

Cross-App. Brief

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No. 30880-1-II

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

DAVID MOELLER,

Appellant,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and
FARMERS INSURANCE EXCHANGE,

Respondents/Cross Appellants.

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DIVISION II
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ASSIGNMENTS OF ERROR ON CROSS APPEAL

Assignment of Error

1. The trial court erred in granting plaintiff's motion for certification of a CR 23(b)(3) class.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion in granting plaintiff's motion for class certification when (a) plaintiff did not and cannot prove that every member of the proposed class sustained diminished value injury; (b) the ruling resulted in an improper shift of the burden of proof and contemplated an impermissible bifurcation of proceedings; and (c) the court failed to realize that if the case were to go to trial as a class action and plaintiff failed to establish classwide injury, because the consequence would be decertification, no judgment could be entered in the insurer's favor binding the unnamed class members. (Assignment of Error 1).

STATEMENT OF THE CASE

I. Statement of Facts

A. Accident and Insurance Coverage

In November 1998, Plaintiff/Appellant David Moeller's car was damaged in a collision. CP 39.

Moeller had insurance coverage under a Farmers Insurance Company of Washington (FIC) automobile insurance policy. CP 1-34. In relevant part, the policy provided:

PART IV – DAMAGE TO YOUR CAR

* * *

Coverage G – Collision

We will pay for **loss to your insured car** caused by **collision** less any applicable deductibles.

CP 19. “**Loss**” was defined as “direct and accidental loss of or damage to **your insured car**, including its equipment.” *Id.*¹ The phrase “**your insured car**” included the “vehicle described in the Declarations of this policy,” CP 12; and the term “**collision**” was defined as “collision of **your insured car** with another object or upset of **your insured car**.” CP 19.

The payment obligation described in the policy was subject to a contractual limitation of liability that read, in pertinent part, as follows:

Limits of Liability

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

1. The amount 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. . . .

¹ In the general definitions section of the policy, “**accident**” was defined as “a sudden event . . . resulting in **bodily injury** or **property damage** neither expected nor intended by the **insured person**.” CP 12. “**Property damage**” was defined as “physical injury to or destruction of tangible property, including loss of its use,” while “**damages**” were defined as “the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**.” *Id.*

CP 20, 33. The policy also gave FIC the option of paying the insured for the loss or repairing the car:

Payment of Loss

We may pay the **loss** in money or repair or replace damaged or stolen property.

CP 20. If Moeller and FIC did not agree regarding the loss, either party was allowed to demand an appraisal. Id.

B. Post-Accident

FIC elected to repair Moeller's damaged car. CP 79-80. After Moeller authorized the repairs, FIC paid the full cost, less Moeller's \$500 deductible. Id. After acknowledging that the repairs were "complete" and "acceptable," Moeller demanded that in addition to repairing his car, FIC pay him for the "diminished value" of his car. CP 80, 41. FIC rejected Moeller's demand. CP 41.

II. Procedural Background

In his Third Amended Class Action Complaint, Moeller asserted claims for breach of contract, insurance bad faith, Consumer Protection Act ("CPA") violations, and failure to make prompt payment of his insurance claim in alleged violation of provisions of the Washington Administrative Code. CP 36-47. Moeller brought these claims on his own behalf and on behalf of a putative class of FIC policyholders residing in the state of Washington. Id. The latter claims hinged on proof that FIC's

insureds sustained diminished value injury and that such injury was a compensable loss under the insurance policy. Id.

On September 13, 2002, the trial court granted Moeller's motion for class certification. CP 1569-83. Appointing Moeller as class representative, the court certified a CR 23(b)(3) class of:

[A]ll persons who: (1) were insured pursuant to a casualty automobile insurance policy issued by Farmers for the state of Washington; (2) received payment under their collision or comprehensive coverages for damage to an insured automobile from May 30, 1993 to the date of class certification in this action; and (3) did not receive payment for inherent diminished value where: (a) the repair estimate including supplements totaled at least \$1,000, (b) the vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident, and (c) the vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

Excluded from the class are Defendants; their officers and directors; this Court and any member of the Court's immediate family; and those individuals whose vehicles were leased or total losses.

CP 1582.

Court Commissioner Schmidt denied the request of defendants/respondents FIC and Farmers Insurance Exchange (collectively, "Farmers") for discretionary review of the class certification ruling. Ruling Denying Review (Docket No. 29480-0-II, Jan. 10, 2003).

In May 2003, Farmers moved for summary judgment on the grounds that the insurance policy at issue did not require payment of diminished value claims and that Moeller's bad faith and consumer protection act claims were barred because Farmers' decision that the policy did not cover diminished value claims was reasonable as a matter of law. CP 81-104. The trial court orally granted Farmers' motion in July 2003, RP (Judge's Ruling, July 29, 2003) 1-17, and entered judgment in Farmers' favor in September 2003.

Moeller appealed the judgment entered in Farmers' favor, assigning error to the trial court's rulings on Moeller's breach of contract and CPA claims. Appellant's Brief ("App. Br.") at 1-3. Although Farmers believes the court's summary judgment ruling is correct, in the event the judgment is reversed, Farmers is cross appealing the class certification ruling. CP 1584-1602.

SUMMARY OF ARGUMENT

The issue on appeal is whether an insurer that has issued an automobile insurance policy limiting the insurer's liability to the amount necessary to repair the insured's car is required to pay an additional sum to the insured for any diminution in the car's value resulting from the fact that the car has been involved in a collision. According to Moeller, when certain vehicles are involved in certain types of accidents, there is a

difference between the pre-accident value of the vehicle and the vehicle's value after it is repaired and returned to the insured. Moeller refers to that difference as diminished value and claims that in addition to the return of his repaired car, he was entitled to payment for that difference in value. Although the question of a first-party insured's contractual entitlement to payment for a vehicle's diminished value is one of first impression in this state, it is a question that has been addressed by numerous courts around the country. Recently, a majority has ruled, as did the trial court in this case, that the plain language of the insurance policies at issue is unambiguous and does not require the insurer to pay a first-party insured for more than the cost of repair.

The cross appeal in this matter will be moot if the summary judgment entered in Farmers' favor is affirmed. If, however, the judgment is reversed in whole or in part, the issue on cross appeal is whether class certification under CR 23(b)(3) was proper. Farmers respectfully submits that the trial court abused its discretion when it granted class certification: (1) because Moeller failed to satisfy the predominance requirement of CR 23(b)(3), (2) because class certification resulted in an improper shifting of the burden of proof, (3) because the certification order contemplated an impermissible bifurcation of trial proceedings, and (4) because the class certification order would not have allowed Farmers

to obtain a judgment binding on the class, even though the class would have been able to obtain a judgment binding on Farmers had Moeller proved his case.

ARGUMENT

I. Moeller's Insurance Policy Did Not Require FIC to Pay Moeller For Any Diminished Value In Addition to the Cost of Repair.

A. Standard of Review

Because insurance policies are construed as contracts, they are interpreted as a matter of law. See, e.g., Spratt v. Crusade Ins. Co., 109 Wn. App. 944, 948, 37 P.3d 1269, review denied, 147 Wn.2d 1003 (2002). Summary judgment is appropriate and the trial court's interpretation of the policy is reviewed de novo. See Allstate Ins. Co. v. Peasley, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997); Allstate Ins. Co. v. Bauer, 96 Wn. App. 11, 13, 977 P.2d 617 (1999).

B. The Plain and Unambiguous Language of Moeller's Insurance Policy Required FIC To Pay Only the Cost of Repair, Less the Deductible.

When interpreting an insurance policy, the policy, including endorsements, is considered as a whole and every provision in it is given effect, if possible. See, e.g., Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). The policy language is interpreted the way it would be understood by the average insurance

purchaser. See Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 666, 15 P.3d 115 (2000). Terms that are not defined by the policy are given their “plain, ordinary and popular” meaning. See Kitsap County, 136 Wn.2d at 576. That meaning may be ascertained by reference to standard English dictionaries. Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha, 126 Wn.2d 50, 77, 882 P.2d 703 (1994). The specialized knowledge of an alleged expert is not relevant to the question of how the average person would understand the policy. See Spratt, 109 Wn. App. at 950.

