i> , 124 S.W. 3d 154, 156, 159 (Tex. 2003)	3
<i>Schwendeman v. USAA Cas. Ins. Co.</i> , 116 Wn. App. 9, 65 P3d 1 (2003).....	3, 4
RULES	
RAP 9.12	1

ANSWER

Amicus National Association of Mutual Insurance Companies (NAMIC) has filed a "Supplemental Brief" (SB) that is largely cut and pasted from its earlier *amicus* brief in support of the Petition for Review. To the extent that NAMIC's earlier brief discussed issues that Farmers raised on appeal, Moeller has already responded to those arguments in his Supplemental Brief. To the extent that NAMIC's briefs raise new issues that Farmers never raised below, those are not properly before this Court. See, e.g., Moeller SB at 6 n.3.

NAMIC's SB does raise a few new arguments. First, NAMIC argues generally that the appellate decision will create confusion about damage appraisals. Of course, the Court of Appeals has not decided whether the Class has actually suffered diminished-value damages, as that is a question of fact and cannot be resolved on summary judgment. See e.g., Moeller SB at 5-6. NAMIC's new fact arguments (which were never raised below and are not properly before this Court under RAP 9.12) concern issues of fact that cannot be resolved on summary judgment.

NAMIC similarly raises disputed fact issues in arguing about whether diminished-value damage exists. Moeller proffered ample

evidence on this issue. *See, e.g.*, CP 246 (1 through 6, attached); CP 680-85; Deposition of Bernard Siskin (filed July 8, 2002). A jury must decide this question.

In its next section, NAMIC rehashes the arguments it made in its earlier brief about coverage analysis, albeit backing off of some of the unsupported claims it made earlier. But now NAMIC claims that the appellate decision misapplies and misreads the language of the contract, while citing absolutely no authority to support its apparent claim that our courts should not just read the contract. NAMIC SB at 9-11. The Court of Appeals read the plain language of the contract exactly as it is written. That is appropriate insurance contract analysis.

At the end of this section, NAMIC comes close to admitting that even the cases it cites held that diminished value is covered under Farmers' policy language. *Id.* at 12-13. As the appellate court noted here, the vast majority of courts have so held. *See* Slip Opinion at 8 n.8. But NAMIC, like Farmers, again repeats its false claim that a majority of courts have held that its limits of liability clause precludes coverage for diminished-value damages. *Id.* at 13-15. As Moeller has repeatedly explained, in "a majority of these cases, the policy expressly limits liability to the 'lesser' of the

vehicle's 'actual cash value' or the cost of repair or replacement." Slip Opinion at 8 n.10 (citing, e.g., *Am. Mfrgs. Mut. Ins. Co. v. Schaefer*, 124 S.W. 3d 154, 156, 159 (Tex. 2003)). Those cases are inapposite because Farmers' policy contains no such language.

Finally, NAMIC again rehashes its incorrect arguments that the trial court, which held a four day hearing on class certification, somehow abused its discretion. NAMIC relies on *Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 65 P3d 1 (2003), concerning a claim that aftermarket parts were not of "like, kind and quality" to original-equipment-manufacturer parts. The appellate court affirmed the trial court's exercise of discretion in denying class certification. Whether any given part was of "like, kind and quality" would need to be tried on an individual basis, so common issues did not predominate.

But *Schwendeman*, like all of NAMIC's cases, involved the "lesser of" policy language distinguished above, not Farmers' policy language. *Schwendeman* is nothing like this case. This case involves damage that remains after a car has been fully repaired. The Class is limited to vehicles that sustained structural (frame) damage, deformed sheet metal and/or body or paint work, with a minimum repair estimate of at least \$1,000. CP 1582. The

Schwendeman purported class was nothing like this Class, so the cases' class-certification analyses are not comparable.

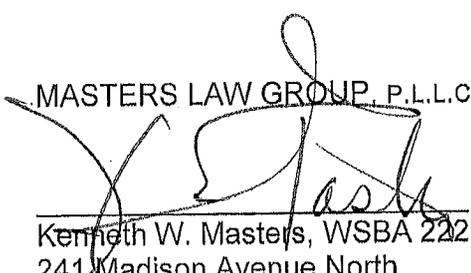
In any event, that one trial court properly exercised its discretion in denying a class certification says little about whether another trial court did so in granting a different class certification. These decisions are made on a case-by-case basis. The trial court did not abuse its discretion here.

CONCLUSION

NAMIC's re-arguments have not improved with age. This Court should affirm.

RESPECTFULLY SUBMITTED this 24th day of February, 2011.

MASTERS LAW GROUP, P.L.L.C.


Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

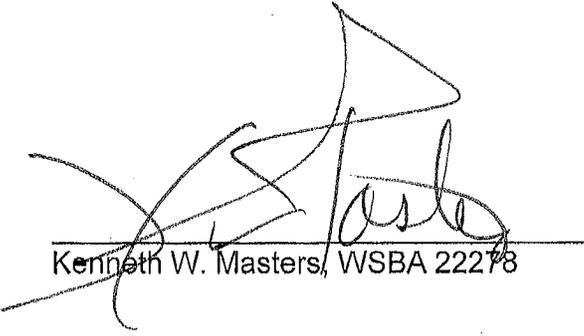
CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing postage prepaid, **ANSWER TO SUPPLEMENTAL BRIEF OF AMICUS NAMIC** via U.S. mail on the 25th day of February 2011, to the following counsel of record at the following addresses:

Stephen M. Hansen
Lowenberg, Lopez & Hansen, P.S.
950 Pacific Avenue, Suite 450
Tacoma, WA 98402-4441

Morris A. Ratner
Scott P. Nealey
Lieff, Cabraser, Heimann & Bernstein, LLP
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339

Jill D. Bowman
Attorney at Law
600 University St., Ste 3600
Seattle, WA 98101-3197


Kenneth W. Masters, WSBA 22278

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DAVID MOELLER, on behalf of himself and
all others similarly situated,

Plaintiff,

Case No. 99-2-07850-6

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON and FARMERS
INSURANCE EXCHANGE,

Defendants.

EXPERT DISCLOSURE OF DR. BERNARD SISKIN Ph.D.

1. I provide this Supplemental Disclosure to update the Court and Parties of my work in this case, and my conclusions, and basis therefore. I reserve the right to further supplement this disclosure, if and when, I receive further information.

2. To determine if diminished value exists, and calculate its amount, I sought to obtain a single data set that: (1) provided objective information on the subject vehicles, e.g., make, model, mileage, options; (2) provided information on whether the subject vehicles had been damaged and if so, how extensively; (3) provided information on whether the subject vehicles had been "properly" repaired (i.e., had no "repair related" DV); and (4) provided a market sale price for the subject vehicles.

3. As I have described in my prior report in this case, I observed that data from auto auctions is frequently used in studying valuation issues. This is because there are large numbers of buyers and sellers as well as large numbers of cars that can be studied. Auctions are also a primary source of data for the major evaluation guides including the Blue Book Used Car Guide and the NADA Blackbook. Auctions also allow an opportunity to gather information on vehicles prior to their sale without the observer's presence in the auction process biasing the results, i.e., introducing a "survey bias."

4. To collect a single data set at auction, in consultation with two consulting experts, Dr. Will Guild and James Duffy I developed a study protocol. Data collectors, who were

experienced with auto body repair techniques, were trained in this protocol and an inter-rater reliability study was done. The inter-rater reliability study showed that the data collectors and study protocol gathered the targeted variables consistently. The data collectors were then sent to geographically dispersed auto auctions where they inspected all vehicles that fell within the parameters of the class and that were pre-disclosed as being damaged. The data collectors also inspected large numbers of randomly selected vehicles to find both vehicles which might have had undisclosed damage and undamaged vehicles to be used as comparators. The coders: (i) recorded all objective information about the vehicle (e.g., make, model, mileage), which I, in consultation with subject matter experts, had determined *might* have a relationship to value; (ii) inspected to see if the vehicle had been wrecked and, if so, recorded where and how the vehicle had been damaged; (iii) checked the quality of any repairs to see if they were "proper" (i.e. the type of repairs that are typically performed and that insurance carriers pay for and consider a complete repair) and; (iv) finally, inspected the vehicle for additional disamenities which might reduce the value of the vehicle, (e.g., unrepaired damage). To insure that the data set did not inadvertently include vehicles that had been improperly repaired, the protocol was designed so that a second inspector inspected every vehicle that was found to be damaged and repaired, to see if the second inspector concurred with the first inspector's determination that the vehicle had been "properly" repaired. The sales prices of the vehicles at auction were then gathered.

5. Once the data had been gathered, under my direction, Dr. Guild and James Duffy coded the data and removed from the data set vehicles that fell outside of the class, e.g., over 90,000 miles or more than 6 years old. I then removed from the data set any vehicle that had other disamenities that might have affected the sales price, (e.g., unrepaired damage and improperly repaired damage). In addition, my staff researched and added to the database the Blue Book values for each of the data set vehicles.

6. Using regression analysis on this data set, I explored the extent to which the measured variables, including those measuring damage and repair to the vehicle, affected price. I found that the variables relating to frame damage and the number of areas in which the vehicle had been

damaged, (i.e., the observable severity of damage) statistically significantly diminished the auction sale price of the vehicle. Furthermore, I found that the effects of these variables did not interact with any of the other characteristics that affected the auction sale price.

7. The results of this regression analysis showed that, for every area of damage, (e.g., hood, front fender, etc.) a vehicle lost approximately 1.6 percent of its value. If the vehicle had also suffered frame or structural damage it lost an additional approximately 4.5 percent of its value. I have calculated that a predictive model based upon this data has an adjusted R^2 of .934. These results are highly significant: the probability of the damage variables observed occurring by chance, that is, that they did not truly diminish the value of the vehicle, is less than 0.001.

