No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 85589-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TIMOTHY LUNDQUIST and a class of similarly situated individuals,
Petitioners,

v.

STANDARD INSURANCE COMPANY,
Respondents.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Other Authorities

Rules

A. Decision Below.

Timothy Lundquist petitions for review of two issues raised by the Court of Appeals' Opinion (Appendix A).

B. Issues Presented for Review.

1. Does the Court of Appeals' holding that a jury must interpret the coverage provision in Standard Insurance Company's policy conflict with Washington precedents holding interpretation of an insurance policy is a question of law based on the plain meaning of what is written and that ambiguities are construed against the insurer as a matter of law?

2. Does the Court of Appeals' holding that hypothetical "non-common evidence of intent" precludes the existence of "questions of law or fact common to the class" conflict with Washington precedent holding that CR 23(a) requires only a single common question of law or fact and the policies at issue here include identical coverage language?

C. Statement of Facts.

1. As this Court explained in its landmark *McCleary* decision, teachers in Washington are paid a single salary funded by state and local funds.

This case requires an understanding of education funding in Washington, particularly *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012). Article IX, §1 of Washington's constitution imposes a "paramount duty" on the State "to make ample provision for the education of all children." In *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 525, 585 P.2d 71 (1978), this Court held that the State must provide for basic education "by means of dependable and regular [state] tax sources," rather than local levies.

The 1977 Basic Education Act outlined the State's "basic education" program and declared it satisfied the State's constitutional duty. *McCleary*, 173 Wn.2d at 487. Ten years later, the Legislature adopted a state-wide teacher salary schedule establishing minimums and

maximums. Washington Laws 1987, 1st ex. s. ch. 2 §205 (RCW 28A.400.200). The Legislature authorized school districts to exceed the maximums through "supplemental contracts" for "additional time, additional responsibilities, or incentives" ("TRI") for work beyond the "the basic education program." Washington Laws 1987, 1st ex. s. ch. 2 §205; RCW 28A.400.200(4)(b); CP1676.

TRI contracts are funded through local levies. CP1675-78; RCW 28A.150.276. The Legislature referred to TRI contracts as "supplemental," RCW 28A.400.200(2)(c)(iv), although *all* teachers receive TRI pay for regular work (*e.g.*, grading papers, preparing lessons) as part of their annual contract and regular monthly paychecks. CP830, 1337-38, 1345, 1364-65, 1374-75, 1673-80.

In *McCleary*, this Court held that Washington was violating Article IX, §1 because it underfunded "basic education" forcing "districts [to] rely heavily on local levies

to fund teachers' salaries." 173 Wn.2d at 536. In reality, "*total* [teacher] *salaries* consist[] of the current state allocations *and* supplemental salaries provided by school districts." *McCleary v. State*, No. 84362-7, 2017 WL 11680212, at *18 (2017) (emphasis added).

2. Lundquist sued Standard for calculating his long-term disability benefits based only on the portion of his salary funded by the State. The trial court granted Standard summary judgment.

School teachers receive long-term disability benefits as part of their compensation. In 1983, Standard issued a long-term disability benefit policy to the Seattle School District (SSD) that defines "Insured Earnings" as follows:

> INSURED EARNINGS means the first $16,667 of one-twelfth (1/12th) of your annual rate of earnings from your EMPLOYER; including deferred compensation, but excluding bonuses, overtime pay, and any other extra compensation. The following rules apply to the computation of your annual rate of earnings: (1) If you are paid on an annual contract basis, your annual rate of earnings is your annual contract salary.

CP1695. Standard renewed the policy annually. Except for

the maximum coverage amount, the coverage provision was never amended. CP277-78.

In 2017, petitioner Lundquist became totally disabled with Parkinson's disease and applied to Standard for disability coverage. CP691-92. While purporting to approve his claim, Standard secretly excluded some earnings—TRI pay and employer contributions for deferred compensation (pensions) and health insurance, CP423-25, even though these items of earnings are shown in teachers' monthly paychecks. CP830. Standard did no investigation into TRI pay when processing his claim, did not identify the applicable provision, or inform him that it was partially denying disability coverage for some of his regular earnings (all in violation of the Insurance Fair Conduct Act). CP945-49, 2010-12.

Lundquist sued Standard. The trial court certified a class of teachers in 18 districts across Washington. CP1461-66. The policy issued to Central Kitsap School District has

coverage language identical to the SSD policy. CP770-71, 1681-82. The policies of the other 16 districts, like the SSD policy, have coverage based on "earnings from your employer" and "annual contract salary." These policies differ only by excluding "deferred compensation" from "earnings." CP758-816. The TRI claim here is identical in all 18 policies.

The trial court denied the class's motion for summary judgment on all policies because of supposed "disputed questions of fact . . . concerning the meaning of 'Insured Earnings.'" CP1468-97, 1617. Standard sought discretionary review of class certification, and the class sought review of the summary judgment order. CP1847, 1848. Both motions were denied. CP1857.

Lundquist then moved for partial summary judgment on the identical coverage provisions in the SSD and Central Kitsap policies. CP1863-91. Standard opposed the motion, sought summary judgment on all 18 policies,

CP1640, and moved to decertify. CP2079.

Pointing to dictionary definitions, Lundquist argued that the plain, ordinary, and unambiguous meaning of "earnings from your employer" and "annual contract salary" in the SSD and Central Kitsap policies included TRI and employer contributions. CP738-41. Standard did not propose an alternate interpretation of "earnings from your employer" or "annual contract salary." Rather, Standard relied solely upon "extrinsic evidence," CP745-48, none of which is admissible. This includes testimony and notes from individuals who never read the policy and opinion from a Standard employee hired in 2019 that "Standard[] inten[ded]" for "annual contract salary" to mean "annual contract salary not including an employee's receipt of [] ('TRI Pay') or employer contributions." CP4076-77.

Lundquist maintained the policy language was unambiguous, CP1484, 1494-96, but also submitted extrinsic evidence, including policy descriptions supplied

to SSD and its agents consistent with his interpretation. CP1344. Lundquist also submitted advice from Standard's in-house attorney acknowledging that Lundquist's interpretation was reasonable and recommending Standard amend the policy to exclude TRI pay. CP1625.

The trial court granted Standard summary judgment and decertified the class. The trial court included 51 "findings of fact" and, relying only on Standard's extrinsic evidence, ruled that TRI and employer-paid contributions to health and retirement benefits are not "earnings" or "annual contract salary." CP2461.

3. The Court of Appeals reversed summary judgment for Standard, remanding for a jury to interpret the policy as a question of fact.

