

Cross-Res. Reply

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STATE OF WASHINGTON

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Court of Appeals No. 30880-1-II

84500-0

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

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

Plaintiff/Appellant,

v.

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

Respondents.

**REPLY BRIEF OF APPELLANT/
BRIEF OF CROSS RESPONDENT**

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STATEMENT OF ISSUES/SUMMARY OF ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment.

In their Opening Brief, Plaintiffs showed that:

(1) An insurance policy must be viewed in its entirety, and words or phrases cannot be interpreted in isolation, nor ignored and not given effect [*App. Br.* at 16-17];

(2) The Superior Court erred in its construction of Farmers' *coverage clause*, under which the loss in vehicle value sought by Plaintiffs in this case is unambiguously covered as a "direct and accidental loss" [*App. Br.* at 18-22];

(3) Plaintiffs' interpretation of the language in Farmers' "Limits of Liability" clause — that it acts to prevent betterment, not as an exclusion for diminished value — is reasonable and therefore, Farmers' summary judgment motion should have been denied [*App. Br.* at 22-32];

(4) The un rebutted evidence shows that Plaintiffs' interpretation of the policy is reasonable, and this evidence should have been considered by the Superior Court [*App. Br.* at 32-37]; and

(5) A disputed issue of material fact — whether Plaintiffs' vehicles were restored to pre-loss condition — barred application of the Superior Court's own [erroneous] holding [*App. Br.* at 37-38].

Farmers' brief ignores all of these issues. Farmers:

(1) fails to discuss the requirement that an insurance

policy be construed as a whole, giving effect to each phrase. Farmers instead ignores entirely key phrases in the policy, and focuses on a single word — “repair” — taken out of context.

(2) fails to defend the trial court’s erroneous holding that loss in vehicle value is not a “direct and accidental loss,” or to respond to Plaintiffs’ showing the trial court erred in interpreting the coverage clause [*Res. Br.* at 23-24];

(3) fails to discuss Plaintiffs’ showing that, read reasonably, the Limits of Liability clause in *Farmers’ policy* does not exclude diminished value; rather it acts to prevent “betterment.” Farmers instead attempts to cite to cases construing limits of liability clauses containing entirely different and distinguishable language from that found in Farmers’ policy [*Res. Br.* at 18-23];

(4) fails to discuss, or otherwise address, Plaintiffs’ showing that evidence to show that a proposed interpretation of language in a policy is reasonable (here, that the limitation of liability clause did not exclude loss in value; rather it acted to prevent betterment) is admissible, and instead attempts to cite cases addressing the admissibility of evidence introduced to attempt to *vary* the express language of a policy [*Res. Br.* at 24-28]; and

(5) although conceding that Plaintiffs’ vehicles cannot be restored to their physical condition before the accident [*Res. Br.* at 13] —

Farmers in fact argues that its only obligation is to provide a drivable car: “just as a plate that is broken in two can be repaired by gluing the parts together and making the plate usable again, a damaged car can be repaired by pounding out dents or replacing damaged parts so that the vehicle can be driven again” [*id.*] — Farmers never explains how this fact does not prohibit summary judgment — even were the trial court’s construction of the policy correct (which it is not).

As shown below at 16-25, rather than addressing Plaintiffs’ arguments, or the reasoning of cases addressing the language found in *Farmers’ own* Limits of Liability clause (which have found loss in value to not be an excluded loss), Farmers simply cites irrelevant cases (in an effort to show some type of a trend) which: (1) involved policies *with language not found in Farmers’ policy* limiting the insurers’ liability to the *lesser* of the vehicles’ (i) “actual cash value” or (ii) “the amount necessary to repair or replace the property”; (2) do not discuss the obligation found in Farmers’ policy that any repairs must be to “like kind and quality”; and (3) do not involve a policy which — *as Farmers’ policy does* — expressly references “depreciation,” *i.e.*, “a decline in value of property,” Black’s Law Dictionary 441 (6th ed. 1990), in the limits of liability clause claimed to exclude value. Viewing the actual Farmers’ policy in its entirety, as must be done under well-established Washington law, it is clear that Farmers’ policy covers loss in value, and does not then unambiguously exclude that

covered loss under the Limits of Liability clause. The Superior Court's decision must therefore be reversed.

Because Farmers' interpretation of its own policy — which was directly contrary to the opinions of other courts' addressing the same or similar language, was unreasonable, and Farmers knew internally that it was obligated to pay diminished value, the Superior Court's grant of summary judgment on the CPA claim was also erroneous as disputed issues of fact remained.

II. The Trial Court Correctly Certified The Proposed Class.

Farmers' further claims regarding class certification are based on a fundamental misunderstanding: they wrongly confuse proof of the merits with the CR 23 examination of whether common issues predominate. In effect, Farmers' cross-appeal demands that this Court usurp the trier-of-fact's role to determine whether loss in value (the claim at issue) exists. Yet, the Superior Court would have clearly erred if it had ruled on the merits of the case at the class certification stage. *See Miller v. Farmers Bros. Co.*, 115 Wn. App. 815, 820, 64 P.3d 49, 53 (2003) (courts "will not attempt to resolve material factual disputes or make any inquiry into the merits of the claim."); *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 299-300, 38 P.3d 1024, 1029 (2002) ("A court's determination of whether class certification is appropriate must be made independently, with no consideration of the merits of the claims."); *Smith v. Behr Process*

Corp., 113 Wn. App. 206, 320 n.4, 665 P.3d at 673 n.4 (2002) (“In making the initial class certification determination, the trial court takes the substantive allegations of the complaint as true.”) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975)); and *Washington Ed. Ass’n v. Shelton School Dist. No. 309*, 93 Wn.2d 783, 613 P.2d 769, 773 (1980) (“the certification of a class is to be undertaken with no consideration of the merits of Plaintiffs’ claims). The correct standard, supported by decades of class certification jurisprudence, is that a trial court must examine the issues and the types of evidence that will be used at trial and, if that evidence is predominantly (though not exclusively) common, should certify the class. *See* below at 34-40.

Farmers makes four allegations in identifying the errors it contends require review. The first of these, that Plaintiff “did not and cannot prove that every member of the class sustained diminished value injury,” *Res. Br.* at 1, reflects Farmers’ misunderstanding of class certification decision. During the proceedings below, Plaintiff offered examples of the type of proof that would be submitted at trial to show every member of the class sustained diminished, *i.e.*, loss in value, value injury. For purposes of class certification, it is not necessary to actually prove this point. Farmers’ other three assignments of error follow from this misunderstanding and should therefore be dismissed. Because a trial is necessary to resolve merits issues, the class certification decision did not

improperly shift the burden of proof to Farmers, *see* below at 45-48, there has been no bifurcation of liability issues, *see* below at 41-45, and because the class definition is objective, there is no danger that decertification (if it were to occur) would permit the Class to seek recovery without risk of an adverse judgment. *See* below at 48-49.

STATEMENT OF THE CASE ON CROSS APPEAL

After extensive briefing, a four-day class certification hearing covering 600 pages of transcript, *see* VRP 6/27/02, 7/1/02, 7/2/02, 7/8/02, CP 1573, and allowing post hearing submissions, CP 1573, the Superior Court below issued a comprehensive oral decision regarding class certification on July 26, 2002. VRP 6/27/02. After argument, a written Class Certification Order based on this oral decision was then entered by the Superior Court on September 13, 2002. CP 1569-1583.

In reaching its decision, the Superior Court below carefully considered the parties voluminous factual submissions, which included depositions of the parties' class certification witnesses, and numerous documents. CP 1572-1573. In reviewing this evidence in the context of the CR 23 criteria, the Court below repeatedly noted that it was applying "heightened scrutiny" to Plaintiffs' class allegations, VRP 6/27/02 at 8, and that class certification would only be granted "after rigorous analysis, to ensure the prerequisites of CR 23 have been satisfied." CP 1571. The Superior Court also indicated that in reaching its decision it had looked

beyond the pleadings and made “a preliminary inquiry into the merits of the action so as to obtain an understanding of the claims, defenses, relevant facts, and application of substantive law.” *Id.*

Though the Superior Court is not required — indeed, is precluded — from weighing and deciding the merits of Plaintiff’s claim for relief at the class certification stage, the parties engaged in an extensive class certification discovery process resulting in voluminous factual submissions being presented to the Superior Court by both parties. This included numerous exhibits and eleven deposition transcripts, declarations, and affidavits. CP 1572-1573. This evidence is summarized below in part only insofar as it relates to Farmers’ assignments of error.

Plaintiffs offered substantial evidence that all vehicles within the proposed class definition sustained loss in value. For example, Larry Batton, a qualified expert in the field of vehicle valuation, explained that a vehicle suffers measurable loss in value when it sustains collision damage such as that described in the Class definition and that “[t]his difference in value is well recognized in the automobile sales profession.” CP 695-700. Mr. Batton further testified that loss in value occurs at the time of the accident, and is sustained whether or not the vehicle is repaired according to industry standards: “diminished value exists the moment a vehicle is in an accident and continues to exist throughout the life of the operational vehicle The repair of these types of damage always leaves evidence of

repair. Anytime a vehicle has been repaired and it is apparent, the value will be affected.” CP 695-700. Plaintiff’s expert Paul Griglio similarly testified that vehicles suffering the types of damage within the Class definition cannot be restored and that they have remaining persistent physical damage because of limits in the repair techniques available to body shops. CP 686-694.