When the policy language is clear and unambiguous, the policy must be enforced as written and the court cannot modify it or create ambiguity where none exists. See, e.g., Allstate Ins. Co. v. Peasley, 131 Wn.2d at 424. Policy language is ambiguous only if, on its face, it is fairly susceptible to two different but reasonable interpretations. See id. A policy is not rendered ambiguous merely because the parties attribute different meanings to particular provisions. See Weyerhaeuser, 142 Wn.2d at 667; Stouffer & Knight v. Continental Cas. Co., 96 Wn. App. 741, 749-50, 982 P.2d 105 (1999), review denied, 139 Wn.2d 1018 (2000). Nor is it ambiguous merely because it is complex or because its provisions are interrelated. See Hess v. N. Pac. Ins. Co., 122 Wn.2d 180, 186, 859 P.2d 586 (1993). It is the responsibility of the court to determine

as a matter of law whether policy language is ambiguous. See Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn. App. 791, 800, 65 P.3d 16, petition for review filed (Wash. Dec. 15, 2003); Baehmer v. Viking Ins. Co. of Wisconsin, 65 Wn. App. 301, 303-04, 827 P.2d 1113 (1992); Spratt, 109 Wn. App. at 949-52.

In this case, the trial court properly concluded that Moeller's insurance policy was unambiguous and that it did not require payment for any diminished value. When presented with Moeller's damaged car, FIC elected to repair the car, as the policy plainly allowed it to do. CP 20. Instead of asserting that his car was unrepairable, Moeller authorized the proposed repairs and then accepted his repaired car, acknowledging that the repairs were "complete" and "acceptable." CP 80. Moeller's subsequent demand for payment of an additional sum representing the alleged diminished value of his car was properly rejected by FIC because the policy limited FIC's liability to what it cost to repair Moeller's car. CP 20, 33.

Based on the unambiguous language in Moeller's policy and the fact that FIC had already fully complied with its contractual obligation by paying for the repair of Moeller's car, less the deductible, the trial court

properly granted summary judgment in Farmers' favor.² As shown below, Moeller's challenges to the ruling are not well taken.

C. When Used in Connection with a Damaged Vehicle, the Word "Repair" Means "Mend" or Put Back into Working Order, It Does Not Mean Restore the Vehicle to Factory Condition or to the Exact Condition of the Vehicle As It Was Before the Accident

On this appeal, Moeller argues that the trial court erred by ignoring evidence that Moeller's car and others similarly damaged "were incapable of being repaired to pre-loss condition." App. Br. at 1. The key question,

² Moeller's assertion that "[i]t is well settled as a matter of tort law that diminished value is recoverable under these circumstances," Appellant's Brief at 1, is irrelevant and misleading because this is a contract case, not a tort case. See, e.g., Pritchett v. State Farm Mut. Auto Ins. Co., 834 So. 2d 785, 788-89 (Ala. Civ. App.) (acknowledging that diminished value may be recoverable in third-party cases where claims are governed by tort principle that injured parties should be made whole, but noting that contract principles govern first-party claims and holding that insurance policy did not require insurer to pay insured for diminished value), cert. denied (Ala. 2002); Gen. Accident Fire & Life Assur. Corp. v. Judd, 400 S.W.2d 685, 687 (Ky. 1966) (characterizing first-party insured's suit as "nothing more than a suit on and for a breach of contract" and rejecting insured's claim for diminished value); Townsend v. State Farm Mut. Auto Ins. Co., 793 So. 2d 473, 479-80 (La. Ct. App.) ("State Farm's obligation to indemnify Townsend when a first-party claim is submitted due to a collision is limited by the terms of the contract. It is not governed by tort principles. Bootstrapping the standards for measuring damages when property is damaged through the fault of another to the contractual coverage provided by an insurer for first-party collision claims would result in a new contract, one enlarged beyond what is reasonably contemplated by the clear terms set forth therein. . . ."), writ denied, 804 So. 2d 635 (La. 2001); Bickel v. Nationwide Mut. Ins. Co., 206 Va. 419, 143 S.E.2d 903, 905 (1965) ("[T]he present action is not an action for damages, but is brought upon a contract of insurance, and . . . the provisions of the contract govern the measure of recovery rather than any rules applicable to cases sounding in tort;" rejecting diminished value claim).

however, is the meaning of the term “repair” in the context of FIC’s insurance policy.

In common usage, the word “repair” means “to restore by replacing a part or putting together what is torn or broken: FIX, MEND.”³ Webster’s Third New International Dictionary of the English Language 1923 (2002), or, as the court in Carlton v. Trinity Universal Ins. Co., 32 S.W.3d 454, 464 (Tex. App. 2000) stated, “[t]o bring back to good or usable condition” (citing Riverside Webster’s II Dictionary 580 (rev. ed. 1996)). See also Black’s Law Dictionary 1298 (6th ed. 1990) (defining “repair” as “to mend, remedy, restore, renovate. To restore to a sound or good state after decay, injury, dilapidation or partial destruction”; also noting that the word “repair” contemplates restoring an imperfect thing “to the condition in which it originally existed, as near as may be.”).

When used with regard to a vehicle, the word repair “connotes something tangible, like removing dents or fixing parts.” Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 158 (Tex. 2003). When used in an auto insurance policy, the contractual obligation to “repair” a damaged vehicle means that the vehicle has to be repaired “in a workmanlike

³ The definition of “mend” is “to put into good shape or working order again: patch up: REPAIR.” Webster’s Third New International Dictionary of the English Language 1410 (2002).

manner and . . . returned to substantially the same form as before the accident.” O’Brien v. Progressive N. Ins. Co., 785 A.2d 281, 290 (Del. 2001); accord, e.g., Siegle v. Progressive Consumers Ins. Co., 788 So. 2d 355, 360 (Fla. Dist. Ct. App. 2001) (observing that an insurer’s obligation to repair a car means that the car must be “restore[d] to a good condition”), approved, 819 So. 2d 732 (Fla. 2002); Owens v. Pyeatt, 248 Cal. App. 2d 840, 849, 57 Cal. Rptr. 100 (1967) (policy’s obligation of repair required that the car be placed “substantially in the condition it was before the accident”). It “does not require the insurer to restore the vehicle to factory condition or even to the condition of the vehicle before the accident.” O’Brien, 785 A.2d at 290; accord Johnson v. State Farm Mut. Auto Ins. Co., 157 Ariz. 1, 754 P.2d 330, 331 (Ariz. Ct. App. 1988) (with policy allowing insurer choice of repairing or replacing property, finding that “nowhere in the policy does there appear any language which requires State Farm either to restore the vehicle to its pre-accident condition or to pay the insured the difference in value after the accident as opposed to before.”).

Although Moeller argues that FIC should be required to compensate him because his vehicle could not be “repaired to its ‘pre-loss condition,’” App. Br. at 1, he points to no language in the policy that expands the repair requirement to one of restoring a damaged vehicle to

exactly its “pre-loss condition.” 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. In both cases, the item is repaired when it is put in good working order again, and returned to substantially the same form as before the accident. In neither case is the repaired item in exactly the condition it was before the accident, but the fact that it may therefore not be of the same value does not mean that it was not adequately repaired. See Hall v. Acadia Ins. Co., 801 A.2d 993, 995 (Me. 2002) (“The act of repairing an object typically focuses upon restoring the object’s function and purpose, and not upon returning the object to its earlier worth or value.”); see also Johnson v. Illinois Nat’l Ins. Co., 818 So. 2d 100, 104 (La. Ct. App. 2001) (“The fact that a damaged, but adequately repaired, vehicle may realistically have a lesser value in the marketplace has nothing to do with the ‘quality’ of the repair itself.”), writ denied, 809 So. 2d 139 (La. 2002).