The Court of Appeals reversed in part and affirmed in part. Relying on extrinsic evidence, not the text of the policies, it held that "reasonable minds could easily differ on whether SSD and Standard intended to include TRI and employer contributions under 'Insured Earnings'" and

thus "genuine issues of material fact remain as to the interpretation of policy language." Op. 11-12. The Court of Appeals affirmed decertification, saying that "the trial court could evaluate non-common evidence of intent as to each contract," even though the coverage terms are the same. Op. 15.

The Court of Appeals denied reconsideration, while issuing a substitute opinion adding denial of Lundquist's summary judgment motion. Appendix B.

D. Grounds for Review.

1. The Court of Appeals' decision remanding for a jury trial on the meaning of Standard's policy conflicts with *McCleary* and settled precedent governing interpretation of insurance policies, and raises an issue of substantial public interest.

The decision below conflicts with *McCleary*, which explained that *both* state and locally funded portions of a teacher's salary are part of their regular salary. This Court should grant review under RAP 13.4(b)(1)-(2) because

holding that a jury must interpret policy terms defining teacher salaries conflicts not only with *McCleary*, but with decades of Washington precedent holding that interpretation of an insurance policy is a question of law based on the plain language and that ambiguities in an insurance policy are construed against the insurer as a matter of law.

No Washington court has ever before held that an insurer can convert a question of interpretation (an issue of law) into a question for the jury (finder of fact, not law) simply by submitting extrinsic "evidence" (uninformed understandings from people who did not read the policy). The decision raises an issue of substantial public interest under RAP 13.4(b)(4) because it undermines consistent outcomes in insurance interpretation disputes and invites insurers to waste judicial resources holding jury trials to interpret coverage provisions.

a. Remanding for a jury to determine whether TRI is part of a teacher's "earnings" conflicts with *McCleary*.

The Court of Appeals' decision conflicts with *McCleary*, in which this Court made clear that teachers' "*total* salaries consist[] of the current state allocations *and* supplemental salaries provided by school districts." *McCleary v. State*, No. 84362-7, 2017 WL 11680212, at *18 (2017) (emphasis added); *McCleary*, 173 Wn.2d at 537 (citing testimony from Basic Education Finance Task Force that TRI "*money is all just salary increases*") (Court's emphasis). Its holding that "reasonable minds could easily differ on whether SSD and Standard intended to include TRI and employer contributions under 'Insured Earnings'" would allow a jury to find—contrary to *McCleary*—that TRI is *not* part of a teacher's earnings. Op. 12.

This would deny teachers benefits covered by the plain language of the policies based on the vagaries of Washington's education funding. CP1677-79. No ordinary

insured would assume that part of their "earnings" would be excluded from disability pay because of a budgeting label not mentioned in the policy. It would be a manifest injustice to deny Washington teachers tens of millions in benefits that anyone else would receive simply because their salaries are funded with both state and local funds.

b. The remand for a jury to resolve the meaning of policy terms warrants review under RAP 13.4(b)(1)-(2).

By remanding for a jury to interpret the policy, the Court of Appeals turned Washington insurance law on its head. Beyond practical problems—*e.g.*, how to instruct a jury on interpreting policy text as a matter of law—it gives insurers a greenlight to contest their own coverage provisions through *post hoc* testimony regarding subjective intent. This conflicts with longstanding Supreme Court authority and the Court of Appeals' own precedent, necessitating review under RAP 13.4(b)(1)-(2).

The rules governing insurance contracts are "well-

settled." *Gardens Condo. v. Farmers Ins. Exch.*, 2 Wn.3d 832, 839, 544 P.3d 499 (2024). "Washington courts interpret language in insurance policies as a matter of law, and [the appellate] court reviews de novo the lower court's interpretation of policy language." *Seattle Tunnel Partners v. Great Lakes Reinsurance*, 200 Wn.2d 315, 320, 516 P.3d 796 (2022). "Courts construe insurance policies as a whole, giving the language a fair, reasonable, and sensible construction as would be given by an average person." *Gardens*, 2 Wn.3d at 839 (internal quotation and citation omitted). "Undefined terms are assigned their plain, ordinary, and popular meanings." *Id.* (internal quotation and citation omitted); *McLaughlin v. Travelers Com. Ins.*, 196 Wn.2d 631, 641, 476 P.3d 1032 (2020) ("when determining the meaning of undefined terms . . . , we look to the expectations of the average insurance purchaser.").

Courts must also consider that "[t]he purpose of insurance is to give protection" and thus "it can be

presumed that such was the intent of the parties." *McDonald Indus., Inc. v. Rollins Leasing Corp.*, 95 Wn.2d 909, 914–15, 631 P.2d 947 (1981). Accordingly, "inclusionary clause[s] in insurance contracts should be liberally construed to provide coverage whenever possible." *Ross v. State Farm Mut. Auto. Ins.*, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997).

"If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists." *Panorama Vill. Condo. Owners v. Allstate Ins.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001) (internal quotation and citation omitted). "[A] clause is ambiguous only when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Quadrant Corp. v. Am. States Ins.*, 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005) (quotation marks removed). A "possible interpretation" is not reasonable when "it is not supported by the definitions in the

dictionary." *Spratt v. Crusader Ins.*, 109 Wn. App. 944, 950-51, 37 P.3d 1269 (2002).

The Court of Appeals' decision directly conflicts with these precedents because it failed to give undefined terms their plain meaning. RAP 13.4(b)(1). Lundquist, in the trial court and Court of Appeals, cited Webster's Third to supply the plain meaning of the undefined terms "earnings" as well as "annual contract salary." CP741-42, 747. The plain language of the coverage terms includes all the items of pay at issue in this action because it is undisputed that TRI and employer contributions are all paid by employers pursuant to annual teaching contracts. CP830, 1337-38, 1345, 1364-65, 1374-75, 1625, 1673-80. Neither Standard, nor the trial court, nor the Court of Appeals cited any definition of the coverage terms—"earnings from your employer" and "annual contract salary"—that excludes TRI pay. Indeed, the trial court flatly rejected the dictionary. CP2461 (criticizing plaintiffs for "relying on a dictionary definition

of the term 'earnings'").

Instead, Standard relied on testimony from one employee it hired in 2019 who testified that he understood "annual contract salary" to really mean "annual contract salary, not including . . ." CP4076-77. This testimony did not aid the trial court in choosing between reasonable interpretations of the written words because it added words to the policy. Despite being presented with only one reasonable interpretation, the Court of Appeals nevertheless ruled that the policy was "ambiguous" because Standard argued for a different interpretation based on "extrinsic evidence." Op. 11-12 (saying "reasonable minds could easily differ" on coverage "given th[e] [extrinsic] evidence"). The Court of Appeals thus permitted Standard to create an ambiguity with *post hoc* opinion testimony from a Standard employee as well as individuals who never read the policy. CP1066.