Plaintiff also relied upon the testimony of Farmers’ own class certification expert witnesses to show the common issues and common types of proof that could be used to show that the presence of certain types of damage that persisted even after repair results in diminished value. For example, Farmers’ own expert Michael West testified in his deposition that:

- repairs involving welding weakened the repaired parts. AD Depo. of West at 13.
- welds on repaired parts were different than factory welds. *Id.* at 19.
- repair techniques did not entirely fix a vehicle; rather, they attempted to “approximate or duplicate as close as we can the factory way they did it.” *Id.* at 25.
- paint on repaired vehicles was different: “it wouldn’t be the same paint, because it’s a different, a whole different process.” *Id.* at 27.
- he could tell if a vehicle had been repaired, *id.* at 17-18, and routinely inspected vehicles on behalf of clients for evidence of prior accidents. *Id.* at 47-48.

The analogy Farmers itself uses in its brief is an apt description of the type of repair Farmers seeks to undertake: “Just as a plate that is broken in two

can be repaired by gluing the parts together and making the plate usable again, a damaged car can be repaired by pounding out dents or replacing damaged parts so that the vehicle can be driven again.” *Res. Br.* at 13. The unrebutted evidence showed that repair to the type of seriously damaged newer model vehicles in this class could never be done so that the vehicle was like it was before the accident.

Confirming the basic thesis of Plaintiff’s case, Farmer’s expert Mr. West also conceded that given an unwrecked and repaired vehicle: “I would probably take the unwrecked car, because the unknown is what we’re talking about there.” AD Depo. of West at 41. Mr. West was asked several times if he would pay the same amount for a vehicle that had repair work on it as he would pay for a vehicle that was undamaged and he responded several times that he would not, he would only pay less for the vehicle. *Id.* at 52-55.

On what the Superior Court itself recognized was a key issue — the ability to present a statistical model to show the classwide amount of damages, CP 1577-1580, Plaintiff also presented the testimony of a statistician Dr. Bernard Siskin to demonstrate a method -- known as multiple regression analysis -- which could be used to show the amount of classwide and individual damages at trial.¹

¹ Multiple regression analysis “is a statistical technique designed to determine the effect that two or more explanatory independent variables have on a single dependent variable.” *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486 (W.D. Pa. 1999). Such an analysis allows the statistician to

In two depositions, Dr. Siskin laid out a procedure to determine class-wide and individual damages, built upon the type of data used to value automobiles in reference guides such as the NADA Blue Book and by auto appraisers using comparable sales prices — auction data. Dr. Siskin testified that he intended to conduct a regression analysis on a “data set which is [now] being collected from auctions.” AD Depo. of Siskin at 38. As Dr. Siskin explained with this data “I will be able to run the model with confidence levels that we’ve discussed and come up with estimates” of damages for the class. *Id.* at 47. Because of the scope of data available at auctions, the resulting data set, Dr. Siskin testified, “will represent all the classes of vehicles in the class,” *Id.* at 181, and the regression analysis will be able to account for factors such as the effect of other accidents. *Id.* at 194-96.

According to Dr. Siskin, results from the regression analysis could then be applied to information on class members, *e.g.*, the “characteristics of their cars and the accidents they’re in” to obtain a class-wide estimate of damages. *Id.* at 199. Individual damages can then be allocated in a post trial claim process by applying the model to qualifying accidents. As Dr. Siskin observed, “You would not have to inspect the

quantify the effect of one variable (*e.g.*, accident history) on outcomes that may be influenced by many variables (*e.g.*, vehicle sales prices). Washington courts have noted that multiple regression analysis is “a common statistical tool.” *City of Seattle v. McCready*, 123 Wn.2d 260, 264, 868 P.2d 134, 136 (1994). Multiple regression analysis is commonly used in class actions. *See* D.L. Rubinfeld, *Reference Guide on Multiple Regression, Reference Manual on Sci. Evid.* 415-469 (Federal Judicial Center 1994).

cars,” *Id.* at 201, rather information would be taken from Farmers claims records, possibly supplemented by (if needed) an affidavit from certain class members. *Id.* at 202, 206.

Asked about the “reliability” of any eventual results from his analysis Dr. Siskin explained:

I can say the standard there is simply if the result is statistically significant, and the courts have generally defined there terms, in the levels they want for that, the answer would be yes, I could make a conclusion if it is statistically significant or not. If you’re talking about a nonstatistical judgment, which is sort of when you get to damage number stage, can you live with an estimate which says it’s \$100 plus of minus two dollars? That’s a judgment call and I wouldn’t make that decision. Whoever the decision maker is... would have to decide.

Id. at 214. As Dr. Siskin noted in his class certification testimony: “This model . . . it’s doable, the data is collectable, I mean, we’ll get these answers.” *Id.* at 216. At the time of the class certification hearing the data for creating a damage model had already been collected. VRP 6/27/02 at 72. As noted below at 13-15, the process of analyzing and applying this data to create a model was completed *after* class certification.

At the class certification hearing Plaintiffs and the Court extensively discussed how classwide damages could be shown through the use of Dr. Siskin’s model to determine and then distribute individual damages. *See* A841; VRP 6/27/02 at 39-64, 69-103. However, in addition

to relying upon Dr. Siskin's own testimony, at the class certification hearing Plaintiffs principally relied upon the testimony of Defendants' own expert Dr. Finis Welch, who had been re-deposed two days before the class certification hearing after Defendants submitted a new affidavit from him. *See AD Depo. of Welch at 1-3.*

Dr. Welch's testimony showed (amongst other things) that:

- the results of a regression analysis like Plaintiff proposed to use (which controls for alternative factors effecting value) would *more accurately* show any loss in value than the vehicle's actual sales price. VRP 6/27/02 at 53-54; AD Depo. of Welch at 26-38.
- Dr. Welch would prefer to use a regression model similar to that Dr. Siskin proposed to determine loss in value over attempting to do individual car by car analysis using a few comparable sales. *Id.* at 32-38.
- Dr. Welch would use the same approach as Dr. Siskin to calculate damages except he proposed to use data obtained by selling cars at auction, repurchasing them, wrecking and repairing them, and then reselling them at auction rather than using data on vehicles already at auction. *Id.* at 39-40; 64. This was an approach Dr. Welch testified might cost between 10 and 100 million dollars. *Id.* at 66.
- Using the Defendants' records a damage model could accurately reflect any circumstances where a vehicle although within the class, which have suffered no damages because, *e.g.*, it might have suffered damage in the same area as in a prior accident and therefore had no additional damages. *Id.* at 81-86; 90-91.
- Damages shown by a regression analysis could be distributed individually based upon information in the Defendants' claims files as it would be "just computation." *Id.* at 107-08.

- Dr. Welch knew of no relevant variables that Dr. Siskin had failed to gather for his analysis. *Id.* at 110.

The Superior Court, however, did not simply take Plaintiffs' claims at face value, but applying "heightened scrutiny" it carefully considered the evidence and stopped Plaintiff's Counsel and read the portions of Dr. Welch's new deposition which were being relied upon as they were cited. *See, e.g.*, VRP 6/27/02 at 42-43, 53. Rejecting Defendants' extensive arguments attempting to undermine Plaintiff's factual submissions as to their ability to show classwide and individual damages, *see* VRP 7/2/02 at 38-62, 66-154, the Superior Court found in its Class Certification Order that:

Plaintiffs have also presented the Court with a preliminary plan of how to proceed to gather the data on vehicles and how to manage this litigation as a class action. Their plan evidences a keen understanding of the steps necessary to process claims, identify class members, analyze the data on the existence or amount of diminished value, make adjustments to the classwide damages for any defenses raised (and substantiated by Defendants), and then provide for notification and allocation of any damages awarded to the class after trial.

CP 1579-80.

This ruling based upon the extensive evidence presented by Plaintiffs has now been shown to have been completely correct.

Dr. Siskin's work was in fact completed after class certification, and an

expert report was then provided to Farmers' counsel on April 28, 2003.

CP229-236. Farmers' counsel then deposed Dr. Siskin over several days on his opinions in Spring of 2003.

Dr. Siskin's analysis of the auction data shows that change in vehicle price interacts with the presence of frame damage and the observed severity of repaired damage, but does not interact with other vehicle characteristics (such as make, model, mileage). CP230-1. As such, the only factors that affect the dollar value of diminished value is a vehicle's value, and extensiveness of damage. *Id.* Dr. Siskin's analysis reveals that vehicles that had suffered frame/structural damage lost 4.5% of their pre-loss value, plus an additional loss of 1.6% of their pre-loss value for each area (hood, fender, door, etc.) that had been damaged and repaired. CP231. These results have a very high R^2 of .934, *i.e.*, they are "highly significant." CP231.