In this case, Moeller does not argue that any repair was not done that could have been, or that his repaired car was not fully functioning when it was returned, or that the car was unrepairable and should have

been treated as a total loss.⁴ Indeed, it is undisputed that Moeller authorized the repair of his car and then acknowledged in writing that the repairs were “complete” and “acceptable.” CP 80. Nevertheless, he now points to the opinions of two alleged experts, one of whom opined that “even if a vehicle is repaired to the best of human ability in a body shop setting, the wrecked vehicle cannot be completely restored to its pre-loss factory assembled condition.” CP 160. The other declared that “the steel parts, including their metallurgical properties, on collision-damaged and repaired automobiles are not the same as those parts on the original manufactured vehicle before a collision has occurred.” CP 171. Even accepting the opinions as true for purposes of summary judgment analysis, Moeller’s argument fails because nowhere in the insurance policy is it stated that the repair obligation cannot be fully satisfied unless the

⁴ See Ray v. Farmers Ins. Exch., 200 Cal. App. 3d 1411, 1417, 246 Cal. Rptr. 593, 595 (1988) (quoting 15 Couch on Insurance § 54:29, p. 432 (2d ed. 1983) for the statement “[w]here the insurer, in the exercise of its option to repair, restores the automobile to its normal running condition, there is by hypothesis no total loss of the insured vehicle.”). Moeller does not argue that his car was not restored to its “normal running condition.”

Moeller’s effort to align himself with the plaintiff in Barton v. Farmers Ins. Exch., 255 S.W.2d 451 (Mo. Ct. App. 1953), instead of the plaintiff in Ray, App. Br. at 26-27 n.5, should be rejected. As several courts have noted, Barton is distinguishable on the ground that it dealt with inadequate repairs, not diminished value. See Camden v. State Farm Mut. Auto Ins. Co., 66 S.W.3d 78, 83 (Mo. Ct. App. 2001); transfer denied (Mo. 2002); Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 20-21 (Mo. Ct. App. 2002); Johnson v. State Farm Mut. Auto Ins. Co., 157 Ariz. 1, 754 P.2d 330, 331 (Ariz. Ct. App. 1988).

damaged vehicle is “completely restored to its . . . factory assembled condition” (a condition it may or may not have been in before the collision) or somehow put in exactly the same condition as it was in before the collision occurred. See, e.g., O’Brien, 785 A.2d 281 (rejecting diminished value claim of insured who admitted his vehicle was properly repaired, but maintained he should be indemnified for diminished value resulting from “residual physical damage.”)

Moeller’s expansive re-definition of “repair” is simply an effort to incorporate the element of value. He makes this clear in his amended complaint, where he alleges that Farmers breached the insurance contract “by not restoring vehicles to their pre-loss condition through payment of the difference in value between the vehicle’s pre-loss value and its value after it was damaged, properly repaired and returned.” CP 44. In other words, according to Moeller, even when a vehicle is “properly repaired” (i.e., physically mended), it is not “repaired” as that term is used in the insurance policy unless the insured is also paid for the diminished value of the vehicle.

Merely stating the proposition reveals its flaws. “There is no concept of ‘value’ in the ordinary meaning of the word ‘repair.’”

Campbell v. Markel Am. Ins. Co., 822 So. 2d 617, 627 (La. Ct. App. 2001), writ denied, 805 So. 2d 204 (La. 2002); accord Pritchett v. State

Farm Mut. Auto Ins. Co., 834 So. 2d 785, 791 (Ala. Civ. App.) (“The various definitions of repair do not discuss the concept of value. We do not believe that in its common usage, the term ‘repair’ is understood to encompass the concept of value or require a restoration of value.”), cert. denied (Ala. 2002); Townsend v. State Farm Mut. Auto. Ins. Co., 793 So. 2d 473, 478 (La. Ct. App.) (“The generally prevailing meaning of repair does not encompass restoration of value, an item of damage that cannot be physically repaired.”), writ denied, 804 So. 2d 635 (La. 2001); Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132, 135 (2003) (“There is no concept of value in the ordinary meaning of” the words “repair” and “replace”); Wildin v. Am. Family Mut. Ins. Co., 249 Wis. 2d 477, 638 N.W.2d 87, 90 (Wis. Ct. App. 2001) (“‘Repair’ is not ordinarily understood to mean to restore to pre-broken or pre-collision market value”), review denied, 644 N.W.2d 686 (Wis. 2002). “To ascribe to the words “repair or replace” an obligation to compensate the insured for things that, by their very nature, cannot be ‘repaired’ or ‘replaced’ would violate the most fundamental rules of contract construction.” Campbell, 822 So. 2d at 619, 627 (rejecting diminished value claim of insured who did not assert that insurer had failed to perform quality repair jobs on vehicles in question, but argued that vehicles that have been in an accident are “by the very nature of their damage and subsequent repair,

worth less than similar vehicles that have not been damaged”); accord Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 725 (5th Cir. 2002) (“‘repair or replace’ policy language does not require the insurer to pay for diminished value”); O’Brien, 785 A.2d at 286, 290 (concluding policy did not require insurer to pay for any diminution in value “resulting from the minute physical imperfections that are inherent to any repair, so long as repairs have been completed in a workmanlike manner and the vehicle has been returned to substantially the same form as before the accident;” rejecting diminished value claim of insured who argued that his vehicle “was not restored to its pre-loss condition because, after the completion of the repairs, the vehicle was worth less than it was before the collision.”); Roth v. Amica Mut. Ins. Co., 440 Mass. 1013, 796 N.E.2d 1281, 1283 (2003) (affirming summary judgment in favor of insurer on insured’s claim for compensation for “inherent diminished value” of repaired vehicle); Black v. State Farm Mut. Auto Ins. Co., 101 S.W.3d 427 (Tenn. Ct. App. 2002) (same), appeal denied (Tenn. 2003). This Court should reject Moeller’s effort to redefine the word “repair” so as to include payment for any diminished value resulting from damage not susceptible to repair or replacement.

D. An Insurance Policy Requiring that A Damaged Vehicle Be Repaired With Replacement Parts “Of Like Kind and Quality” or With New Parts Less An Adjustment for Betterment or Depreciation Does Not Require That A First-Party Insured Be Paid For A Vehicle’s Diminished Value

The policy’s limitation of liability clause provided that FIC’s liability for any loss would not exceed “[t]he amount 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.” CP 20, 33.⁵ A repair or replacement with property “of like kind and quality” requires a vehicle to be restored to good condition with parts and workmanship of the same essential nature that

⁵ Under Part IV-Damage to Your Car, the Limits of Liability provision reads as follows:

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

1. The amount 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. Deductions for betterment and depreciation will be taken only for parts normally subject to repair or replacement during the useful life of **your insured car**. Deductions will be limited to the lesser of the following:
 - a. an amount equal to the proportion that the expired life of the part to be repaired or replaced bears to the normal useful life of that part.
 - b. an amount which the resale value of **your insured car** is increased by the repair or replacement.