The Court of Appeals erred again by ignoring this

Court's precedent that, assuming an ambiguity existed, "[a]mbiguities in the policy are construed against the drafter-insurer" *as a matter of law*. *Gardens*, 2 Wn.3d at 839. This rule exists because "it was the insurer who used the ambiguous language." *McDonald*, 95 Wn.2d at 914–15; *see also Boeing Co. v. Aetna Cas. & Sur.*, 113 Wn.2d 869, 883, 784 P.2d 507 (1990) ("fact remains that the policy in question is a standard form policy prepared by the company's experts, with language selected by the insurer.").

A court may consider "the circumstances surrounding the making of the" policy as an aid to resolving ambiguities. *Lynott v. Nat'l Fire Ins. Co.*, 123 Wn.2d 678, 682-84, 871 P.2d 146 (1994). Evidence of "[u]nilateral or subjective purposes and intentions about the meanings of what is written do *not* constitute evidence of the parties' intentions." *Lynott*, 123 Wn.2d at 684 (emphasis added). In other words, "[i]t is the duty of the court to declare the

meaning of what is written, and not what was intended to be written." *Lynott*, 123 Wn.2d at 683-84 (quoted source omitted).

The Court of Appeals said there is conflicting extrinsic evidence. Op. 12. Where evidence regarding the context of the formation of the policy does not resolve an ambiguity, the court construes the ambiguity in favor of the insured. *See Lynott*, 123 Wn.2d at 697 (rejecting insurer's extrinsic evidence and holding "the legal effect of such ambiguity is to find the exclusionary language ineffective"); *Am. Nat. Fire Ins. v. B&L Trucking & Const.*, 134 Wn. 2d 413, 428–29, 951 P.2d 250 (1998) ("because we discern no extrinsic evidence from the record indicating an intent by both parties to exclude coverage, we must resolve the ambiguity in favor of the insured."); *Am. Star Ins. v. Grice*, 121 Wn.2d 869, 880, 854 P.2d 622 (1993) ("Since . . . the extrinsic evidence does not show an unambiguous exclusion of coverage, we construe the ambiguity in favor

of coverage."); *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 82-83, 882 P.2d 703 (1994).

On its own terms, the Court of Appeals held the policy was ambiguous because both parties had extrinsic evidence supporting their interpretation, which, under this Court's precedent, requires the language to be interpreted in favor of the insured as a matter of law. However, the Court of Appeals tasked a jury with resolving this question of law, violating fundamental principles of our judicial system. *State v. Clausing*, 147 Wn.2d 620, 629, 56 P.3d 550 (2002) ("Legal questions are decided by the court, not the jury, for good reason."). This warrants review under RAP 13.4(b)(1) .

Moreover, the decision conflicts with the Court of Appeals' own precedent, warranting review under RAP 13.4(b)(2). In *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wn. App. 791, 65 P.3d 16 (2003), the insured argued his disability policy's requirement that he be "under the care of

a licensed physician" applied only when he submitted his claim. 115 Wn. App. at 805. The trial court refused to interpret the policy as a matter of law and instead had a jury interpret the policy. 115 Wn. App. at 804-05. After the jury returned a verdict against the insured, the Court of Appeals reversed, holding that the policy was ambiguous, that the insured was "entitled as a matter of law to have these clauses interpreted in his favor," and that "the trial court erred by submitting the question . . . to the jury." 115 Wn. App. at 812.

The Court of Appeals' decision directly conflicts with *Kaplan*. It rejected both parties' arguments the policy unambiguously favored them: "Both parties assert that the language of the contract is unambiguous, and yet in disputing the plain, ordinary, and popular meanings of the terms 'contract salary' and 'earnings,' present contradictory results." Op. 11. Having (erroneously) held that the policy was ambiguous and that extrinsic evidence

did not resolve the ambiguity, the Court of Appeals should have ruled against Standard as a matter of law. *Lynott*, 123 Wn.2d at 697. It instead remanded for a jury to resolve "genuine issues of material fact . . . as to the interpretation of policy language." Op. 12. That is precisely what *Kaplan reversed* the trial court for doing.

c. Upending Washington insurance contract interpretation principles raises an issue of substantial public interest.

Both the Legislature and Washington courts have repeatedly recognized that insurance is an area of significant public importance.

The Legislature has recognized the substantial public interest in consistent rules governing the handling and resolution of insurance claims. *See, e.g.*, RCW 48.01.030 ("The business of insurance is one affected by the public interest"); RCW 48.30.010 (prohibiting unfair practices in insurance and authorizing the Insurance Commissioner to regulate claims handling); RCW 48.30.015 (establishing

penalties for unreasonable claim denials). This Court regularly accepts insurance cases, reiterating the "well-settled" rules governing insurance claims to keep the lower courts on track. *See, e.g.*, *Gardens* 2 Wn.3d at 839; *Seattle Tunnel Partners*, 200 Wn.2d at 321.

The decision below allows insurers to ask a jury to divine the meaning of the policy even when a claim is covered under Washington's well-settled rules. A review of Standard's extrinsic evidence, which the Court of Appeals found created both an ambiguity and a genuine issue of material fact, highlights the absurdity of asking a jury to resolve the legal question of insurance contract interpretation. Standard cited testimony from an employee it hired in 2019 purporting to state "Standard's intent with respect to the term 'annual contract salary,' as used in the" 1983 SSD policy. CP4077, 4261. This *post hoc* testimony of unilateral subjective intent is not admissible extrinsic evidence. *See Lynott*, 123 Wn.2d at 689 (rejecting insurer's

extrinsic evidence because it was created after policy was issued). And this testimony explicitly added words to the policy. CP4076-77 (claiming "annual contract salary" was intended to mean "annual contract salary *not including TRI pay* . . ."") (emphasis added); *Berg v. Hudesman*, 115 Wn.2d 657, 669 801 P.2d 222 (1990) (extrinsic evidence "is not admissible for the purpose of adding to . . . the terms of a written contract"). Instead of following the decades of well-established law on how to interpret insurance policies, the Court of Appeals invites every insurer seeking to avoid coverage to offer a corporate witness to testify the insurer did not "intend" to provide coverage as written.