As he had indicated he would, Dr. Siskin then took a large sample (900) of class members' claims files and determined from this sample that 80% of those on the class list provided by Farmers were class members. CP232. Using information from Farmers' claims files, Dr. Siskin then determined each vehicle's pre-loss value (using information on the vehicle, *e.g.*, mileage, condition, make, model, to find the appropriate blue book value as of the time of the accident) and the extensiveness of the damage (from the repair estimate), and then applied his

formula to determine each vehicle's loss in market value as of the time of the accident. CP232-3. This showed an average loss per claim of \$890 for the sample. CP233. Dr. Siskin then applied this calculation to the Class size to yield class-wide damages, and was awaiting two final pieces of information from Farmers (data on how long the average policyholder is with Farmers and number of policies in force) to finalize his discount for prior accidents, when summary judgment was entered. CP233-4. In sum, Dr. Siskin did precisely what he, and Farmers' own expert Dr. Welsh, told the Superior Court could be done.

In certifying the Class, the Superior Court correctly noted the existence of a number of common issues, which it held satisfied the "predominance" test of CR 23(b)(3):

First, the relevant language of the insurance policies at issue is materially identical, and the legal issues arising from this common contract languages therefore presents a common legal issue, whether Farmers' full coverage casualty automobile insurance provision of the policy issued to Plaintiff covers any reduction in value of a vehicle which has been involved in an accident. . . .

Second, the Court finds that there is an underlying and overriding common issue of fact: has each class member's vehicle suffered a reduction in value as a result of the vehicle having been in an accident without consideration of repair related diminished value? The Court finds that other common issues of fact exist, including, whether vehicles

in the class can be returned to their preaccident condition

CP 1574. The Superior Court also correctly declined to resolve Farmers' attacks on the expert evidence, as they constituted improper attempts to argue the merits at the class certification stage:

[T]here has been much argument between expert witnesses on the existence, or nonexistence, of inherent diminished value. The methodology proposed by Dr. Siskin has been challenged, as has the lack of existence of exact data, and the method [he] proposes to use to gather data on sales. Defendants also argue that under Washington law, economic damages cannot be calculated. These arguments, and others put forth by Defendants for the recovery of inherent diminished value, go to the merits of the Plaintiffs' claims.

CP 1581; *see* above at 4-5. The Superior Court found that all of the requirements of CR 23 were met and certified the class. CP 1582.

ARGUMENT

I. The Trial Court Incorrectly Construed The Language Found In Farmers' Policy, Which — Read In Its Entirety — Covered Loss In Value, And Did Not Exclude The Loss Under The "Limits Of Liability" Clause.

A. Farmers' Policy Must Be Construed Based Upon The Language Found In Farmers' Policy, Not Entirely Different Language Found In Other Insurers' Policies.

It is well established that an "insurance contract must be viewed in its entirety, a phrase cannot be interpreted in isolation." *Allstate Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (*citing Hess v. North Pac. Ins. Co.*, 122 Wn.2d 180, 186, 859 P.2d 586 (1983)).

Therefore, “when construing the policy, the Court should attempt to give effect to each provision in the policy.” *Id.* As Farmers itself correctly notes, “the policy must be enforced as written and the court cannot modify it.” *Res. Br.* at 8 (*citing Peasley*, 131 Wn.2d at 424). Yet this is exactly what Farmers asks — that this Court rewrite the language that Farmers itself drafted.

As Farmers admits, the policy it drafted promises to “pay for **loss to your insured car**,” *Res. Br.* at 2; loss being further defined as “direct and accidental loss of or damage to” the vehicle. *Id.* However, Farmers now relies upon the following clause (which is truncated in Farmers’ brief) to attempt to exclude payment for loss in value:

Limits of Liability

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

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

CP 20.²

² In its brief, Farmers also quotes the Payment of Loss clause reading “we may pay the loss in money or repair or replace damaged or stolen property.” *Res. Br.* at 3. However, Farmers never discusses the relevance of this “repair option” to this case, there is none. Farmers usually (as here) pays losses in money, and the clause relates to the unusual circumstances where the insurer *itself* takes on the repair of a vehicle (and liability therefore if the repairs are not correctly done), or provides a replacement vehicle, rather than paying cash. *See generally Mockmore v. Stone*, 493 N.E.2d 746 (Ill. App. 1986); 12 Couch on Ins. § 176:41 (3d ed. 2003). Neither situation

It must be emphasized that Farmers' policy *does not read*:

“Our limit of liability for loss will be the **lesser** of the: 1. Actual cash value of the stolen or damages property; or 2. Amount necessary to repair or replace the property.”

Hall v. Acadia Ins. Co., 801 A.2d 993, 994-5 (Me. 2002) (emphasis added).

Yet, every single diminished value case cited by Farmers in its brief contains this or similar language about paying the *lesser* or *lower* of “actual cash value” or the “amount necessary to repair or replace.”³ This is simply not the language found in Farmers' policy. The differences in policy

applies here; rather, Farmers elected to pay the loss in cash.

³ See *American Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 156 (Tx. 2003); *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 285 (De. 2001); *Siegle v. Progressive Cons. Ins. Co.*, 788 So.2d 355, 358 (Fla. App. 2001); *Siegle v. Progressive Cons. Ins. Co.*, 819 So.2d 732, 734 (Fla. 2002); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 754 P.2d 330 (Az. App. 1988); *Johnson v. Illinois Nat. Ins. Co.*, 818 So.2d 100, 103 (La. App. 2001); *Lupo v. Shelter Mut. Ins. Co.*, 70 S.W.3d 16, 19 (Mo. App. 2002); *General Acc. Fire & Life Corp. v. Judd*, 400 S.W.2d 685, 687 (Ky. App. 1966); *Pritchett v. State Farm Mut. Auto. Ins. Co.*, 834 So.2d 785, 787 (Ala. App. 2002); *Campbell v. Markel Amer. Ins. Co.*, 822 So.2d 617, 620 (La. App. 2001); *Bickel v. Nationwide Mut. Ins. Co.*, 143 S.E.2d 903, 905 (Va. 1965); *Camden v. State Farm Mut. Auto Ins. Co.*, 66 S.W.3d 78, 79 (Mo. App. 2002); *Driscoll v. State Farm Mut. Auto. Ins. Co.*, 227 F. Supp. 2d 696, 700 (E.D. Mich. 2002); *Black v. State Farm Mut. Auto. Ins. Co.*, 101 S.W.3d 427, 428 (Tn. App. 2002); *Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 133 (S.C. 2003); *Spellman v. Sentry Ins.*, 66 S.W.3d 74, 75-76 (Mo. App. 2001); *Townsend v. State Farm Mut. Auto. Ins. Co.*, 793 So.2d 473, 477 (La. App. 2001); and *Wildin v. Am. Fam. Mut. Ins. Co.*, 638 N.W.2d 87, 481-2 (Wis. App. 2001).

The only different policy language in all of the loss in value cases relied upon by Farmers is found in *Given v. Commerce Ins. Co.*, 786 N.E.2d 1275 (Mass. 2003), where the Massachusetts high court construed statutory mandated policy language, which gave the *insured* the option of payment of the cost of repair or “the amount of the decrease in the actual cash value of [the insured's] auto.” *Id.* at 1277 (emphasis in original). The *Given* Court found that the presence of this election prohibited an insured from recovering under both clauses. *Id.* at 1280. *Given* is obviously entirely apposite to the policy in this case, and actually supports recovery of loss in value where, as here, there is no election to be made between repair or loss in value under the policy itself.

Farmers' misleadingly cites one further case, *Uniguard Ins. Co. of Seattle v. Wish*, 496 S.W.2d 392 (Ark. 1973) as if it were a decision addressing the issue in this case. *Res. Br.* at 23. *Wish* does not address the availability of diminished value, and Farmers' citation is particularly misleading because Arkansas law unanimously holds that, loss in value is not excluded by a limits of liability clause stating that repair or replacement will be to “like kind and quality.” *MFA Ins. Co. v. Citizens Nat'l Bank of Hope*, 545 S.W.2d 70 (Ark. 1970).

language in the cases (mis)cited to this Court (none of which involved Farmers) by Farmers, and Farmers' own policy language is not trivial – instead the different language distinguishes the results in three major ways.

First, nearly every case relied upon by Farmers bases its decision on the insurers' asserted right to an election to pay the *lesser* of "actual cash value" or "the amount necessary to repair or replace the property." For example, the court in *Wildin v. Am. Fam. Mut. Ins. Co.*, *supra*, reasoned that the limits of liability provision lists separate options to pay the actual cash value or cost of repair or replacement "and permits American Family to chose the option which costs the least." *Wildin*, 638 N.W.2d at 89.⁴ Yet Farmers' policy contains no similar election between paying the lesser of "actual cash value" or the cost of repair and replacement.⁵

Second, the cases cited by Farmers in large part base their decision on the presence of an option to simply "repair or replace" the property. For example, the policy in *Wildin* did not contain an obligation to repair or replace the property to "like kind and quality," *Wildin*,

⁴ This reasoning forms the basis of the decisions in *Schaefer*, 124 S.W.3d at 160; *O'Brien*, 785 A.2d at 288; *Siegle*, 788 So.2d at 361; *Hall*, 801 A.2d at 976; *Lupo*, 70 S.W.3d at 19, 23; *Pritchett*, 834 So.2d at 796; *Bickel*, 143 S.E.2d at 905-6; *Camden*, 66 S.W.3d at 81, 82; *Driscoll*, 227 F.Supp.2d at 707; *Given*, 796 N.E.2d at 1280; *Schulmeyer*, 579 E.2d at 135-6; and *Townsend*, 793 So.2d at 479. None are relevant to this case.