8. These auction survey results upon which I am relying, provide a framework that I could apply to the class through a sampling of the class members. Based on my regression one should estimate that the value of a vehicle would decline by 4.5 percent if there is frame damage and an additional 1.6 percent per area of damage. In order to apply this approach to the class members' vehicles, one must identify: (i) the average value of the vehicle absent any accident damage; (ii) on average, how often as a result of the accident did vehicles suffer frame or structural damage; and (iii) the average number of areas of the vehicle damaged in the accident. In addition, one would have to determine on average how often vehicles would have suffered collision damage to their frame or structural components in areas in which the vehicle had previously been damaged (e.g. a vehicle had been damaged in the hood and left fender in a prior accident, and a second accident damages the same area of the vehicle without causing any additional damage). This is necessary because diminished value occurs at the moment of the first impact. Subsequent frame/structural damage or repeat damage to the same area of the vehicle (as contrasted to damage to different areas or additional areas of the vehicle) does not result in any additional loss in value.

9. I identified a random sample of claim files to determine the class characteristics, (e.g., the average value of the cars in the class and the average severity of the damage to them and any over-inclusion in the Class list). These Claims files were requested from Defendant, and a sample of those produced were reviewed under the direction of my staff. The Blue Book values of the

vehicles were determined¹ and recorded in addition to whether or not frame/structural damage was suffered and the number of areas of damage². In addition, data were obtained to determine the likelihood that a vehicle with frame/structural damage had previously been in an accident and suffered frame/structural damage, and the likelihood that the affected areas of the vehicle had been previously damaged. From these data, one can calculate the amount of diminished value experienced by taking the value of the vehicle times the estimated effect of the damage it incurred, (i.e. approximately 4.5 percent if the vehicle sustains frame/structural damage plus 1.5669 percent for each area of the vehicle damaged). This is then summed over all vehicles in the sample and then discounted by the likelihood of overlapping prior damage. This number represents the average loss per class member as a result of the insurance practice at issue. Multiplying by the number of class members yields the amount of class-wide damages.

10. I requested 2,000 files. A thousand of those requested were selected for study. Of these 1,000, Farmers' could produce only 900 files. Reviewing these files, it was determined that 80 percent of them were within the class definition and 20 percent were outside the class definition. The Blue Book value, whether or not frame damage occurred and the number of locations could be determined for 639 of those received. These constituted the database for the analysis.

11. In computing Blue Book value, we used the "retail excellent" value in the Kelly Blue Book Official Guide associated with the year and month of the accident³. The "trade-in-good" value used in the model building was not available historically. Therefore, I drew a sample of 100 cars studied in the model building and recorded both the retail excellent value and the trade-in-good value. I found that one can estimate to a reasonable degree of certainty the trade-in-good value from

¹ Confirmation of Blue Book values is ongoing. I do not expect any changes to affect my conclusions but, when completed, a revised supplemental disclosure may be issued.

² Confirmation of these values is ongoing. I do not expect any changes to affect my conclusions but, when completed, a revised supplemental disclosure may be issued.

³ When the car was too new to appear in the Blue Book for that year, we used the first Blue Book in which that year's car appeared. This would tend to underestimate the value.

the retail excellent value and the age of the car. One is able to predict the trade-in value with an R^2 value of 0.991. In computing my estimate of class damages, I rely on the lower, more conservative estimate of trade-in value rather than the retail excellent value. Based on the values of and damage to the 595 sample cars, I estimate the loss per claim to be \$890.

12. Farmers identified 53,180 potential claims. Of these, I estimate that 42,544 (80 percent of 53,180) represent claims within the scope of the class. If we assume that all 42,544 claims represent unique damage (i.e., the first time the vehicle was damaged or the vehicle experienced no previous similar damage to the same location or to the frame), then classwide damages would be $\$890 \times 42,544$ or \$37,864,160.

13. However, as discussed above, to the extent that prior damage to the car overlaps with current damage, a discount must be made. Using the data on accidents from auctions that were used to develop the model, I am able to compute the likelihood that, given a prior accident, the number of spots currently damaged had been damaged previously. The data show:

Given a Prior Accident

Probability of Prior Frame Damage = 0.102 and

Probability of Overlap	Spots Damaged						
	1	2	3	4	5	6	7
1	0.094	0.359	0.426	0.428	0.409	0.376	0.340
2	—	0.061	0.146	0.193	0.235	0.281	0.307
3	—	—	0.017	0.037	0.067	0.111	0.149
4	—	—	—	0.003	0.010	0.024	0.042
5	—	—	—	—	0.001	0.003	0.006
6	—	—	—	—	—	0.000	0.001
7	—	—	—	—	—	—	0.000

These data, combined with the probability of a damaged car being in a prior accident, will allow me to calculate the discount for accidents.

14. Of the potential claims, the percent of claims for which the policy number and model year of the car were unique is 84.9 percent. Thus, assuming that multiple claims on the same policy and on the same model year represent multiple claims on the same car, then at least 15.1 percent of

the cars were involved in multiple accidents. However, to be able to determine the likelihood of a car being in a prior accident, I need data on the average policy life and the policies in force per period. I have requested these data and, when received, I will be able to compute the appropriate discount for prior accidents.



Bernard R. Siskin, Ph.D.
Dated: April 28, 2003