CP 20, 33; compare WAC § 284-30-390(8).

existed on the vehicle prior to the accident. See Johnson v. Illinois Nat'l Ins., 818 So. 2d at 104; see also Siegle v. Progressive Consumers Ins. Co., 819 S.2d 732, 736 (Fla. 2002) (holding that policy's reference to "of like kind and quality" was "properly interpreted to require that the insurer place the insured in possession of a car 'the same or nearly the same' as the damaged auto, in terms of the 'fundamental nature' and 'degree of excellence' of the automobile."); Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16, 22 (Mo. Ct. App. 2002) ("[A]pplying the common prevailing meaning, a 'repair . . . with other of like kind and quality' would require [insurer] to restore the damaged automobile to good, sound condition with parts and workmanship of the same essential quality or character that existed on the automobile prior to the accident."); cf. Schwendeman v. USAA Cas. Ins. Co., 116 Wn. App. 9, 22, 65 P.3d 1 (2003) (accepting trial court's determination that "like kind and quality" does not mean new parts, nor does it mean "identical in every regard regardless of materiality"). "This restoration of the damaged vehicle may or may not return it to its pre-accident market value, but a return to market value is not what the words 'repair' with 'like kind and quality' commonly mean." Johnson v. Illinois Nat'l Ins., 818 So. 2d at 104; accord Johnson v. State Farm, 754 P.2d at 331 (ruling that policy with language requiring insurer to pay "to repair or replace the property or part with like kind and quality" did not

require insurer to pay insured for diminished value of insured's vehicle); Gen. Accident Fire & Life Assur. Corp. v. Judd, 400 S.W.2d 685, 687 (Ky. 1966) (finding insurance policy that limited liability to the amount it would cost "to repair or replace the property or such part thereof with other of like kind and quality" did not require a restoration of value but only a restoration of the vehicle to "as substantially good physical condition as it was before the accident," while acknowledging that a car damaged in a collision may never be fully restored to its pre-collision market value); Lupo, 70 S.W.3d at 19 (finding that provision obligating insurer to repair or replace with like kind and quality "does not require a restoration of pre-accident value, but rather a restoration of the physical condition of the automobile"); Schaefer, 124 S.W.3d at 160 (rejecting insured's argument that phrase "of like kind and quality" required insurer to compensate insured for vehicle's diminished value); cf. O'Brien, 785 A.2d at 287 (reasoning that presence or absence of the term "like kind and quality" from insurance policies at issue was not dispositive with respect to whether the policies provided coverage for diminution of value; holding that unambiguous repair or replace language did not require insurers to pay for the diminished value of insureds' vehicles).⁶

⁶ Moeller's reliance on Hyden v. Farmers Ins. Exch., 20 P.3d 1222, 1225 (Colo.

Nor does the inclusion of a reference to an adjustment for depreciation if new parts are used to repair a damaged vehicle mean that the policy's "repair or replace" obligation is somehow converted to a "repair and pay for diminished value" obligation. In a similar lawsuit, the policy at issue contained a "Limits of Liability" provision stating that under the collision and comprehensive coverages, the limit of the insurer's liability for loss would "not exceed the actual cash value of the stolen or damaged property, nor what it would then cost to repair or replace it or such part with others of like kind and quality, less depreciation." Lupo, 70

Ct. App. 2000), cert. denied (Colo. 2001) is misplaced. No fewer than five appellate courts have flatly rejected the Colorado court's view that the phrase "of like kind and quality" requires an insurer to pay the insured for his or her repaired vehicle's diminished value. See Pritchett, 834 So. 2d at 793; Siegle, 788 So. 2d at 362; Johnson, 818 So. 2d at 104; Campbell, 822 So. 2d at 627; Schaefer, 124 S.W.3d at 157 n.3; see also Driscoll v. State Farm Mut. Auto. Ins. Co., 227 F.Supp.2d 696, 706-08 (E.D. Mich. 2002) (noting the Hyden court's holding, but concluding the "better view" is that the policies at issue did not require payment for diminished value); O'Brien v. Progressive N. Ins. Co., No. 99C-05-033-FSS, 2000 WL 33113833, at *5 (Del. Super. Dec. 18, 2000) (distinguishing Hyden on grounds that the dispute between the insured and insurer concerned claim "that [insured's] car was 'totaled' and not repairable"; holding insurer's obligation to repair vehicles damaged in collisions did not include paying insureds for repaired vehicles' diminished value), aff'd, 785 A.2d 281 (Del. 2001).

On the other hand, Moeller's discussion of Hess v. N. Pac. Ins. Co., 122 Wn.2d 180, 859 P.2d 586 (1983), App. Br. at 24-25, is just plain misleading inasmuch as Moeller fails to explain that the case involves a homeowners policy, where the issue was whether an insured who does not repair or replace a destroyed building is entitled to collect the replacement cost, which presumably would have exceeded the cash value of the destroyed building. In other words, the circumstances were the obverse of those presented here.

S.W.3d at 19. The appellate court in that case found that the policy was unambiguous and did not entitle a first-party insured to repair of the damaged vehicle *and* compensation for diminished value. See id. at 19-23; see also Campbell, 822 So. 2d at 620-29 (same outcome in case where limit of liability provision authorized insurer to pay actual cash value or “amount required to repair or replace the property at the time of loss with deduction for depreciation where it applies”). As the Lupo court explained, to hold the insurer liable for the vehicle’s diminished value “would make it an insurer of the automobile’s cash value in all instances and would render meaningless its expressed [sic] right under the ‘limits of liability’ provision to elect to repair or replace rather than to pay the actual cash value of the automobile at the time of the loss.” 70 S.W.3d at 22.

The Court should reject as unreasonable Moeller’s argument that the limits of liability clause in the FIC policy can be read as “simply capp[ing] Farmers’ liability at the pre-loss value of the vehicle so as to prevent financial betterment.” App. Br. at 9; also id. at 23.⁷ If the limitation of liability clause is read as Moeller argues, the repair option is ignored. Further, the repair clause cannot be read without consideration of

⁷ The Court should also reject Moeller’s repeated efforts to incorporate his trial court briefing into his appellate brief (e.g., App. Br. at 30, 31). See Kaplan v. Northwestern Mut. Life Ins. Co., 115 Wn. App. 791, 800 n.5, 65 P.3d 16, petition for review filed (Wash. Dec. 15, 2003).

the companion payment of loss provision, which specifically gave FIC the choice of paying a loss with money or repairing the vehicle. Moeller's argument would render meaningless FIC's choice of payment or repair. See Lupo, 70 S.W.3d at 22; see also O'Brien, 785 A.2d at 287-88 (observing that insured's reading of repair or replace provision would render "illusory and meaningless" insurer's contractual right to choose between paying cash value of damaged vehicle or paying to repair the vehicle); Bickel v. Nationwide Mut. Ins. Co., 206 Va. 419, 143 S.E.2d 903, 906 (1965) ("To apply [a diminished value] measure of damages would be arbitrarily reading out of the policy the right of defendant to make repairs or replace the damaged part with materials of like kind and quality."); cf. Unigard Ins. Co. of Seattle v. Wish, 254 Ark. 832, 496 S.W.2d 392 (1973) (reversing award in favor of insured for difference between fair market value of car before and after accident due to absence of evidence that car was a total loss, ordering entry of new judgment for insured in amount of repair cost less deductible).

E. Where, As Here, an Insurance Policy Does Not Provide Coverage for Diminished Value, the Absence of an Exclusion for Diminished Value Is Immaterial

Moeller also argues that his policy required payment of diminished value damages because such damages are not listed in the policy's "Exclusions" section. App. Br. at 8-9. In response to the same argument

in Schaefer, the Texas Supreme Court pointed out that an exclusion's purpose is to remove from coverage an item that would otherwise have been included, and that the absence of an exclusion cannot confer coverage. 124 S.W.3d at 160. "Because the policy's language does not obligate [the insurer] to pay for the diminished value of a car that has been fully and adequately repaired, the failure to include diminished value damages in the policy's Exclusion section is immaterial." Id.; accord Siegle, 819 So. 2d at 740; Given v. Commerce Ins. Co., 440 Mass. 207, 796 N.E.2d 1275, 1279 (2003); Camden v. State Farm Mut. Auto. Ins. Co., 66 S.W.3d 78, 82 (Mo. Ct. App. 2001). The same reasoning obtains here.

F. Moeller's Extrinsic Evidence Is Inadmissible

Although Moeller nowhere affirmatively asserts that any portion of his insurance policy is ambiguous, he argues that the trial court erred in declining to consider the extrinsic evidence he offered in support of his interpretation of the policy's limitation of liability clause. Here, too, Moeller is wrong.

In Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), the court held that ambiguity in the meaning of contract language need not exist before evidence of the circumstances surrounding the making of the contract could be admissible. In the context of insurance policies, this

means that when the terms of a policy are negotiated, extrinsic evidence may be admitted for the purpose of aiding in the interpretation of those terms. See Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa, 123 Wn.2d 678, 683, 871 P.2d 146 (1994). But when, as here, it is acknowledged that no policy term was negotiated, extrinsic evidence is inadmissible. See Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 124 Wn.2d 618, 629-30, 881 P.2d 201 (1994) (explaining that drafting history of insurance provision cannot be relevant unless known by insured as well as insurer when contract made); Spratt, 109 Wn. App. at 949-50 (holding that affidavit of English professor regarding meaning of policy terms should have been excluded as irrelevant); Stouffer & Knight v. Continental Cas. Co., 96 Wn. App. 741, 750 n. 10, 982 P.2d 105 (1999) (observing that internal memoranda of insurance company were not admissible “because they did not form any part of the basis of the contract.”).

Alternatively, if a court finds that a policy is ambiguous, it may admit extrinsic evidence to attempt to resolve the ambiguity. See Kitsap County, 136 Wn.2d at 576 (“If there is an ambiguity, extrinsic evidence, if any, of the parties’ intent may normally be considered.”); Queen City Farms, 126 Wn.2d at 82-88 (considering history of insurance industry statements to regulators only after determining that a key term in the

policy was ambiguous). *Before* admitting that extrinsic evidence, however, the court must determine that the policy on its face is fairly susceptible to two different but reasonable interpretations. See, e.g., Santos v. Sinclair, 76 Wn. App. 320, 324, 884 P.2d 941 (1994). Moeller would have this Court reverse these steps and admit extrinsic evidence for the purpose of establishing the “reasonableness” of his interpretation of the policy’s limits of liability provision. In other words, he is arguing that his extrinsic evidence should be admitted to prove ambiguity. It is not surprising that he cites no case supporting this inversion of the proper analysis when the law here and elsewhere is clear that extrinsic or parole evidence is admissible only after the court determines the contract is ambiguous. See Am. Star Ins. Co. v. Grice, 121 Wn.2d 869, 874, 854 P.2d 622 (1993) (“If an ambiguity exists, then the court may attempt to determine the parties’ intent by examining extrinsic evidence.”), opinion supplemented, 123 Wn.2d 131, 865 P.2d 507 (1994); Cook v. Evanson, 83 Wn. App. 149, 156, 920 P.2d 1223 (1996) (“A party can present drafting history to assist in determining a reasonable construction *after* the court finds a clause ambiguous.”), review denied, 131 Wn.2d 1016 (1997); Lupo, 70 S.W.3d at 20 (“This Court will not create an ambiguity by using extrinsic or parole evidence.”); Spellman v. Sentry Ins., 66 S.W.3d 74, 76-77 (Mo. Ct. App. 2001) (“[W]hen there is no ambiguity in the language of

[an insurance policy or other] contract, extrinsic evidence should not be introduced”), transfer denied (Mo. 2002); Carlton, 32 S.W.3d at 460 (“[B]ecause the policy language at issue here is not ambiguous, the rules of contract construction expressly prohibit us from considering parol or other extrinsic evidence;” declining to consider Texas Department of Insurance bulletin). Because the trial court properly held that Moeller’s policy was unambiguous, there was no error in refusing to consider the proffered extrinsic evidence.⁸

⁸ Similarly, the Court need not consider the views of Moeller’s “respected commentators.” See Camden, 66 S.W.3d at 81 (rejecting insured’s effort to “define the limitation of liability/‘repair or replace’ sections [of the policy] using numerous treatises. We find it unnecessary to resort to those treatises. The terms can be understood in the context of the policy.”).

In any event, it should be noted that Moeller’s reference to Blashfield’s Cyclopedia of Automobile Law and Practice, App. Br. at 27, omits any reference to the publication date. To the best of Farmers’ knowledge, Blashfield’s work has not been updated for more than 40 years. Similarly, the Appleman citation, id. at 28, is more than 30 years old. Neither commentator takes into account the current trend of the law, which is to deny diminished value claims made by first-party insureds. See Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132, 135 (2003) (“The majority of states to recently address the issue deny recovery for diminution in value.”).

Further, Moeller’s citation to Couch, App. Br. at 27-28, is misleading inasmuch as Moeller neglects to mention that his quoted language is described as “an opposing view.” 12 Couch on Insurance, § 177:19 (3d ed. 1997) available at WL Couch § 177:19 (database updated Dec. 2003). The cited section starts with the sentence: “By one view, an automobile collision policy limiting liability to actual cash value on what it would cost to repair or replace with an other [sic] of like kind and quality does not require that the repairs restore market value, but only restore physical condition.”

II. The Trial Court Properly Granted Summary Judgment on Moeller's CPA Claim.

Moeller's argument that the trial court erred in granting Farmers summary judgment on Moeller's CPA claim is predicated entirely on the assumption that the FIC policy required first-party insureds to be paid for diminished value. App. Br. at 38-43.⁹ Moeller argues that Farmers violated provisions of the Washington Administrative Code when Farmers "fail[ed] to disclose anything regarding diminished value" and told insureds that diminished value was "not a covered loss," *id.* at 39,¹⁰ and that these violations constituted per se unfair trade practices under the CPA.

Because the FIC policy does not require that Farmers repair first-party insureds' vehicles *and* pay for any diminished value the vehicles may have sustained, Moeller's assertions that Farmers violated

⁹ Moeller failed to assign error to the trial court's summary judgment ruling on his claims for insurance bad faith and failure to make prompt payment of his insurance claim, Counts II and IV in his Third Amended Class Action Complaint, CP 44-47, and presented no argument on these claims in his opening brief. Accordingly, any challenge to the trial court's ruling on these claims is waived. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

¹⁰ Moeller's characterization of the testimony of his expert witness, the former Insurance Commissioner of Washington, App. Br. at 40-42, should be disregarded because such extrinsic evidence is inadmissible when, as here, the insurance policy plainly and unambiguously provides that payment for diminished value is not required.

WAC § 284-30-350(1) (failure to disclose all pertinent benefits, coverages) and (2) (concealing benefits, coverages), and § 284-30-330(1) (misrepresenting policy provisions), (4) (refusing to pay claims without conducting a reasonable investigation), and (7) (compelling insureds to litigate to recover amounts due under policy), cannot stand. Moreover, Moeller introduced no evidence supporting his assertion that Farmers violated WAC § 384-30-330(3) (failing to adopt and implement reasonable standards for prompt investigation of claims).

In addition, Moeller failed to establish that Farmers acted unreasonably in rejecting his claim for diminished value. “RCW 19.86.920 imports the reasonableness standard into the CPA as a whole,” Am. Mfrs. Mut. Ins. Co. v. Osborn, 104 Wn. App. 686, 699, 17 P.3d 1229, review denied, 144 Wn.2d 1005 (2001), which means that to preclude summary judgment on his CPA claim, Moeller needed to establish the existence of a question of fact as to whether Farmers acted reasonably, see id. at 700. He failed to do this. The evidence was undisputed that a number of courts had ruled that first-party insureds are not entitled to diminished value payments. Indeed, in Ray v. Farmers Ins. Exch., 200 Cal. App. 3d 1411, 246 Cal. Rptr. 593, 595-96 (1988), the California Court of Appeal had looked at a Farmers policy and concluded if an insured’s vehicle was repaired to substantially the same condition as it had

been in prior to the accident, Farmers' contractual obligation was discharged. In this instance, Moeller had authorized the repair of his car and signed a written acknowledgment that the repairs were complete and acceptable. Under these circumstances, there could be no question as to the reasonableness of Farmers' actions.

Finally, if a per se unfair trade practice violation is established, a plaintiff pursuing a CPA claim still has to prove that the violation caused a recognized injury. See Osborn, 104 Wn. App. at 698. Moeller failed to submit any evidence that he was injured by any such violation or that all members of the class were injured. See discussion at 34-36, infra.