⁵ Other cases have rejected this reasoning finding that no election is lost by payment of loss in value because the cost of repair to "like kind and quality"; *i.e.*, to pre-loss value is frequently cheaper than the vehicle's "actual cash value," *i.e.*, value as a total loss. *See, e.g., Allgood v. Meridian Sec. Ins. Co.*, 807 N.E.2d 131, 137 (Ind. App. 4/28/04). *See also App. Br.* at 31-32, addressing this argument

638 N.W.2d at 89, and the Wisconsin Appellate Court in *Wildin* distinguished a long-established and well-reasoned opinion from the Wisconsin Supreme Court, *Hausner v. Baltimore-American Ins. Co.*, 236 N.W. 546 (Wis. 1931) which had found loss in value covered, because *Hausner* had involved a different policy obligation: to pay the “cost to repair or replace the automobile or parts thereof with other of like kind and quality.” *Wildin*, 638 N.W.2d at 90 (citing *Hausner*, 236 N.W. at 547). As the *Wildin* Court noted this difference in language “warranted a different result.” *Wildin*, 638 N.W.2d at 90.

Identical reasoning to that found in *Wildin* is found in *Schulmeyer*, 579 S.E.2d at 133 (relied upon by Farmers in *Res. Br.* at 16, 27), where — finding loss in value excluded under a State Farm policy promising to merely “repair or replace” the property — the South Carolina Supreme Court distinguished its earlier decision in *Campbell v. Calvert Fire Ins. Co.*, 109 S.E.2d 572 (S.C. 1959) (diminished value not excluded by “repair or replace” with “like kind and quality” limit of liability clause) noting that the clause before it was “more specific in its obligations,” than that in *Campbell* where there had also been a “like kind and quality” obligation. 109 S.E.2d at 577. Of course, unlike *Wildin*, *Schulmeyer*, or other cases cited by Farmers, *Farmers’ policy does contain a “like kind and*

quality” obligation.⁶

Not only do the very cases cited by Farmers make clear the importance of the “like kind and quality” provision to the issue before this Court but as Plaintiffs showed the Superior Court below nearly every court that has looked at the “like kind and quality” language in Farmers’ policy has found that it does not act as a diminished value exclusion because “like kind and quality” includes notion of value. CP150-155 (chart of decisions as of date of summary judgment). Examples of these cases are: *Stoops v. First Amer. Fire Ins. Co.*, 22 S.W.2d 1038, 1039 (Tn. 1930) (court finds presence of “like kind and quality” and alternative conjunction in “repair or replace” “with other of like kind and quality” renders clause ambiguous; clause does not act as an exclusion for loss in value); *Mason v. Tennessee Farmers Mut. Ins. Co.*, 640 S.W.2d 561 (Tn. App. 1982) (same);⁷ *Dunmire Motors Co. v. Oregon Mut. Fire Ins. Co.*, 114 P.2d 1005 (Or. 1941);

⁶ There are eight other decisions cited by Farmers where the policy at issue did not contain a “like kind and quality” obligation modifying the obligation to merely “repair or replace” the property. See *Johnson*, 754 P.2d 330; *Hall*, 801 A.2d at 994-5; *Pritchett*, 834 So.2d at 787; *Campbell*, 822 So.2d at 620; *Camden*, 66 S.W.3d at 79; *Black*, 101 S.W.3d at 428; *Spellman*, 66 S.W.3d at 756; and *Townsend*, 793 So.2d at 477. Six other options cited by Farmers appear from the recitation of the facts to contain a “like kind and quality” provision, but the court at issue never discussed or addressed it, in effect writing it out of the policy. See *O’Brien*, 785 A.2d at 290-91; *Johnson*, 818 So.2d at 103; *Lupo*, 70 S.W.3d at 19-23; *Judd*, 400 S.W.2d 685; *Bickel*, 143 S.E.2d 903; and *Driscoll*, 227 F.Supp.2d 696.

⁷ Rather than citing *Stoops* and *Mason* where the language at issue was similar to Farmers’ policy, in that it had a “like kind and quality” provisions, Farmers only cites *Black* to this Court [*Res. Br.* at 17] a case which, as noted above in ft 6, has entirely different language than that found in Farmers’ own limits of liability clause and no “like kind and quality” obligation. Farmers has elected to [mis]cite irrelevant cases containing different policy language rather than discussing the actual language in its own policy, hoping that this Court would be somehow persuaded by a purported trend in law, as the trial court admitted it was. See *Res. Br.* at 6 (arguing that this Court should follow the recent “majority” trend); Tr. 11-12 (trial court states it is “persuaded by the weight of authority.”) Yet upon closer examination there is no trend in Farmer’s favor.

“repair or replace the property” with other of like kind and quality,” is ambiguous and therefore must be construed against the drafter); *Potomac Ins. Co. v. Wilkinson*, 57 So.2d 158 (Miss. 1952) (same); *Dependable Ins. Co. v. Gibbs*, 127 S.E.2d 454 (Ga. 1962) (same); *Venable v. Import Volkswagen, Inc.*, 519 P.2d 667, 672 (Kan. 1974) (same); *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Co. App. 2000) (same); *Ciresi v. Globe & Rutgers Fire Ins. Co.*, 244 N.W. 688 (Minn. 1932) (same); *Edwards v. Maryland Motor Car Ins. Co.*, 197 N.Y.S. 460 (NY App. 1922) (same); and *Federal Ins. Co. v. Hiter*, 176 S.W. 210 (Ky. App. 1915) (same); *see also* CP150-155. In total at least *thirty* Appellate opinions have rejected Farmers’ current contention that a limits of liability clause with “like kind and quality” in it excludes payment for diminished value. *See* CP150-155; above at 19-21, below at 23-24.

A recent decision, *Allgood v. Meridian Security Ins. Co.*, 807 N.E.2d 131 (Ind. App. 4/28/04), which found that loss in value is a covered, non-excluded, loss exemplifies the reasoning of these cases. As the *Allgood* Court reasoned the phrase “repair or replace with other of like kind and quality” could clearly encompass an obligation to repair value. This was because (using standard definitions):

‘Like’ is defined as ‘[p]ossessing the same or almost the same characteristics; similar . . . [a]like . . . ; [h]aving equivalent value or quality.’ American Heritage Dictionary (4th ed. 2000). ‘Kind’ is defined as ‘[f]undamental,

underlying character as a determinant of the class to which a thing belongs; nature or essence.’ *Id.* ‘Quality’ is defined as ‘[d]egree or grade of excellence: [as in] *yard goods of low quality.*’ *Id.*

Allgood, 807 N.E.2d at 136 (footnotes omitted). As the *Allgood* Court held:

“‘Like kind and quality’” therefore includes some inherent concept of value.” *Id.* Using the facts of *Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Co. App. 2000), [discussed in *App. Br.* at 25-26], where the vehicle at issue was worth one-third of its pre-accident value after the crash, as an example, the *Allgood* Court reasoned its construction met an insured’s reasonable expectation when confronted with a real loss:

No reasonable insured would read a policy containing a limit of liability provision like that in *Hyden* or herein and assume that, if he were involved in a collision and turned to his insurer to cover the loss, he might be left with only one-third of what he had before the collision. In most cases, the disparity between pre-collision and post-repair value is probably not so drastic as in *Hyden*. But the fact remains that a vehicle that has been involved in a collision is considered to have less value than a vehicle identical in all respects except that it has not been involved in such a collision. In undertaking to compensate *Allgood* for “direct and accidental loss” to her vehicle through one of several options, Meridian is primarily obligated to restore to *Allgood* what she has lost. That may require not only repair of the vehicle or replacement of its parts but also compensation for the diminution in value.

Id. at 137-8. The *Allgood* court finally rejected the notion that “repair” that

did not fully repair the car satisfied by the insurer's obligation to pay for any loss:

If there is diminished value even after repair, we do not consider the repairs to have been adequate, and therefore disagree with *Siegle* and the line of cases cited by Meridian in footnote one above because those cases assume that the repairs are adequate in denying compensation for diminution in value.

Id. at 137; accord *Dunn v. Meridian Sec. Ins. Co.*, ___ N.E.2d ___, 2004 WL 1375706 (Ind. App. 6/21/04) (adopting reasoning of *Allgood*; diminished value is not excluded by a limits of liability clause with "like kind and quality").

Finally, Farmers' policy is different from that construed in every case it relies upon in that it has "new property less an adjustment from physical deterioration and/or depreciation" as a parallel obligation to "like kind and quality." CP20. As noted above "like kind and quality" includes value, and so clearly does "depreciation." See, e.g., Black's Law Dictionary at 441 ("a decline in value of property"). Farmers has therefore even more clearly introduced the properties' pre-loss value as the limit of its performance to repair and/or replace under the Limits of Liability clause than any other insurer has in the cases cited by Farmers. Obviously a clause which says that Farmers will pay no more than the properties' pre-loss value (having taken an adjustment for depreciation) cannot be also said to unambiguously *exclude* Farmers' obligation under the coverage clause to

pay its insureds up to this exact same pre-loss value. Once value was added into the limits of liability clause by Farmers it cannot be appropriately construed as excluding payment for value as Farmers now suggests. *See App. Br.* at 22-25.