Standard also cited testimony from individuals who never read the policy as well as notes from SSD's Joint Insurance Committee (JIC)[1], regarding whether it was necessary to amend the policy to address TRI. CP1540,

[1] The JIC is an advisory committee comprised of employee representatives and management that "provide[s] health benefits recommendations." CP839.

4080-4107, 4143-44, 4219-20.[2] Subjective "understandings" from individuals who never read the insurance policy cannot assist a court in interpreting the policy. And documents from the JIC, which never reviewed the policy,[3] only demonstrate that Standard's insurance agent told the JIC of Standard's interpretation. CP279; CP982-83.

The decision provides insurers with a blueprint in future cases for creating ambiguities in coverage language merely by submitting *post hoc* employee testimony that demonstrates only a counter-textual understanding. Allowing a jury to consider employee statements parroting Standard's counter-textual interpretation directly conflicts with precedent holding that extrinsic evidence is only

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[2] Standard conceded below the JIC notes were not submitted for the truth of the matter asserted, *i.e.*, the meaning of the contract. CP2568. The trial court nonetheless relied on them in granting Standard summary judgment. CP2461-62.

[3] The members of the JIC never reviewed the coverage language. CP1045.

relevant to prove *mutual* intent of the text. It encourages parties to submit opinion testimony about insurance coverage that "is nothing more than an opinion on a legal issue to be decided by the court." *Fiscus Motor Freight v. Universal Sec. Ins.*, 53 Wn. App. 777, 782, 770 P.2d 679 (1989). And it creates practical problems, such as how to instruct a jury on interpreting policy language, a question of law previously reserved for the court.

It is not the role of Washington courts to save insurers from drafting language they later regret. *Aluminum Co. of Am. v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 556 n.15, 998 P.2d 856 (2000) ("Insurers know how to write exclusions to coverage"). The Court of Appeals should not have amended the coverage here, particularly given Standard's flimsy evidence. The decision undermines the substantial public interest in consistent resolution of insurance coverage disputes. Insureds, insurers, and the public all rely upon consistent outcomes based on

Washington's well-settled rule that courts interpret policies' language as a matter of law based on their text.

2. The Court of Appeals' holding affirming decertification conflicts with Washington law and involves an issue of substantial public interest.

This Court also should grant review under RAP 13.4(b)(1)-(2) because decertification was contrary to this Court's precedents that commonality under CR 23(a) requires only a single common issue of fact or law and is not defeated when there may hypothetically be individual issues. The decision also involves an issue of substantial public interest because it curtails the ability of insureds, including the 1,100 teachers here, to use class actions to contest unreasonable denials by insurers. RAP 13.4(b)(4).

"Class certification is governed by CR 23. CR 23 is liberally interpreted because the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and also frees the defendant from the harassment of identical future litigation." *Moeller v.*

Farmers Ins. Co. of Washington, 173 Wn.2d 264, 278, 267 P.3d 998 (2011) (quotation, alterations, and citation omitted).

This Court has repeatedly stressed Washington's "strong policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice" and to "strongly deter future similar wrongful conduct." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851-52, 161 P.3d 1000 (2007); *Chavez v. Our Lady of Lourdes Hosp.*, 190 Wn.2d 507, 514, 415 P.3d 224 (2018) (class actions "vindicat[e] claims [that], taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group.").

In affirming decertification, the Court of Appeals said the commonality requirement of CR 23 was not met because the trial court "must examine individualized [extrinsic] evidence to interpret each policy." Op. 15. This ruling would allow any insurer to defeat class certification

based solely on *hypothetical* extrinsic evidence. This error flows from the Court of Appeals' refusal to follow the rules of insurance contract interpretation.

The Court of Appeals also ignored that "there is a low threshold to satisfy" the commonality requirement because "there need be only a single issue common to all members of the class." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 320, 54 P.3d 665 (2002) (internal quotation and source omitted); *see also Miller v. Farmer Bros.*, 115 Wn. App. 815, 825, 64 P.3d 49 (2003) ("CR 23(a) is satisfied by the mere existence of a common legal or factual issue."). CR 23(a) "does not require 'that the shared questions of law or fact be identical' as to each individual class member." *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 683, 267 P.3d 383 (2011) (quoting *Miller*).

Insurance coverage disputes routinely raise common issues because they center on standard policy language. *Moeller*, 173 Wn.2d at 269, 278-80 (affirming certification

for diminished value of vehicle claims); *Elter v. United Servs. Auto. Ass'n*, 17 Wn. App. 2d 643, 648, 487 P.3d 539 (2021) ("a common fact pattern existed based on common policy language"); 1 *Newberg and Rubenstein on Class Actions*, §3:24 (6th ed. Nov. 2024 Update) ("claims arising . . . out of form contracts, are often particularly appropriate for class action treatment"); *Boeing*, 113 Wn.2d at 883 ("once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state"). The Court of Appeals ignored that commonality is easily satisfied by common policy language. RAP 13.4(b)(1)-(2).

Here, all the policies at issue contain the same coverage language. And Standard at no time presented "individualized evidence" for each policy—not when opposing class certification, not when moving for summary judgment on all eighteen policies, and not when moving to decertify. Indeed, its motion seeking decertification

referred to what the "evidence may include." CP2090.

Allowing an insurer to defeat certification based on hypothetical extrinsic evidence would make it impossible to certify insurance cases for classes. Under the Court of Appeals' decision, an insurer can prevent certification by merely stating that it intends to introduce "individualized evidence" for each policy.

Not surprisingly, Washington courts have rejected the argument that commonality is not met if the defendant hypothesizes it could offer some non-common evidence. *Moeller*, 173 Wn.2d at 280 (affirming ruling that the need to "present evidence on individual claims supporting defenses unique to each claim" did not defeat commonality); *Elter*, 17 Wn. App. 2d at 659 (rejecting argument against commonality because there "would need to be testimony from each class member and damages necessarily would vary from insured to insured"); *Brown v. Brown*, 6 Wn. App. 249, 255, 492 P.2d 581 (1971)

(presence of both common factual questions *and also* "different factual questions" did not defeat commonality); *Miller*, 115 Wn. App. at 825 (differences in facts "do[] not defeat commonality.").