For each of these reasons, the trial court did not err in granting summary judgment on Moeller's CPA claim. See, e.g., Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 149-56, 930 P.2d 288 (1997) (affirming summary judgment on insured's CPA claim); Osborn, 104 Wn. App. 686 (same).

III. The Trial Court Abused Its Discretion When It Certified This Case for Class Action Treatment Under CR 23(b)(3).

A. Standard of Review

Class certification is reviewed for abuse of discretion. Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). Discretion is abused when the decision is based on untenable grounds or an error of law or is manifestly unreasonable or arbitrary. See

Oda v. State, 111 Wn. App. 79, 91, 44 P.3d 8, review denied, 147 Wn.2d 1018 (2002); King v. Olympic Pipeline Co., 104 Wn. App. 338, 355, 16 P.3d 45 (2000), review denied, 143 Wn.2d 1012 (2001).

B. The Trial Court Erred in Finding That the Predominance Requirement of Rule 23(b)(3) Was Met

“Class actions are specialized types of suits, and . . . must be brought and maintained in strict conformity with the requirements of CR 23.” DeFunis v. Odegaard, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). Before granting class certification, the trial court must perform a “rigorous analysis” to determine whether all requirements of CR 23 have been met. See Schwendeman, 16 Wn. App. at 18-19; Oda, 111 Wn. App. at 93.

The threshold requirements for a Rule 23 class action are numerosity, commonality, typicality and adequacy of representation. See CR 23(a); Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 250, 63 P.3d 198 (2003). When a class is certified under CR 23(b)(3), the court must also find that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members” CR 23(b)(3); see Schwendeman, 116 Wn. App. at 18 & n.18.

The predominance inquiry of Rule 23(b)(3) focuses “on the legal or factual questions that qualify each class member’s case as a genuine

controversy,” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 2249, 138 L. Ed. 2d 689 (1997), and “tests whether the class is sufficiently cohesive to warrant adjudication by representation,” In re LifeUSA Holding Inc., 242 F.3d 136, 144 (3d Cir. 2001); accord Schwendeman, 116 Wn. App. at 20. The predominance requirement is “far more demanding than the Rule 23(a)(2) commonality requirement.” LifeUSA, 242 F.3d at 144. It requires that “the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.” Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000).

On this issue, the court “examine[s] the causes of action asserted in the complaint on behalf of the putative class.” McCarthy v. Kleindienst, 741 F.2d 1406, 1412 (D.C. Cir. 1984). “Whether an issue predominates can only be determined after considering what value the resolution of the classwide issue will have in each class member’s underlying cause of action.” Rutstein, 211 F.3d at 1234; accord Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001); Schwendeman, 116 Wn. App. at 10 (predominance requirement entails a “pragmatic inquiry into whether there is a common nucleus of operative facts to each class member’s claim.” (citations omitted)); cf. Oda, 111

Wn. App. at 94 (“Rigorous analysis of the commonality issue . . . requires discussion of the theory of the plaintiffs’ case as well as consideration of the statistical model with which they intend to prove it.”).

1. To Prove His Claims, Moeller Must Establish That Every Class Member Sustained Diminished Value Injury

Moeller asserted class action claims for breach of contract and for alleged statutory violations. The elements of a cause of action for breach of contract are (1) a contractual duty, (2) breach of the contractual duty, and (3) injury to the claimant proximately caused by the breach. See Northwest Indep. Forest Mfrs. v. Dep’t of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Similarly, the elements of a cause of action for violation of a statute are (1) a statutorily imposed duty, (2) breach of the duty, and (3) injury to the claimant proximately caused by the breach. See id. When considering class certification, the court must examine which, if any, of these elements can be proved on a classwide basis.

2. Proof That Diminished Value “Exists” Is Not Equivalent To Proof That Every Class Member Sustained Diminished Value Injury

Moeller claimed that the insurance contract imposes a duty on Farmers to pay all first-party insureds compensation for the diminished value of the insureds’ repaired vehicles. The claim was predicated, as were all the class claims, on the allegation that diminished value injury

exists for all first-party insureds whose vehicles are damaged in the manner described in the class definition. Whether each and every class member sustained actionable injury is a separate inquiry from the amount of damages claimed to have been proximately caused by the alleged contractual breach.¹¹

Moeller told the trial court he intended to prove that diminished value “exists” by calling a statistician, Dr. Siskin, to testify regarding a multiple regression analysis that supposedly would show “a statistical variation in the price of wrecked and repaired cars and unwrecked cars. [i].e., we’re using it to show diminished value and the amount of diminished value.” RP (Class Action Certification Hearing, June 27, 2002) 48-49. Dr. Siskin would use auction sales price data to calculate average prices for “vehicles that have been wrecked and properly repaired and vehicles that are unrepaired”; he then would use the presumed difference between the average prices “to infer diminished value.” *Id.* at 63; see id. at 69-78. According to Moeller, the question at trial would be whether such evidence “is enough to convince the trier of fact that diminished value . . . exists” *Id.* at 49.

¹¹ Moeller acknowledges the difference between injury and damages when examining the scope of insurance coverage, App. Br. at 21-22, but ignored it when moving for class certification.

Moeller admitted that Dr. Siskin had not conducted his regression analysis by the time of the class certification hearing. *Id.* at 64, 72-73. So Dr. Siskin had not formed an opinion as to whether diminished value injury exists in some or all of the cases where damage to the vehicle falls within the class description (*i.e.*, “structural (frame) damage and/or deformed sheet metal and/or required body or paint work” necessitating repairs that cost “at least \$1,000”). *Dr. Siskin could not and did not opine that every individual in the proposed class had suffered diminished value injury. This omission is key because it means that Moeller did not show that the requisite element of injury would be proved on a classwide basis.*

Moeller’s other alleged expert, Larry Batton, opined that diminished value “occurs whenever a vehicle suffers damage that includes any of the following: structural and/or frame damage, paintwork, deformed sheet metal and/or flood damage.” CP 700. But Batton ignored the obvious possibility that post-collision repairs can increase a vehicle’s value. For example, the value of a car may be diminished because the paint on the hood of the car has been chipped by rocks. If the car is damaged in a front-end collision and the hood is repaired or replaced and painted anew, the insured gets the benefit of no longer having rock-chipped paintwork. The repair thus may increase the car’s value. CP 823,

844-45. In such a case, the insured would have suffered no actionable injury.

Further, Moeller admitted that some class members have not suffered diminished value injury. While discussing the statistical modeling Dr. Siskin proposed to use to quantify damages classwide, Moeller's counsel conceded that where vehicles are wrecked and repaired, and then the same parts of the vehicles are wrecked and repaired again, "it doesn't make sense" that the insureds "get any more diminished value." RP (Class Action Certification Hearing, June 27, 2002) 77.¹² In other words, class members whose vehicles have been involved in multiple accidents, damaging the same parts of the vehicles, have not suffered diminished value injury.

The trial court failed to recognize that this was an admission of Moeller's inability to prove classwide injury. Instead, the trial court found 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 ?" CP 1574. The court erred in not realizing that while the same question regarding injury may be *asked*

¹² This admission alone is evidence of the overbreadth of Batton's opinion.

of every class member, it cannot be *answered* on a classwide, or “common,” basis.

A similar difficulty existed in a recent class certification case involving allegations of antitrust violations. See Weisfeld v. Sun Chem. Corp., 210 F.R.D. 136 (D.N.J. 2002), aff’d, No. 02-4478, 2004 WL 45152 (3d Cir. Jan. 9, 2004). The plaintiff offered the declaration of an expert who proposed to use multiple regression analysis to project what members of the class would have earned had the alleged illegal price-fixing and boycott agreements not been in place. Id. at 143. The plaintiff offered the expert’s initial results to show that he would be able to prove antitrust injury (referred to as “impact”), on a classwide basis. Id.