B. Loss In Value Is Unambiguously Covered Under Farmers' Policy.

In Plaintiffs' opening brief Plaintiffs showed that the coverage clause covered loss in value, because it is a "direct and accidental loss," *i.e.*, a loss which is triggered by the damage which occurred to Plaintiffs' vehicles. *App. Br.* at 18-22. Farmers ignores Plaintiffs' well reasoned arguments. In fact every one of the cases cited by Farmers itself which discusses the issue acknowledges that loss in value is unambiguously a "direct and accidental loss." *See, e.g., Schaefer*, 124 S.W.3d at 158; *Lupo*, 70 S.W.3d at 20; and *Campbell*, 822 So.2d at 621, 624. Farmers does not cite even a single case holding loss in value is not a covered loss.

Yet, the Superior Court below erroneously held loss in value was not a "direct and accidental loss" under the policy, and then built upon this error by stating it did not find diminished value *coverage* under the limits of liability clause because there was no mention of "diminished value" in the clause. *Tr.* 8-10; *App. Br.* at 13-15. In so holding the lower court erred, and applied the wrong standard. Since there was coverage the rule that, "[E]xclusionary clauses are to be construed strictly against the

insurer,” *Eruick v. Pemco Ins. Co.*, 108 Wn.2d 388, 340, 738 P.2d 251 (1987) (citing *Farmers Ins. Co. v. Clure*, 41 Wash.App. 212, 215, 702 P.2d 1247 (1985)), applied there was no issue of finding coverage. The absence of any clear mention of “loss in value” or “diminished value” in the Limits of Liability clause merely shows it was not an exclusion for loss in value. *McDonald Ind., Inc. v. Rollins Leas. Corp.*, 95 Wn.2d 909, 915, 631 P.2d 947, 950 (1981) (Limits on coverage will “not be extended beyond their clear and unequivocal meaning.”); *Scottsdale Ins. Co. v. International Prod. Ag., Inc.*, 105 Wn.App. 244, 250, 19 P. 3d. 1058, 1061 (Div. 2 2001) (limits must “clearly and unambiguously” apply to bar coverage.)

C. **Plaintiffs’ Construction Of The Language In Farmers’ “Limits Of Liability” Clause Is Reasonable, And Therefore It Does Not Unambiguously Exclude Loss In Value.**

In Plaintiffs’ opening brief, *App. Br.* at 22-25, we showed that the limits of liability clause in Farmers’ policy acts to prevent betterment by limiting Farmers’ payments to the pre-loss value of the property measured by the value of either “Like kind and quality” property or new property less an “adjustment for physical deterioration and/or depreciation.” CP20. These limits apply equally to *all* losses regardless of whether the vehicle is totaled or Farmers pays to repair the loss. As noted in Plaintiffs’ opening brief Farmers’ own claims manager for this State testified the Limits of Liability clause was, as Plaintiffs argue, designed to prevent an insured from recovering more than the vehicle’s pre-loss value. *App. Br.* at 10-11;

23. Several courts have adopted this reasoning in finding a “like kind and quality” provision not to exclude loss in value under similar language to that found in Farmers’ policy. *See, e.g., State Farm Mut. Auto Ins. Co. v. Mabry*, 556 S.E.2d 114, 118 (Ga. 2001) (noting that limits of liability clause is related to betterment and is not an exclusion for loss in value). As one judge reasoned about a similar limits of liability clause:

Under this policy, State Farm is entitled to a “betterment” from its insured when it elects to repair an automobile because if the repair or replacement results in “better than like kind and quality, you must pay for the amount of the betterment.” By this policy provision, the insurance company is entitled to reduce its payment to an insured by depreciating a new part that would make the car more valuable. By the terms of its own policy, State farm has applied market value to repair.

Pritchett, 834 So.2d at 810 (Yates, P.J. dissenting). Farmers entirely ignores this reasonable construction of Farmers’ policy — a construction that unless Farmers had shown it unreasonable requires that the policy be construed in Plaintiffs’ favor. *Peasley*, 131 Wn.2d at 424 [cited in *Res. Br.* at 8].

Plaintiffs also showed in their Opening Brief that cases applying dictionary definitions of “like,” “kind” and “quality” had uniformly found it to include value (and therefore that it could act as a limit on betterment by capping the loss at pre-loss value). *App. Br.* at 25-26. As shown above at 22-23, courts which have recently looked at common

definitions of “like kind and quality” have also found it to include value.

As Farmers itself states: “meaning may be ascertained by reference to standard English dictionaries.” *Res. Br.* 8. Yet, Farmers does not bother to respond to the multiple cases which have found the limits of liability clause not to exclude loss in value under common definitions of “like kind and quality.” Instead Farmers relies upon language taken from certain opinions which never considered common definitions of “like kind and quality.”⁸ In any event, these cases, as noted above at 18-24, each involved a different contractual provision than that found in Farmers’ policy, and were decided on irrelevant grounds. What is even more astounding through is that Farmers’ counsel in its discussion of “like kind and quality” cites three decisions as relevant to the meaning of “like kind and quality” where the policy being construed in those cases did not even include a “like kind and quality” provision. *See Campbell*, 822 So.2d at 620; *Johnson*, 754 P.2d at 330; and *Pritchett*, 834 So.2d at 787. [*Res. Br.* at 18-23.]

Plaintiffs’ argument that the limits of liability clause encompasses value, and therefore that it can not act as an exclusion for

⁸ Farmers relies upon the following eleven cases in its “like kind and quality” discussion, most of which discuss definitions of “repair by itself,” yet *none* of which address or discuss definitions of “like kind and quality: *Schaefer*, 124 S.W.3d at 159-60 (looking at dictionary definition of “repair,” but ignoring “like kind and quality”); *Siegle*, 819 So.2d at 736-7 (same); *Lupo*, 70 S.W.3d at 21-22 (same); *Campbell*, 822 So.2d at 624 (same); *Driscoll*, 227 F.Supp.2d at 704 (same); *O’Brien*, 785 A.2d 281 (court ignores “like kind and quality” and does not construe it); *Johnson*, 818 So.2d at 103-5 (consulting no definitions); *Judd*, 400 S.W. 685 (same); *Bickel*, 143 S.E.2d 903 (same); *Johnson*, 754 P.2d at 330 (same); *Pritchett*, 834 So.2d 785 (same).

value, is clearly reasonable. Therefore, the summary judgment must be reversed and coverage found to exist. *Peasley*, 131 Wn.2d at 424; *McDonald Ind., Inc.*, 95 Wn.2d at 915.

D. Admissible, Relevant And Unrebutted Evidence Shows That Plaintiffs' Construction Of The Policy Language Is Reasonable.

As also shown in Plaintiffs Opening Brief, *App. Br.* at 10-12, all of the evidence presented in the trial court showed that Plaintiffs' proposed construction of the limits of liability clause was not only reasonable, but the only reasonable construction. This included admissions by Farmers' executives that the limits of liability clause was meant to prevent betterment, CP126, 292-293, that when Farmers paid to repair or replace a vehicle the "like kind and quality" provision required that "you should have equivalent value of the items that are being repaired or replaced." CP121, 271-283; and that "like kind and quality" itself encompassed value. CP121, 285-289. Plaintiffs further showed that Farmers had admitted that it considered adding an exclusion for diminished value, but had decided not to as it would have reduced coverage, with a possible need to reduce Farmers' prices. CP121. Plaintiffs noted that they did not seek to introduce this evidence to show "intent" independent of the contract, rather they introduced it to show that their construction of the policy was reasonable.

Three recent opinions from the Washington Supreme Court

have approved of considering precisely this type of evidence. Yet, Farmers never addresses the reasoning of *Queen City Farms, Inc. v. Central Nat. Ins. Co.*, 126 Wn.2d 50, 83, 882 P.2d 703 (1995) (drafting history “should not be considered as evidence of the parties’ intent, but instead should be considered as one reasonable interpretation of the ambiguous exclusionary language.”), where the Court held in precisely the circumstances of this case that:

[I]f the interpretation proposed by the insured came from the mouth of the drafter of the provision, ordinarily this would be some evidence that the proposed interpretation is reasonable.

Id. at 89, 882 P.2d at 722-3 (quoting K. Abraham, *Environmental Liab. Ins. Law* 38-39 (1991)). Nor does Farmers address the fact that in both *Key Tronic Corp., Inc v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 630, 881 P.2d 201, 208 (1994) (extrinsic evidence is considered when it “represented a reasonable construction of the policy language”); and *Lynott v. National Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 693, 871 P.2d 146, 154 (1994) (court considers intrinsic evidence of (1) the insurers’ failure to further clarify the contracts’ terms despite knowledge of the issue and (2) the availability of a specific exclusion (which was not in the policy at issue) in rejecting an insurer’s claims that coverage was

excluded), evidence of the type presented to the trial court was considered.⁹

The approach followed in this State of allowing evidence to support the reasonableness of constructions proposed by the parties is also found elsewhere. As the Third Circuit observed in *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 233 (3d Cir. 2001) (citations omitted):

A term is ambiguous if it can have two or more reasonable meanings. “If a reasonable alternative interpretation is suggested, even though it may be alien to the judge’s linguistic experience, objective evidence in support of that interpretation should be considered by the fact finder.” In determining whether a contract term is ambiguous, we must consider the actual words of the agreement, as well as alternative meanings offered by counsel, and extrinsic evidence offered in support of those alternative meanings.