Decertification here raises issues of substantial public importance because insurers in future cases will defeat class certification even when the dispute focuses on identical terms merely by asserting that it might present non-common evidence as part of its defense.[4] This would effectively deny relief to a statewide group of 1,100 disabled

[4] The Court of Appeals also said decertification was appropriate based on a purported "concession" Lundquist made by first filing a motion for partial summary judgment on two policies. Op. 15; He did so at the suggestion of the Court of Appeals. CP1856 (telling parties to "narrow the issues" when denying review). Moreover, Lundquist asserted that "[t]o satisfy the commonality requirement, insurance policies need not be identical contracts, but rather must only raise a *single common issue*." CP2105 (emphasis added). The Court of Appeals itself recognized that Lundquist always made the same arguments in favor of coverage. Op. 5. Standard likewise recognized that all 18 polices contain common language by seeking summary judgment on *all* of them. CP1640.

teachers owed $100 million by Standard. If the teachers cannot recover disability benefits here, they will never recover at all. *See Scott*, 160 Wn.2d at 855 ("[t]he *realistic* alternative to a class action is not" an individual suit brought by every class member "but zero individual suits.") (quotation and citation omitted) *(*Court's emphasis). This is particularly true here where Standard never informed class members that it denied these claims. Decertification deprives these class members of their right to effective relief.

Moreover, decertification requires individuals who could only rely on the class action to bring individual suits, without ever notifying them of this possibility. Decertification is thus a "'drastic step,' not to be taken lightly." 3 *Newberg on Class Actions*, §7:37 (5th ed. 2013); *Chavez*, 190 Wn.2d at 517, n.8 ("a trial court is entitled to 'noticeably more deference' on a grant of class certification").

Here, two trial court judges certified class claims, and five appellate rulings denied review of those orders. CP413-15, 925, 1461-66, 1852. When the case was transferred to a third judge, Standard sought decertification, even though the record had not changed. CP2079. The new judge then decertified the class. CP2438. Allowing the defendant to attack class certification without any changed circumstances is contrary to Washington's policy in favor of class actions.

The decertification here disregards the interests of class members and the standards governing decertification. RAP 13.4(b)(4). If Lundquist prevails here or on remand, so too should the 1,100 teachers with the same claims.

E. Conclusion.

This Court should grant review under RAP 13.4(b)(1)-(2), (4).

I certify that this brief is in 14-point Georgia font and contains 4,980 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 11th day of June, 2025.

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Appendix A

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TIMOTHY LUNDQUIST and a class of similarly situated individuals, Appellants, v. SEATTLE SCHOOL DISTRICT NO. 1 and STANDARD INSURANCE COMPANY, Respondents.	No. 85589-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Standard Insurance Company issued a group disability policy to the Seattle School District (SSD) and 17 other school districts in Washington State. Timothy Lundquist worked for SSD as a school teacher until he became disabled. Lundquist applied to Standard for disability coverage, which Standard approved. In paying out coverage, however, Standard did not include time, responsibility, and incentive (TRI) pay, or employer contributions to deferred compensation or health insurance.

Lundquist brought a claim against Standard, alleging that his SSD policy includes TRI and employer contributions to deferred compensation and health insurance. Lundquist successfully obtained certification of a class, including policy holders in all 18 school districts, for that claim. He then moved for summary judgment on the interpretation of the SSD and Central Kitsap School

policies. Standard opposed the motion and sought dismissal of all claims. Standard also moved to decertify the class.

The trial court denied Lundquist's motion and granted Standard's motion, decertified the class and held that the policy did not include TRI, deferred compensation, or health insurance. The court also denied Lundquist's motion to amend to add a Consumer Protection Act claim. Lundquist appeals, asserting that summary judgment and decertification were inappropriate because genuine issues of material fact remain and the class met the CR 23 requirements. He also asserts that the trial court erred in denying his motion for leave to amend.

We reverse the grant of summary judgment but affirm the decertification of the class and denial of leave to amend.

FACTS

Background

Timothy Lundquist taught middle school language arts and physical education in the SSD from 1999 to 2017.

Standard insured SSD under a group policy since 1983. SSD renewed the policy each year until 2020. Although the parties amended the policy several times to increase the amount of earnings covered, they did not otherwise amend the coverage provisions in the policy. The policy defines "insured earnings" as the "annual rate of earnings from your employer, including deferred compensation, but excluding bonuses, overtime pay, and any other extra

compensation."[1] The policy further provides that "[i]f [the insured is] paid on an annual contract basis, [their] rate of earnings is [their] annual contract salary." It does not further define "earnings," "annual contract salary," or "extra compensation."

Lundquist was diagnosed with Parkinson's disease in July 2015. Because his condition was escalating, Lundquist took a paid leave of absence beginning in March 2017. Shortly thereafter, he applied for long term disability compensation through Standard. Standard approved the application and began paying Lundquist benefits in May 2017.

In July 2017, Standard informed Lundquist that it had incorrectly included TRI as part of his benefit calculation and had thus "overpaid" him. Lundquist challenged this determination, but following internal review, Standard concluded that Lundquist's insured earnings did not include TRI.

SSD Suit

In January 2019, Lundquist brought suit against SSD, alleging that his compensation was lower than it should be because SSD failed to report earnings and pay premiums insuring the TRI payment portion of his salary. In doing so, Lundquist obtained certification of a class including all disabled Seattle Public Schools employees subject to SSD's disability policy. SSD challenged the class certification and sought dismissal of the case. The trial court granted certification and SSD appealed. This court ordered the dismissal of Lundquist's claims

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against SSD, citing his failure to exhaust his collective bargaining agreement's grievance procedure.[2]

Standard Suit

While the appeal was pending, Lundquist added claims against Standard to his initial suit. In contrast to his argument that SSD failed to pay the premiums needed to insure TRI, he now alleged that the existing policy included TRI payments. He also asserted that the policy covered employer contributions for deferred compensation and for health insurance because they were not specifically excluded by the policy language.

When Standard requested discovery on Lundquist's claims, Lundquist sought a protective order requiring Standard to serve interrogatories rather than subject Lundquist to an oral video deposition. His spouse submitted a declaration in support of Lundquist's request, attesting to his cognitive decline. The court granted Lundquist's protective order, noting "serious mental symptoms resulting from his Parkinson's disease."

In April 2022, Lundquist then moved to certify the same class for his claims against Standard. The trial court granted class certification.

Summary Judgment Motions

Following class certification, Lundquist moved for partial summary judgment on the meaning of the terms "earnings" and "extra compensation" in the long-term benefit insurance policies that Standard issued to the 18 school

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districts that employed members of the class. Lundquist argued that the insurance policy should be interpreted to pay benefits based on TRI and employer contributions to pensions and healthcare. He withdrew and replaced his motion for partial summary judgment twice. In June 2022, the court denied Lundquist's third amended motion for summary judgment, holding that the extrinsic evidence of intent was inadmissible, that Standard's evidence concerning the meaning of "Insured Earnings" precluded summary judgment for Lundquist, and stating that "[i]t seems pretty obvious that TRI pay wasn't included" given that "the contract was formed before TRI pay existed."[3]

Lundquist sought discretionary review of the court's denial of his motion for partial summary judgment. Although the court commissioner accepted review, the commissioner found that the trial court committed no obvious error and explained that the denial was proper "in light of the evidence . . . that TRI pay was created by statute after the District purchased the policy." The court commissioner also noted that the trial court's order denying Lundquist's motion for partial summary judgment could provide a basis for decertification of the class.