The district court ruled that “for impact to be proven on a classwide basis, ‘the common proof [must] adequately demonstrate[] damage to each individual.’” Id. (quoting Newton, 259 F.3d at 180 n.21). “Not only do Plaintiffs have the burden of proving that they can *calculate* the damages allegedly suffered by each class member, but to satisfy the antitrust injury requirement, Plaintiffs must demonstrate that ‘some damage to each individual’ actually occurred.” Id. (emphasis in original) (quoting Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)).

The court found that although the expert had stated he likely would be able to show that the agreements “impacted the class members,” he had

not asserted that he could show that *all* members of the class suffered antitrust injury. Id. at 144. In the absence of evidence indicating that injury could be proved on a classwide basis, the court found that it would have to take into account a multitude of individual considerations to determine that each purported class member had, in fact, been injured. Id. This determination led to the court's conclusion that individual issues of fact predominated over common issues. Id. at 145.

Weisfeld relied on the Third Circuit's analysis in Newton. There, investors alleged that their broker-dealers had breached the broker-dealers' duty of best execution and violated federal securities laws by executing trades solely at the price offered on the National Best Bid and Offer (NBBO) system instead of investigating alternative trading opportunities that might offer better prices. Newton, 259 F.3d 154. When considering class certification, the district court noted that an essential element of plaintiffs' case was proving that plaintiffs had suffered economic loss. Id. at 177-78.

To show economic loss, plaintiffs were required to prove that a "better" price was obtainable for each executed trade. If a "better" price was unavailable for a particular trade, then the class member did not suffer injury and possessed no actionable claim. So the district court held, and

the appellate court agreed, that economic loss could not be established classwide. Id. at 178-81.

“In an effort to gloss over [the injury] requirement,” plaintiffs proposed that their expert devise a formula to measure aggregate damages and serve as a plan for allocation. Id. at 187-88. Realizing, however, that “[p]roof of damage must be distinguished from the mere calculation of damages,” id. at 188, the appellate court noted:

The ability to calculate an aggregate amount of damages does not absolve plaintiffs from the duty to prove each investor was harmed by the defendants’ practice. In class actions based on a “fraud-on-the-market,” an excessive pricing for securities or an antitrust violation, the alleged conduct itself causes economic injury. But only those class members whose trades could have been executed at better prices sustained economic injury here. Determining which class members were economically harmed would require an individual analysis into each trade and its alternatives. The individual questions, therefore, are overpowering.

Id. at 188-89. The appellate court affirmed the refusal to certify, agreeing that the predominance and superiority requirements of Rule 23(b)(3) were not met. Id. at 193.

In this case, Moeller likewise attempted to “gloss over” the injury requirement. When discussing class members who “would get no DV” because their vehicles had sustained similar damage earlier, Moeller suggested that the classwide “damage estimate” could be adjusted by “lop[ping] . . . off” an appropriate percentage amount. RP (Class Action

Certification Hearing, June 27, 2002) 77. That “discount” could be determined through a statistical sampling of accident histories. *Id.* at 77-78.¹³ But, as the Third Circuit pointed out, the making of adjustments to an aggregate amount of damages does not relieve a putative class representative from proving that each and every class member was harmed by the alleged contractual breach or alleged statutory violation. Moeller did not meet this burden and the trial court erred in not recognizing this fact.

The trial court’s error is significant because it led to the court’s failure to recognize that proof of alleged diminished value injury would have to be made on an individualized basis. The proposed regression analysis would not and cannot prove that every class member was actually injured. It is not a matter merely of proving damages allocable to each class member, with some receiving none and others receiving more than the average amount. Instead, the threshold inquiry is which members of the proposed class, if any, actually suffered injury. The inability to prove

¹³ Moeller’s argument might also be viewed as an effort to take improper advantage of “the difference in the quantum of proof needed to establish the fact of damage as against that needed to establish the amount of damage” *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 713, 257 P.2d 784 (1953); see *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (“[O]nce the buyer establishes the *fact* of loss with certainty (by a preponderance of the evidence), uncertainty regarding the *amount* of loss will not prevent recovery.”).

this element of Moeller's claims on a classwide basis means that the court's finding of predominance is untenable. See Defraites v. State Farm Mut. Auto. Ins. Co., 864 So. 2d 254, 261-63 (La. Ct. App. 2004) (holding trial court's certification of class of individuals making third-party vehicular property damage claims against insurer for insurer's failure to pay for non-repair related diminution in value was improper because trial court would have to determine for each member of putative class (1) whether diminished value was sustained, (2) amount of diminished value, which would depend on such factors as age, make, model and condition of damaged vehicle, (3) type and amount of damages sustained by the vehicle, and (4) the quality of repair to the vehicle); cf. Schwendeman, 116 Wn. App. at 21-23, 29 (affirming trial court's refusal to certify class of insureds making breach of contract and Consumer Protection Act claims against insurer for repairing damaged vehicles without using parts made by the original equipment manufacturer ("OEM"), concluding that determination of whether use of a non-OEM part complied with insurer's obligation under the insurance policy would require individualized proof with respect to each vehicle repaired). Common issues of fact or law cannot be said to have predominated when liability, not just damages, would have to be proved for each individual class member.

**3. The Trial Court Improperly Deferred
Determinations Necessary to Class Certification
by Characterizing Them As Merits Issues**

Observing that there had been “much argument between expert witnesses on the existence, or nonexistence, of inherent diminished value,” CP 1581, and that Farmers had challenged Dr. Siskin’s proposed methodology and argued that diminished value damages could not be calculated as Moeller proposed, the trial court punted on these issues by asserting conclusorily that they went “to the merits of the Plaintiffs’ claims.” CP 1581. In so doing, the trial court failed to engage in the requisite rigorous analysis of Moeller’s proposed statistical methodology, see Oda, 111 Wn. App. at 94-105 (explaining that proper analysis required consideration of plaintiffs’ proposed method of proof), and erred by presuming that Moeller’s experts eventually would be able to prove their hypotheses. As the Supreme Court explained in General Telephone Co. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982), “actual, not presumed, conformance” with Rule 23’s requirements is “indispensable.” See Oda, 111 Wn. App. at 92 (citing Falcon).

**C. Class Certification Resulted in an Improper Shift in the
Burden of Proof**

Diminished value does not exist in the abstract; it exists only by virtue of comparing what a vehicle is worth before an accident with what the vehicle is worth after an accident and the repair of any resulting

damage. In other words, the diminished value *of a particular vehicle* is the predicate for the alleged injury.

What a vehicle is worth before an accident is made up of a wide range of factors: for example, its make and model, its year, its color, its mileage, its condition (both mechanical and appearance), optional equipment, and the available supply of similar vehicles. CP 790-94. If a vehicle is not brand new, its value will depend on assessment of how the factors add up for that particular vehicle. If the vehicle is damaged in a collision and repaired, the same factors apply, but the condition will have changed (perhaps the paint job will be better after the repair than before, or the repaired structural components may be considered less crash-resistant). The difference in value, if any, will be tied to the condition of the particular vehicle before and after the accident. *Id.*; see *Defraites*, 864 So. 2d at 261-63.

Moeller, however, did not plan to consider the diminished value allegedly sustained by each insured as the consequence of the damage to and the repair of each insured's individual vehicle. Rather, he proposed to prove an alleged "average" diminished value injury. But even proof of an "average" alleged injury does not and cannot establish that every class member suffered actual injury. The only way to do that is to consider the individual circumstances affecting the class members' vehicles. Only if

there is an actual decrease in the value of an insured's vehicle could Farmers have been held potentially liable for refusing to pay a claim for diminished value (and that possibility existed only if coverage for diminished value was provided by the insurance contract).

Although the burden of proof of liability should be on the claimant, the trial court found that class certification would "not impede Farmers' ability to investigate particular class members claims, and present evidence on individual claims supporting defenses unique to each claim." CP 1581. With its ruling, the court improperly used the class action device to place the burden of *disproving* liability on Farmers.