Farmers is correct that extrinsic evidence can be used (in very limited circumstances not present here) to show intent *once* an ambiguity in policy language has been found, but it can also be used — when as here it is objective evidence such as admissions against interest — to show the reasonableness of a proposed construction of the language in a policy. This

⁹ Farmers’ reliance on *Spratt v. Crusader Ins. Co.*, 109 Wn.App. 944, 949-50, 37 P.3d 1269 (2002) (affidavit of English professor not admissible) and dicta in a footnote in *Stouffer & Knight v. Continental Cas. Co.*, 96 Wn.App. 741, 750 n.10, 982 P.2d 105 (1999) (internal memos cannot be used to contradict plain language of the policy) is misplaced. In neither case was the evidence submitted, as here, to show the reasonableness of a proposed construction of the policy’s actual language. Nor is Farmers’ argument, that the evidence in *Queen City Farms, Inc.*, was only admitted after an ambiguity was found correct. In fact, it was only after considering the extrinsic evidence as to reasonability of Plaintiffs’ interpretation, and then finding the provision ambiguous because Plaintiffs proposed construction was reasonable, that the policy was construed against the drafter. *Id.*; 882 P.2d at 92. The evidence was never considered to show “intent” to construe the policy as Farmers now suggests. 126 Wn.2d at 83.

Court should find Plaintiffs' proposed construction reasonable and therefore find for Plaintiffs, *Peasley*, 131 Wn.2d at 424; *E-Z Loader Boat Trailers, Inc. v. Travelers Ins. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439, 443 (1986) ("where the clause in the policy is ambiguous, a meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning") and therefore need not rely upon extrinsic evidence to do so, but the Trial Court erred in refusing to consider this evidence showing Plaintiffs' construction was reasonable when it failed to consider a clearly reasonable construction.

E. The Trial Court Should Have Denied Summary Judgment As Disputed Issues Of Fact Remain.

In Plaintiffs' Opening Brief they showed that summary judgment was (erroneously) granted on the basis that the limit of liability limited Farmers' obligation to pay to restore the car "to substantially the same physical, operating, and mechanical condition" as before the accident. *App. Br.* at 37. Plaintiffs, however, presented substantial un rebutted evidence to the Superior Court that Farmers had *failed* to meet this obligation. *Id.* at 6-7. Farmers presents no contrary evidence, and in any event bears the burden on this point as once coverage is shown, "the insurer must prove that specific policy language excludes the insured's loss" *Graff v. Allstate Ins. Co.*, 113 Wn.App. 799, 803, 54 P.3d 1266, 1268 (Div. 2 2002); *Accord Labberton v. General Cas. Co. of Am.*, 53 Wn.2d

180, 186, 332 P.2d 250 (1958). Having failed to respond to this argument Farmers has conceded that summary judgment was improperly granted. Absent restitution of the vehicle to the applicable standard of “like kind and quality” (which includes value) Farmers is obligated to pay any remaining loss.

II. **THE TRIAL COURT INCORRECTLY DISMISSED PLAINTIFFS’ CPA CLAIMS**

In Plaintiff’s Opening Brief we summarized the evidence presented to the Superior Court showing that Farmers knew its policy covered loss in value, but chose not to add an exclusion for business reasons — instead electing to unreasonably deny claims. *App. Br.* at 10-12; 38-39. The Superior Court was also presented with testimony from Debra Senn, the former Insurance Commissioner of this State, that Farmers’ conduct was *per se* unreasonable as a matter of practice in the industry, and also a *per se* violation of the Washington Administration Code governing its conduct. *App. Br.* at 40-42. Farmers never responded to this evidence below, nor obviously in its current brief. Instead, Farmers simply asserts (without citation) that “Moeller failed to establish that Farmers acted unreasonably” *Res. Br.* at 29.

If this Court finds Plaintiffs’ interpretation of the policy reasonable (as it should), then the record contains more than sufficient evidence to raise an issue of disputed fact as to the reasonableness of

Farmers' conduct. Therefore, the decision below should be reversed, and this matter remanded for trial. *See Leingang v. Pierce Cty. Med. Bur., Inc.*, 131 Wa.2d 133, 151, 930 P.2d 288, 297 (1997) (any violation of the WAC is a *per se* CPA violation).

III. THE TRIAL COURT CORRECTLY CERTIFIED THE CLASS

A. Farmers Incorrectly Asserts That All Class Members Must Suffer Damage from the Common Practice or Conduct

As noted above at 7-13, Plaintiff presented substantial evidence from his own, and Farmers' witnesses, that common evidence could show that diminished value *always* occurred on vehicles within the class *and* that the amount of damages suffered by the Class and individual Class members could be calculated based upon a common damage model. After the Class was certified Plaintiff in fact successfully finished the proposed damage model. *See above* at 13-15. Farmers' arguments on predominance, *Res. Br.* at 31-42, not only ignore this showing, but also well established class action law which draws a distinction between proof of a common practice causing harm and the amount of damages (if any) flowing from that practice as to any individual class member.

Although they cite several out-of-state decisions involving vastly different facts (which are never explained), Farmers fails to discuss this Court's recent decisions in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) or Division One's recent decision in *Sitton v. State*

Farm Mut. Auto Ins. Co., 116 Wn. App. 245, 63 P.3d 198 (2003), both of which are on point.

The *Smith* Court confronted a similar argument to Farmers in a case involving the alleged failure of wood sealant on thousands of homes — that predominance could not be satisfied because each use of sealant was somehow unique — and rejecting it reinforced the predominance test was whether there was “a common nucleus of operative facts to each class member’s claim.” 113 Wn. App. at 321, 54 P.3d at 674 (internal quotes and citations omitted). The *Smith* court did not require the class plaintiff to prove on class certification that all class members had suffered damages, it held the opposite, reiterating: “That class members may eventually have to make an individual showing of damages does not preclude class certification.” *Id.* (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

In *Sitton*, Plaintiffs alleged that State Farm’s denial of PIP payments as not “medically necessary” had been in bad faith. 116 Wn. App. at 249. Plaintiffs argued that once bad faith was shown, damages for all of the unpaid PIP benefits was *automatically* recoverable for the entire class. *Id.* at 258. State Farm, however, claimed that certain treatments it had denied were in fact *not medically necessary*. *Id.* at 259. The *Sitton* Court agreed that whether the requested treatment was “medically necessary” required an individual determination, and therefore there could

be no assumption of causation as undoubtedly some requested medical treatment was not necessary. *Id.* Despite the fact that certain Plaintiffs had suffered no injury,¹⁰ the *Sitton* Court still upheld certification noting that:

“The presence of individual issues may pose management problems for the judge, but as the chief commentator has observed, courts have a variety of procedural options to reduce the burden of resolving individual damage issues.”

Sitton, 116 Wn.App. at 254-55.¹¹ The Court further observed that:

“Challenges based on ... causation or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant’s liability.”

Id. at 255 n.22. As the *Sitton* Court concluded contrary to the predominance standard Farmers posits:

“In deciding whether common issues predominate over individual ones, the court is engaged in a ‘pragmatic’ inquiry into whether

¹⁰ State Farm’s predominance argument in *Sitton* was in fact identical to that made now by Farmers:

State Farm contends the claims of each class member will necessarily require litigation regarding the facts of each accident, the medical condition of each insured, the specific action taken by each review panel, individual causation, and individual damages. In essence, State Farm contends that the presence of individual issues regarding causation, reliance or damages precludes certification.

63 P.3d at 204.

¹¹ Differences in the amounts of, or ability to recover, damages do not defeat class certification. *Sitton*, 116 Wn.App. at 255; *Smith*, 113 Wn.App. at 323; *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 696 (9th Cir. 1977). Nor is it relevant that some plaintiffs will have incurred greater damages than others, as “the amount of damages is invariably an individual question and does not defeat class action treatment.” *Smith v. Univ. of Washington Law School*, 2 F.Supp.2d 1324, 1342 (W.D. Wa. 1998).

there is a 'common nucleus of operative facts' to each class member's claim."

Id. at 255. Rejecting a similar CR 23(b)(3) predominance challenge to that made by Farmers, the *Sitton* Court reasoned:

"State Farm contends, however, that case management problems will render class adjudication impossible. This is a matter best determined by the trial court....

Even with the myriad of management devices available, the management of any complex class action is likely to present a challenge. But forcing numerous plaintiffs to litigate the alleged pattern or practice of bad faith in repeated individual trials runs counter to the very purpose of a class action."

Id. at 256-57.