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Standard opposed Lundquist's motion and sought summary judgment against the class on all 18 policies. Standard also moved to decertify the class.

The court granted Standard's motion for summary judgment, concluding that Standard did not breach the policy or violate the Insurance Fair Conduct Act (IFCA), RCW 48.30.010-.015, while denying Lundquist's on both substantive and procedural grounds. The court also decertified the class.

Motion to Amend

Ten days after the summary judgment hearing, Lundquist requested leave to amend to add a Consumer Protection Act (CPA), chapter 19.86 RCW, claim. The trial court denied Lundquist's request.

Appeal

Lundquist appeals the order granting Standard's motion for summary judgment, the order denying his motion for summary judgment, the decertification of the class, and the denial of his request for leave to amend.

ANALYSIS

Summary Judgment

Lundquist contends the trial court erred both in granting Standard's motion for summary judgment and in denying his own motion because the basic rules of contract interpretation require looking to the plain language of the policy; the trial court did not comply with CR 56 by weighing evidence, relying on inadmissible evidence, and entering findings of fact; and the record did not support the dismissal of Lundquist's IFCA claim. Standard maintains that the trial court did not err because it correctly interpreted the policy, did not inappropriately weigh

evidence or err by entering findings of fact, and Lundquist's IFCA claim fails as a matter of law. We conclude that the trial court erred both in granting summary judgment as genuine issues of material fact remain as to policy language and Lundquist's IFCA claim and in entering findings as to those disputed material facts.

We review a trial court's grant or denial of a motion for summary judgment de novo, engaging in the same inquiry as the trial court. *U.S. Bank Nat'l Ass'n v. Roosild*, 17 Wn. App. 2d 589, 596, 487 P.3d 212 (2021). Viewing all evidence and reasonable inferences in the light most favorable to the nonmoving party, summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 320, 516 P.3d 796 (2022); CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

A trial court may not weigh evidence, assess credibility, or otherwise resolve issues of material fact on summary judgment. *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022). And a trial court may only enter findings of fact when ruling on a motion for summary judgment under the limited circumstances detailed in CR 56(d). *Haley*, 25 Wn.App.2d at 234-35.

Under CR 56(d), if the motion for summary judgment is not dispositive on the entirety of the case, the court may make findings only as to material facts that "exist 'without substantial controversy.' " *Haley*, 25 Wn.App.2d 207 at 234

(quoting CR 56(d)). And the court "must examine the pleadings and evidence before it and inquire of counsel to ensure that the facts are agreed." *Haley*, 25 Wn.App.2d 207 at 234-35. If the trial court makes findings of fact without satisfying CR 56(d), the findings are nullities. *Haley*, 25 Wn.App.2d 207 at 235.

Here, Lundquist challenges the trial court's order granting Standard's motion for summary judgment and denying his own motion for partial summary judgment. Because Standard's motion for summary judgment is dispositive on all aspects of the case, CR 56(d) did not permit the trial court to enter any findings of fact. However, because Lundquist only sought partial summary judgment, his motion was not dispositive of all aspects of the case. The trial court therefore had authority under CR 56(d) to make findings of material fact as to Lundquist's motion, but only as to those facts that exist without substantial controversy. We conclude that the trial court reached beyond the bounds of CR 56(d).

First, no evidence in the record shows that the trial court communicated with counsel to confirm that the facts were agreed upon. In fact, the court made findings of fact as to two essential elements of the case, both of which were actively disputed. The trial court stated that "[TRI] is by definition 'other extra compensation' " (emphasis omitted) and that "neither SSD nor . . . Lundquist's Union ever represented to SSD employees that the SSD Policy would pay LTD benefits based on TRI, employer contributions to retirement or health benefits, or anything other than employee base pay." Lundquist provided multiple pieces of evidence challenging both statements, including documents supplied to SSD

employees describing the disability policy consistent with Lundquist's interpretation, testimony of a school financing expert statement that TRI pay is part of a teacher's base salary, a declaration that a Standard form submitted by SSD for Lundquist included both TRI and the employer's pension contributions in his annual earnings, and his collective bargaining agreement (CBA) establishing that TRI is part of Lundquist's annual salary. Even Standard acknowledged the dispute, stating at the motion hearing that "[Lundquist's evidence] disputes our evidence. That flies in the face of our evidence and raises disputed facts."

Because the trial court entered findings of fact as to facts that do not exist without substantial controversy, the trial court erred. Therefore, those findings of fact are nullities on appeal.

We next conclude that the trial court erred in granting summary judgment because, with findings of fact as nullities, genuine issues of material fact remain as to policy interpretation and Lundquist's IFCA claim.

1. Policy Language

Lundquist contends that the trial court erred in granting Standard's motion for summary judgment because the plain language of the policy, understood by the average insurance purchaser, included TRI and employer contributions for deferred compensation and health insurance. Because Lundquist raised genuine issues of material fact as to the interpretation of the policy, we agree.

The rules of interpreting insurance contracts are well settled and are matters of law for the court to decide. *Seattle Tunnel Partners*, 200 Wn.2d at 321. Washington follows the "objective manifestation theory" of contract

interpretation, under which courts focus on the reasonable meaning of the contract language to determine the parties' intent at the time they entered into the agreement. *Hearst Commc'ns, Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

Initially, the plain meaning rule meant that a court would only look to evidence of the parties' intent as shown by the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations if the contract was ambiguous on its face. *Berg v. Hudesman*, 115 Wn.2d 657, 666, 801 P.2d 222 (1990). However, in *Berg*, the Washington Supreme Court "reject[ed] the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible." 115 Wn.2d at 669. The Supreme Court has since further clarified *Berg*, providing that "surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of specific words and terms used' " in a contract. *Hearst*, 154 Wn.2d at 503 (emphasis omitted) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)).

In interpreting an insurance contract, its specific language "must be given fair, reasonable, and sensible construction as would be given by an average insurance purchaser." *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995). Accordingly, "[u]ndefined terms in an insurance contract must be given their 'plain, ordinary, and popular' meaning." *Panorama Vill. Condo. Owners v. Allstate Ins.*, 144 Wn.2d 130, 139, 26 P.3d 910 (2001) (quoting *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990)). In

determining the plain or ordinary meaning of a word, courts look to standard English dictionaries. *Panorama*, 144 Wn.2d at 139.