D. The Certification Order Contemplated an Impermissible Bifurcation of the Issue of Liability Between the Trial and the Ensuing Claims Proceedings

Moeller hoped that the model his experts were constructing would show that diminished value "exists" and would give an aggregate amount of damages suffered by the class, resulting in an aggregate damage award to the class and a subsequent allocation among class members in individual claims proceedings. But, as just shown, assessment of injury to each class member cannot be made without considering the individual facts of that class member's claim. (Many individualized factors, beyond the single point admitted by Moeller, would need to be considered.) Consequently, the supposed classwide finding of liability would have to

be reexamined in each claim proceeding, to determine whether that particular class member suffered any injury. That impairs the right to jury trial, by subjecting the findings of the first jury to reexamination in the claims proceeding.

As the Seventh Circuit has explained in rejecting a similar attempt to subdivide the determination of liability, “[t]he right to a jury trial is a right to have jurable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact.” In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995). Bifurcation is permissible, but the trial judge “must carve at the joint.” Id.; cf. Sitton, 116 Wn. App. at 257-59 (holding that trial plan calling for bifurcated proceedings in breach of contract, bad faith and CPA class action against insurer violated due process and insurer’s right to jury trial because it contemplated an award of aggregate damages without requiring plaintiffs to prove individual causation and without permitting insurer to advance its defenses; noting that bifurcation was still a possibility, but would require a different plan, such as a bad faith phase and a separate causation/damages phase, where latter phase would require individual claimants to demonstrate causation and damages and allow insurer to show justification for its actions); Oda, 111 Wn. App. at 96 n.8 (explaining that the liability phase would not be

confined to statistical analysis, but that defendant would be entitled to examine every single decision in the database). Here, because the individualized issue of injury would be an essential part of any liability determination, the attempt to bifurcate the adjudication between a single trial of common issues and individualized claims proceedings would necessarily require the issue of injury to be considered in both phases, an impermissible result.

E. Farmers Would Not Be Able to Obtain a Binding Adjudication Against Members of the Class, as the Rule Requires

Rule 23(c)(1) requires the court to “determine” whether an alleged class action “may be so maintained” and on behalf of what class. The purpose is to specify, before a merits decision, who would be bound by the judgment; this protects the defendant from having to litigate a case where it can never get a binding decision in its favor.¹⁴ As explained below, the

¹⁴ See Katz v. Carte Blanche Corp., 496 F.2d 747, 759 (3d Cir. 1974). Before the 1966 amendments to the Federal Rules, a class action might proceed to judgment without any mechanism for determining and binding class members. If the plaintiff won, class members could then intervene to participate in the judgment; if the defendant won, they remained free to commence new litigation. This sort of “one-way intervention” was considered unfair, and making judgments binding on class members was the reason for the new Rule 23(c) procedures. Id. Courts have also refused to allow plaintiffs to achieve a result similar to one-way intervention by defining the class in a way that assures the class will have only members who prevail against the defendant, a technique known as a “fail-safe” class. See, e.g., Intratex Gas Co. v. Beeson, 22 S.W.2d 398, 404-5 (Tex. 2000).

court erred in determining that the members of the class would be bound if Farmers prevailed at trial. CP 1581.

Moeller argued that he would someday be able to provide common proof that would allow class adjudication. RP (Class Action Certification Hearing, June 27, 2002) 49, 64. But he relied on an expert, Siskin, to construct a model which they claimed would show both the fact of injury and the amount of damages for each class member, based solely on evidence that would not be provided by the class members. *Id.* at 48-49.

Siskin candidly admitted that the data necessary to construct any model had not been gathered; indeed, he did not know all of the variables he would need to consider and did not know whether data would be available for all of those variables. CP 998-99, 1003, 684. Where data were, in some sense, available (e.g., from auto auctions), Dr. Siskin did not know whether it would be practicable to collect that data in the necessary quantity and with the necessary uniformity to permit a model to be developed. CP 999; but see CP 1517. Siskin testified that, even if he were to prepare such a theory, he had no idea whether it would work – that is, whether it would estimate diminished value within a legally reasonable range of statistical precision. CP 1001-02. By the very nature of multiple regression methodology, even if it were possible to estimate the range of *classwide* diminished value within a specifically acceptable level of

confidence, there is no assurance it would be possible to estimate *individual* diminished value within an acceptable confidence interval (even ignoring the effect of variations in preaccident condition). CP 1007-08.

Such speculation that a plaintiff could produce common evidence is not a permissible basis for class adjudication. To certify a class, the court must be able to *determine* – and determine at the time of certification– that the case could be adjudicated on a class basis, regardless of who prevailed at the eventual trial. If the court made that determination and later decided that its conclusion was wrong, it could decertify. But certification is not routinely revisited, and it is improper to certify before the plaintiff has established that class adjudication will be proper. See Szabo v. Bridgeport Mach., Inc., 249 F.3d 672 (7th Cir. 2001); Harry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 690 (Tex. 2002) (citing Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) for its rejection of “certify now and worry later” approach).

If Siskin could not construct his model, or if it failed to establish any basis for estimating the supposed losses of class members, that would not show that *no* class member has a viable claim that could be proven individually. Moeller did not plan even to try to develop any such individual proof (and doing so would be inconsistent with the very

premise of class adjudication). So, one could not fairly bind absent class members to a judgment in favor of Farmers based simply on the failure to present whatever individual proof might exist. That means that the most Farmers could hope for at the end of a trial of the sort proposed by Moeller would be a judgment rejecting Moeller's claim and decertifying the class. But if Moeller prevailed, judgment could have been entered for the entire class, if the insurance policy provided coverage.

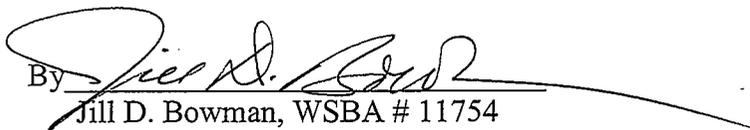
Class certification is improper if the court cannot determine that the class would be bound, win *or* lose.

CONCLUSION

The trial court abused its discretion when it certified this case for class action treatment under CR 23(b)(3). This Court, however, need not review and reverse the trial court's ruling on this issue if it agrees with Farmers and the trial court that the plain and unambiguous language of FIC's insurance policy does not require that first-party insureds whose vehicles are damaged in collisions receive repaired vehicles *and* payment for diminished value. For all of the reasons discussed above, this should be the Court's conclusion and the trial court's summary judgment should be affirmed accordingly.

DATED this 25th day of March, 2004.

STOEL RIVES LLP

By 

Jill D. Bowman, WSBA # 11754
Of Attorneys for Respondents/Cross
Appellants

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STATE OF WASHINGTON

BY
DEPUTY

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

DAVID MOELLER,

Respondent/Plaintiff,

v.

FARMERS INSURANCE COMPANY OF
WASHINGTON and FARMERS
INSURANCE EXCHANGE,

Petitioners/Defendants.

No. 29480-0-II

CERTIFICATE OF SERVICE AND
FILING

I, LaVonne J. Arregui, certify that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On March 25, 2004, I caused a true and correct copy of the following documents to be served upon the following individuals in the manner indicated:

1. Brief of Respondents/Cross Appellants; and
2. Certificate of Service.

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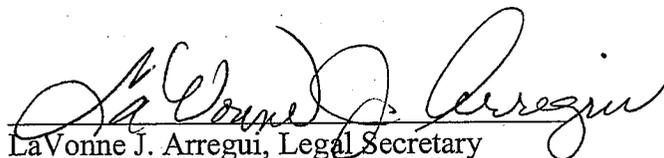
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On the same date, I caused an original and one copy of the documents to be filed by mailing the same by U.S. First Class Mail, postage prepaid, to:

Clerk of the Court
Washington State Court of Appeals, Division II
950 Broadway, #300
Tacoma, WA 98402

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

Executed on March 25, 2004, at Seattle, Washington.


LaVonne J. Arregui, Legal Secretary