Having approved the certification of the class, the *Sitton* court then went on to reject a proposed trial plan. The court did not, however, reject the concept of aggregate damages, rather, the court as did the Superior Court here, carefully analyzed the facts of that case and how plaintiffs' proposed proof would affect other issues, and rejected the predominance standard Farmers now advances:

Under State Farm's interpretation of the predominance requirement, no subsection (b)(3) class could be certified where the claim requires resolution of individual issues such as causation and harm. We reject this interpretation of the rule as inconsistent with the purpose of class actions and as failing to consider judicial economy. Here, the central allegation is that State Farm's utilization reviews are not for the

purpose of determining whether medical treatment is covered, but are a means to wrongfully deny or limit benefits. A common nucleus of operative facts appears to exist on this issue, and that satisfies the predominance standard of Cr 23(b)(3).

63 P.3d at 205.

Farmers' argument — that the fact that certain members of a Class (due to unique facts, *e.g.*, a prior accident causing precisely the same damage to the vehicle) may have suffered no damages from the common practice prevents certification — is directly foreclosed by *Smith, Sitton*, and numerous other cases. To understand why, one must only look at the reason for the *Blackie v. Barrack* rule cited by the *Smith* and *Sitton* courts, as well as numerous other courts. *See e.g., In re: Visa Check/Master Money Antitrust Lit.*, 280 F.3d 124, 139-140 (2d Cir. 2001) (when Plaintiff presents theory that can demonstrate class wide damages, individual factors which may bar recovery do not prevent certification).

Blackie was a securities lawsuit resting from a defendant's failure to correctly report financial results in a 27-month period, a failure which was alleged to have inflated the defendant's stock price. 524 F.2d at 902. The *Blackie* court found that the common issue of whether the defendant's financial results were overstated predominated for all individuals who purchased or sold stock within the prescribed class period. *Id.* at 904-5. However, certain individuals who purchased (or sold) stock

during this period clearly suffered no damages because they, *e.g.*, bought at the inflated price and then sold at the inflated price for a net profit. These individuals (who were all within the objectively defined class), however, could be identified based upon their trading histories, and the *Blackie* Court reiterated that: “the amount of damages is invariably an individual question and does not defeat class action treatment.” *Id.* at 905. Instead, the *Blackie* Court found the total damages would be calculated for the class, and distributed to the class members who had suffered damages, based upon their individual trading histories. *Id.*; *see also Manual for Complex Litigation (Fourth)*, § 21.661 at 332-3 (Federal Judicial Center 2004) (describing claims administration procedures).

As Dr. Siskin and Dr. Welch both explained, this is precisely what will occur in this case. The classwide loss will be calculated, and presented in such a way that the trier-of-fact can exclude damages for those individuals who, although within the class (because they suffered certain types of damage that cause diminished value and face the same common question of contract construction), the trier-of-fact finds suffered no damage because of an individual factor, for example, their vehicle had already been damaged in the same area in a prior accident. This case therefore does not present circumstances where there is no predominant common question, but rather the well recognized principle that individual damages almost always vary, or may in fact be nothing for certain class

members.¹²

The *Blackie* rule, recently re-confirmed in *Smith* and *Sitton* to be Washington law, makes sense. Any other rule would allow a defendant to point to the existence of a few potential outlier class members with unusual facts to defeat a class action for thousands of similarly-situated consumers who were harmed. So long as the ultimate damage award properly accounts for the varying amounts of damages among class members — which, according to Dr. Siskin and Dr. Welch it will, *see above* at 9-15 — Farmers has no basis to complain if its total liability is determined in one proceeding.¹³

¹² *Weisfeld v. Sun Chemical Corp.*, 210 F.R.D. 136 (D.N.J. 2002) cited by Farmers involved an alleged antitrust conspiracy to refuse to hire competitors' workers creating a claimed restraint on the labor market. *Id.* at 138. Plaintiffs sought to certify a class including all of the named defendants' workers "who possess specialized knowledge and skills." *Id.* The sections of the *Weisfeld* opinion Farmers miscites involve a discussion of whether there could be a presumption of injury under antitrust law. (Not an issue in this case.) *Id.* at 142-3. Furthermore, the *Weisfeld* court did not refuse to certify the class because everyone actually affected by the practice had not been "damaged" but because plaintiffs could offer no possible proof that every individual in the class had been affected by the alleged antitrust violations. *Id.* at 143. Farmers' reliance on *Weisfeld*, a district court decision, also ignores the Third Circuit's decision in *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 155 (3d Cir. 2002). *Linerboard* upheld class certification where plaintiff had proposed statistical methodologies under which damages could be calculated at trial. That court explicitly rejected defendant's contention that plaintiff had failed to "prove" impact at the class certification stage, because "this court does not require plaintiffs to have selected a particular econometric model for demonstrating impact (or proving damages) at the class certification stage," in part because "the certification stage is early in the overall litigation process." *Id.* at 155; *accord*, *In re Visa Check/Master Money Lit.* 280 F.3d at 133-35 (same). *Newton v. Merrill Lynch*, 259 F.3d 154 (3d Cir. 2001), is similarly distinguishable in that it also involved a practice where it was impossible to tell if any individual proposed class member had suffered a loss from the practice, and the court refused to presume that such a loss had occurred. *Id.* at 179-80; 187-8. Both *Newton* and *Weisfeld* therefore presented situations where it was (unlike in this case) impossible to determine if any individual had suffered damages based upon common evidence, combined with a defendant's records, but instead individual proof of injury was required because there was no common issue.

¹³ Farmers' further citation to *Defraites v. State Farm Mut. Auto. Ins. Co.*, 864 So.2d 254 (La. App. 2004) does not support its argument. *Defraites* did not involve a suit by an insured against their own insurer for breach of contract as here, but instead a proposed class of *all* past and future people (third party plaintiffs) who were in accidents with State Farm insureds, and the insureds

B. The Certification of This Class Does Not Contemplate Bifurcation of the Issue of Liability Between the Trial and the Ensuing Claims Proceedings

Farmers next argues for the *first time on appeal* that the Certification Order “contemplates” an impermissible bifurcation of the issue of liability between the trial and the ensuing claims proceedings. The Superior Court was not given any opportunity to consider the alleged “improper bifurcation” arguments which are, in any event, meritless. This Court does not consider issues raised for the first time on appeal. *Wells v. Western Washington Growth Manage. Hear. Bd.*, 100 Wn. App. 657, 681, 997 P.2d 405 (2000) *citing* RAP 2.5(a). A lawsuit cannot be tried on one theory and appealed on others absent unusual circumstances. *Teratron General v. Institutional Investors Trust*, 18 Wn. App. 481, 489, 569 P.2d 1198 (1977). No special circumstances exist here.

Relying on *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995), Farmers mistakenly asserts there is an improper bifurcation of the liability issue in this matter. The *Rhone-Poulenc* case is factually and legally distinguishable.¹⁴ *Rhone-Poulenc* was a mass tort

whom they had the accidents with. *Id.* at 259. *Defraites* rejected such an unwieldy class for two reasons: First, it found that unlike here (where Farmers has contractual and statutory duties to its own insureds), State Farm owed no duty to adjust claims, absent a request to do so, as it was an antagonistic party to third party claimants. *Id.* at 260-263. Second, the *Defraites* plaintiff presented absolutely *no* testimony to show how loss in value could be calculated class wide. *Id.* at 261. Here, the record is very different and such evidence was presented.

¹⁴ In any event, CR 23(c)(4) expressly permits certification of limited issues, and putting aside the unusual holding of *In re: Rhone-Poulenc* (which does not bind this Court) bifurcation is frequently employed, and expressly recognized by the *Manual for Complex Litigation (Fourth)* § 21.24 at 272-4.

class with complex choice of law issues because it had been shown there were varying state laws. *Id.* at 1303. The *Rhone* Court determined that individual issues peculiar to personal injury claims precluded certification. *Id.* Here, all class members reside in the same state, there are no choice of law issues, and the claims are property damage claims, not personal injury claims.

The *Rhone-Poulenc* case is also factually distinguishable from the case at hand in that the trial judge did not think it was feasible to certify a class for the adjudication of the entire controversy, and certified the suit “as a class action with respect to particular issues” only. *Id.* at 1297 (emphasis added) . The trial structure established by the trial judge did not envisage the entry of a final judgment to be followed by a claims process (as in this case) but rather the rendition by a jury of a special verdict that would answer a number of questions concerning the defendants’ negligence. *Id.* If the special verdict found negligence, individual members of the class would then file individual tort suits in state and federal district courts around the nation using the special verdict in conjunction with collateral estoppel. *Id.*

The *Rhone-Poulenc* court noted that while bifurcation is permissible, it is improper for the judge to divide “issues” between “separate trials” in such a way that the same issue is re-examined by different juries. *Id.* at 1303. Bifurcation is however, never improper when

the same jury is to try the successive phases of the litigation. *Id.*¹⁵

Farmers now alleges the Class Certification Order “contemplates” bifurcation, but Farmers fails to cite to the record or to the Order in support of its argument. *Res. Br.* at 44-46. That is because there was no discussion or mention of bifurcation at the Superior Court level. Quite simply, Farmers has invented a trial structure that was not “contemplated” in any manner, or even discussed by, the Superior Court. As is clear from the record and the Class Certification Order, the Superior Court contemplated exactly the opposite — a single classwide trial. CP 1571, 1578, 1581.

Herein, the Superior Court certified a class to deal with all issues pertaining to the Class Members’ claims on a classwide basis, not just “particular issues.” The Superior Court specifically held that

“... based on the evidence and argument of counsel, that in the course of identifying the particular class members and in evaluating their particular cases, that the *Defendants in the case will be able to present any relevant information to the Court and jury in a classwide trial* and that classwide treatment is therefore preferable.”