In its motion for summary judgment, Standard asserted that Lundquist ignored key policy terms and that the "undisputed facts" demonstrated that the parties did not intend "Insured Earnings" to include TRI pay or employer benefit contributions. This, Standard, maintained, was sufficient to support the grant of summary judgment. But, as noted above, the facts at issue were not undisputed. Rather, Lundquist provided considerable evidence to the contrary. Because we consider the evidence in the view most favorable to the nonmoving party, genuine issues of material fact remain as to Standard and SSD's intent to include or exclude TRI and employer benefit contributions from the meaning of "Insured Earnings."

As noted above, Lundquist appropriately introduced extrinsic evidence to help determine the meaning of specific contract language. Both parties assert that the language of the contract is unambiguous, and yet in disputing the plain, ordinary, and popular meanings of the terms "contract salary" and "earnings," present contradictory results. A similar dispute exists as to the parties' intent in forming the contract. Lundquist provided evidence that SSD supplied documents to employees describing the disability policy consistent with Lundquist's interpretation, testimony from a school financing expert statement that TRI pay is part of a teacher's base salary, a declaration that SSD submitted a Standard form including both TRI and the employer's pension contributions in his annual earnings, and that the CBA established TRI as a part of Lundquist's annual

salary. Given this evidence, reasonable minds could easily differ on whether SSD and Standard intended to include TRI and employer contributions under "Insured Earnings."

Because the trial court's findings of fact are nullities and we consider the evidence in the view most favorable to Lundquist as the nonmoving party, genuine issues of material fact remain as to the interpretation of policy language.

2. IFCA Claim

Lundquist also asserts that the trial court erred by improperly granting summary judgment on his IFCA claim. Standard disagrees, asserting that Lundquist's IFCA claim fails as a matter of law. Summary judgment on the IFCA claim is not appropriate because, without a determination regarding the policy language, genuine issues of material fact remain as to Lundquist's IFCA claim.

Washington's IFCA allows an insured "who is unreasonably denied a claim for coverage or payment of benefits" to recover damages and costs. RCW 48.30.015(1). To prevail on such a claim, the plaintiff must prove: (1) an unreasonable denial; (2) actual damage; and (3) proximate causation. WPI 320.06.01. IFCA's private cause of action is not available "in the absence of any unreasonable denial of coverage or benefits." *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 672, 389 P.3d 476 (2017).

Standard asserts that Lundquist failed to provide evidence of an unreasonable denial of benefits because Standard paid Lundquist the benefits he was due, which do not include TRI or employer contributions to retirement or healthcare. Without evidence of an unreasonable denial, Standard contends,

Lundquist's claim fails as a matter of law. But because genuine issues of material fact remain as to whether the policy included TRI and employer contributions, Lundquist's assertion of unreasonable denial does not necessarily fail. The trial court erred in granting summary judgment on Lundquist's IFCA claim.

Decertification

Lundquist contends that the trial court erred in disregarding the law of the case and decertifying the class. Standard again disagrees, asserting that the law of the case doctrine does not apply and that Lundquist failed to meet the CR 23 criteria to establish a class. First, the law of the case doctrine does not apply. Next, because Lundquist dropped 16 of the 18 school districts in his motion for summary judgment, attempting to litigate the class action piecemeal and failing to satisfy the CR 23(a) requirements, we conclude that the trial court did not abuse its discretion in decertifying the class.

We review class certification for manifest abuse of discretion. *Pellino v. Brick's Inc*., 164 Wn. App. 668, 682, 267 P.3d 383 (2011). "We will uphold the trial court's decision if the record shows that the court considered the criteria for class certification, and the decision is based on tenable grounds and is not manifestly unreasonable." *Pellino*, 164 Wn. App. at 682. A class certification order is interlocutory and is always subject to later modification or decertification. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

1. Law of the Case

Lundquist first maintains that the trial court erred in decertifying the class because, in reversing the first trial judge's certification, the second trial judge disregarded the law of the case. Standard disagrees. Both parties cite to federal cases when addressing the doctrine. Because the Washington law of the case doctrine applies to appellate decisions, which are not at issue here, the doctrine does not apply.

The law of the case doctrine provides that "an appellate holding enunciating a principle of law must be followed in subsequent stages of the same litigation." *State v. Merrill*, 183 Wn. App. 749, 757, 335 P.3d 444 (2014). Generally, under the doctrine, an appellate court will refuse to consider issues that were decided in a prior appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988); *Merrill*, 183 Wn. App. at 757.

Here, no appellate decision is at issue. Rather, both parties address the difference between two trial judge's rulings. Because the doctrine does not apply in such circumstances, the trial court was not bound to the first judge's decision.

2. CR 23(a)

Lundquist next asserts that the trial court erred in decertifying the class because he establishes commonality, typicality, and adequacy of representation as required by CR 23(a). Standard contends that decertification was appropriate because Lundquist failed to satisfy any of the requirements. We conclude that the trial court did not abuse its discretion.

Class actions are specialized suits that, as a general rule, must be brought and maintained in strict conformity with the requirements of CR 23. *Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8 (2002). "In order to certify a class action under CR 23, the plaintiffs must show numerosity, commonality, typicality, and adequacy of representation." *Pellin*o, 164 Wn. App. at 682.

A class shows numerosity if the class is so numerous that joinder of all members is impracticable. CR 23(a). Commonality is then satisfied when the alleged facts indicate that the defendant was engaged in a " 'common course of conduct in relation to all potential class members.' " *Pellin*o, 164 Wn. App. at 682 (internal quotation marks omitted) (quoting *Oda*, 111 Wn. App. at 91). Similarly, a class shows typicality if the plaintiff's claim arises from the same course of conduct that gives rise to the class members' claim and is based on the same basic legal principles. CR 23(a)(3). Lastly, the class representative must fairly and adequately protect the interests of the class. CR 23(a).

Here, as Lundquist cannot establish commonality, he fails to satisfy CR 23. Lundquist's motion seeking partial summary judgment on only two of the 18 policies within the class demonstrates that the court would be required to evaluate non-common evidence of intent as to each contract. In dropping 16 of the 18 policies, Lundquist essentially concedes that those 16 excluded policies are distinct. Because the court must examine individualized evidence to interpret each policy, the trial court did not abuse its discretion in concluding Lundquist failed to establish commonality under CR 23(a)(2).