CP 1578 (emphasis added). There is no bifurcation since the same jury will try all phases of the litigation.

¹⁵ Farmers also miscites *Sitton* in its brief, *Res. Br.* at 45, suggesting that it somehow found fault with bifurcation — it did not. *Sitton* instead struck down a trial plan which barred the Defendant from contesting liability, 63 P.3d at 206. Here the Superior Court expressly indicated that Farmers could present any relevant evidence it wished to contest liability. CP 1574, 1578, 1581.

Contrary to Farmers' further assertions, the "assessment of injury to each class member" will be made by the jury. The viability of the Defendants' "individual defenses" and their impact on the aggregate damage award will also be determined by the jury. For instance, if Farmers hypothetically contends that certain vehicles within the class do not suffer diminished value when involved in an accident, *e.g.*, non-luxury vehicles such as Ford Escorts, this individual claim can (if relevant admissible evidence is present to support it) be submitted by special interrogatories to the jury. Thus, if Plaintiffs are awarded damages, when the damages are distributed in a claims process after the jury verdict, if the jury found that non-luxury cars suffered no injury, then the amount awarded for classwide damages would reflect this finding and be lower. Accordingly, the Class Members who owned non-luxury cars (who would be identified in the claims process) would not be entitled to participate in the post-trial claims process — because they were found by the jury to have had no damages. As described above at 35-40, this is precisely what occurs in any class action case where a common practice affects large numbers of individuals yet some individuals, although affected by the practice, may have suffered no actual damages as a result.

Finally, in furtherance of its argument, Farmers erroneously attempts to paint a claims process as a "judicial proceeding" when in fact it is merely an administrative, ministerial function that occurs after the trial

and after the jury findings. A claims process serves, post-trial, merely to divide the aggregate Class damages, by applying the jury findings to the Class Members' claims. *See generally* Herbert Newberg & Alba Conte, *Newberg on Class Actions* (4th ed. 2004) ("*Newberg*") §§ 10.2; 10.5.

C. **The Court's Certification Order Does Not Impermissibly Shift the Burden of Proof to Farmers**

Farmers contends that the Class Certification Order impermissibly shifts the burden of proof to Farmers to disprove liability. *Res. Br.* at 42-44. Farmers can point to no language in the class certification order to support its claim, and there is none. As Plaintiff's Counsel repeatedly explained at the class certification hearing, if Plaintiffs fail to prove at trial that diminished value occurs for the class vehicles, or if Farmers' proof reduces or eliminates certain cars in the claimed damages, then the jury will either reduce the award or enter judgment for Farmers as appropriate. The Superior Court's jury instructions will explain the parties' respective burdens of proof at trial. There is simply no support for Farmers' claim that the Superior Court has "shifted" the burden of proof.

In essence, Farmers strategy to defeat class certification below was to point to hypothetical (and as yet unproved) defenses, such as the notion that some cars' values may be *enhanced* by a wreck. The law is clear, however, that such hypothetical individual issues do not defeat class certification. *See, e.g., In re Linerboard Antitrust Lit.*, 305 F.3d at 163

(noting that individual challenges which go to the right of a class member to recover, rather than the underlying common issues of Defendant's liability do not prevent certification); *Miner v. Gillette Co.*, 87 Ill.2d 7, 19-20, 428 N.E.2d 478, 485 (Ill. 1981) (“[T]he hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action. Where it appears that the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action.”) (quoting *Harrison Sheet Steel Co. v. Lyons*, 15 Ill.2d 532, 538, 155 N.E.2d 595, 598 (Ill. 1959)). Furthermore, Defendants' contention that a wreck can improve a vehicle's value is not only facially absurd,¹⁶ but is not even supported by the evidence that Farmers submitted below, and now cites to this Court. (*Res. Br.* at 35 citing CP823.)¹⁷ Farmers submitted not one claims file or actual example below to prove that this situation occurs within the class. More importantly, the jury, not this Court, should decide at trial whether Farmers has proved its theory that vehicle values can be increased in value by a wreck and repair, and then take this into account in its award of damages.

¹⁶ One never sees used car dealers advertising their “wrecked and repaired” cars as superior, for example.

¹⁷ Farmers cites its expert Mr. West for the assertion that post-collision repair “can increase the car's value,” for example where a car's hood has rock-chipped paint before the accident. *Res. Br.* at 35. However, in the cited section CP823, Mr. West actually said something quite different: he opined that a consumer whose vehicle has a rock-chipped hood and who gets in a front-end wreck supposedly “saves” the \$800-\$1200 that it would have cost him to repair the chipped paint. However, Mr. West makes *no* attempt to correlate this purported “benefit” with a change in the vehicle's value, or with the consumer's “loss” as defined in the insurance policy. Mr. West pointedly does *not* say that the rock-chipped vehicle's value has increased from the accident - such a conclusion would be absurd.

Finally, ample authority supports allowing damages to be calculated in the aggregate for purposes of a jury trial, with the allocation of damages to particular class members to be accomplished through a claims procedure. *See, e.g., In re Antibiotic Antitrust Actions*, 333 F.Supp. 278, 281 (S.D.N.Y.), *amended*, 333 F.Supp. 291 (S.D.N.Y.), *mandamus denied*, 449 F.2d 119 (1971) (“It is far simpler to prove the amount of damages to the members of the class by establishing their total damages than by collecting and aggregating individual damage claims as a sum to be assessed against the defendants.”); *Greenhaw v. Lubbock County Beverage Ass’n*, 721 F.2d 1019, 1029 (5th Cir. 1983), *overruled other grounds*, *International Woodworkers of America, AFL-CIO v. Champion Intern. Corp.*, 790 F.2d 1134 (5th Cir. 1986) (aggregated damages award affirmed); *In re Sugar Industry Antitrust Litig.*, 73 F.R.D. 322, 351 (E.D. Pa. 1976) (“the most suitable procedure for the determination of damages sustained by the proposed consumer classes in this litigation, if any, is either by an aggregate class-wide approach or through individualized evidence based on proven and accepted statistical methods.”); *see generally Newberg* §§ 10.1, 10.2, 10.5. The court’s extended discussion of aggregate damages in *In re: NASDAQ Market-Makers Antitrust Lit.*, 169 F.R.D. 493, 524-6 (S.D.N.Y. 1996) explains that such an approach is not only permissible, but has “obvious case management advantages” including eliminating individual damage proofs at trial.

D. The Class Certified In This Case Is Not a Fail-Safe Class

Farmers' final argument is fundamentally dishonest. As Farmers' counsel well knows, Plaintiffs' expert Dr. Siskin in fact *completed* his analysis of his data, then applied it to a sample of Class members, and was in the process of obtaining the final information from Farmers to complete his report when summary judgment was granted. *See above* at 13-15; CP229-234. Farmers' counsel then deposed him for two full days. Despite this, Farmers spends *four full pages, Res. Br. 46-49*, arguing based upon the record as of *class certification* that Dr. Siskin might not be able to run his data or develop a model. Farmers' argument based upon facts as of the time of class certification, facts it knows no longer exist, is entitled to no consideration. In any event, the merits are not to be resolved at class certification. *See above* at 4-5.

The further question raised in a footnote of Farmers' brief of whether the Class certified in this matter is a fail-safe class presents two separate and distinct issues. The first is whether the Class is ascertainable by objective criteria. The second is whether a judgment against Farmers will be binding on all Class Members. A fail-safe class creates one-sided results. *Intratex Gas Company v. Beeson*, 22 S.W.3d 398, 405 (Tex. 2000). A fail-safe class arises in a situation where, if the defendant is found liable, then and only then is class membership ascertainable and the litigation comes to an end. *Id.* A determination that the defendant is not liable,

however, obviates the class, thereby precluding the proposed class members from being bound by a judgment. *Id.*

For a class to be sufficiently defined, it must be precise and the class members must be presently ascertainable by reference to objective criteria. *Intratex*, 22 S.W.3d at 403. A class should not be defined by criteria that are subjective or that require an analysis of the merits of the case. *Id.* The Superior Court below expressly recognized and applied this standard to the facts before it. A14 (*citing In re: Copper Antitrust Lit.*, 196 F.R.D. 348 (W.D. Wis. 2000)). The Class defined herein does not suffer from the infirmities described in *Intratex* and similar cases.

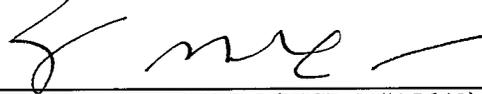
The Class defined herein is based on objective criteria that is ascertainable from the Defendants' own corporate records, and Plaintiffs were in fact able to mail notice and precisely identify Class members from Farmers' own records. CP231-3. An improper permissive intervention will not occur because the merits are not being determined before the identities of the parties to be bound are known. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment, find diminished value is a covered loss under Farmers' policy, uphold certification, and then remand for further proceedings.

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CERTIFICATE OF SERVICE

I certify that on June 25, 2004, I caused a true and correct copy of this Reply Brief of Appellant/Brief of Cross Respondent to be served on Counsel for Respondent via United States Mail:

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