Because the failure to satisfy any one of the CR 23(a) criteria requires certification, the trial court did not manifestly abuse its discretion in decertifying the class.

3. CR 23(b)

Lastly, Lundquist claims that the class action is maintainable under CR 23(b)(1) and (b)(2). Because Lundquist fails to satisfy the CR 23(a) requirements, we do not reach the issue of CR 23(b).

Leave to Amend

Lundquist maintains that the trial court erred in denying his motion for leave to amend to add a CPA claim because adding the claim did not prejudice Standard. We disagree.

We review a trial court's denial of leave to amend for manifest abuse of discretion. *Ensley v. Mollmann*, 155 Wn. App. 744, 759, 230 P.3d 599 (2010). Again, "a manifest abuse of discretion arises when 'the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.' " *State v. Case*, 13 Wn. App. 2d 657, 668, 466 P.3d 799 (2020) (quoting *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017)).

Under CR 15(a), a trial court should "freely" grant leave to amend "when justice so requires." A trial court may grant such leave unless the amendment would cause undue hardship or prejudice to the opposing party. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349-50, 670 P.2d 240 (1983). "In determining prejudice, a court may consider undue delay and unfair surprise as well as the

futility of amendment." *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007).

Lundquist contends that granting leave to amend would not have prejudiced Standard's ability to defend this case because the added CPA claim arose out of the same facts as the other two claims raised and the CPA claim overlapped substantially with his IFCA claim. But Lundquist fails to acknowledge that he waited until 10 days after the last hearing on the cross-motions for summary judgment and the motion to decertify to move for leave to amend, causing undue delay.

Despite actively arguing that his CPA claim arose out of the same facts as his initial claims, Lundquist does not make any showing as to why he could not have included the CPA claim earlier. And because Standard's response to Lundquist's motion for partial summary judgment and Standard's argument as to decertification were based only on Lundquist's original claims, this last-minute addition would require new discovery, new experts, and likely, new motions. Accordingly, the trial court appropriately denied his motion based on the undue delay, and therefore prejudice, the amendment would cause. On remand, however, Lundquist may again move to add a CPA claim.

Given the record in front of the trial court, we conclude that the trial court did not manifestly abuse its discretion in denying Lundquist's motion for leave to amend.

We reverse the grant of summary judgment but affirm class decertification and the denial of leave to amend based on the facts that were before the court at that time.

Smith, C.J.

WE CONCUR:

Díaz, J.

Bjelkeman, J.

Appendix B

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policies. Standard opposed the motion and sought dismissal of all claims. Standard also moved to decertify the class.

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evidence or err by entering findings of fact, and Lundquist's IFCA claim fails as a matter of law. We conclude that the trial court erred in granting Standard's motion for summary judgment and did not err in denying Lundquist's motion for summary judgement because genuine issues of material fact remain as to policy language and Lundquist's IFCA claim. We similarly conclude that the court erred in entering findings as to those disputed material facts.

We review a trial court's grant or denial of a motion for summary judgment de novo, engaging in the same inquiry as the trial court. *U.S. Bank Nat'l Ass'n v. Roosild,* 17 Wn. App. 2d 589, 596, 487 P.3d 212 (2021). Viewing all evidence and reasonable inferences in the light most favorable to the nonmoving party, summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 320, 516 P.3d 796 (2022); CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

A trial court may not weigh evidence, assess credibility, or otherwise resolve issues of material fact on summary judgment. *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022). And a trial court may only enter findings of fact when ruling on a motion for summary judgment under the limited circumstances detailed in CR 56(d). *Haley*, 25 Wn.App.2d at 234-35.

Under CR 56(d), if the motion for summary judgment is not dispositive on the entirety of the case, the court may make findings only as to material facts that

"exist 'without substantial controversy.' " *Haley*, 25 Wn.App.2d 207 at 234 (quoting CR 56(d)). And the court "must examine the pleadings and evidence before it and inquire of counsel to ensure that the facts are agreed." *Haley*, 25 Wn.App.2d 207 at 234-35. If the trial court makes findings of fact without satisfying CR 56(d), the findings are nullities. *Haley*, 25 Wn.App.2d 207 at 235.

Here, Lundquist challenges the trial court's order granting Standard's motion for summary judgment and denying his own motion for partial summary judgment. Because Standard's motion for summary judgment is dispositive on all aspects of the case, CR 56(d) did not permit the trial court to enter any findings of fact. However, because Lundquist only sought partial summary judgment, his motion was not dispositive of all aspects of the case. The trial court therefore had authority under CR 56(d) to make findings of material fact as to Lundquist's motion, but only as to those facts that exist without substantial controversy. We conclude that the trial court reached beyond the bounds of CR 56(d).

First, no evidence in the record shows that the trial court communicated with counsel to confirm that the facts were agreed upon. In fact, the court made findings of fact as to two essential elements of the case, both of which were actively disputed. The trial court stated that "[TRI] is by definition 'other extra compensation' " (emphasis omitted) and that "neither SSD nor . . . Lundquist's Union ever represented to SSD employees that the SSD Policy would pay LTD benefits based on TRI, employer contributions to retirement or health benefits, or anything other than employee base pay." Lundquist provided multiple pieces of

evidence challenging both statements, including documents supplied to SSD employees describing the disability policy consistent with Lundquist's interpretation, testimony of a school financing expert statement that TRI pay is part of a teacher's base salary, a declaration that a Standard form submitted by SSD for Lundquist included both TRI and the employer's pension contributions in his annual earnings, and his collective bargaining agreement (CBA) establishing that TRI is part of Lundquist's annual salary. Even Standard acknowledged the dispute, stating at the motion hearing that "[Lundquist's evidence] disputes our evidence. That flies in the face of our evidence and raises disputed facts."

Because the trial court entered findings of fact as to facts that do not exist without substantial controversy, the trial court erred. Therefore, those findings of fact are nullities on appeal.

We next conclude that the trial court erred in granting Standard's motion for summary judgment because, with findings of fact as nullities, genuine issues of material fact remain as to policy interpretation and Lundquist's IFCA claim.

1. Policy Language

Lundquist contends that the trial court erred in granting Standard's motion for summary judgment because the plain language of the policy, understood by the average insurance purchaser, included TRI and employer contributions for deferred compensation and health insurance. Because Lundquist raised genuine issues of material fact as to the interpretation of the policy, we agree.

The rules of interpreting insurance contracts are well settled and are matters of law for the court to decide. *Seattle Tunnel Partners*, 200 Wn.2d

at 321. Washington follows the "objective manifestation theory" of contract interpretation, under which courts focus on the reasonable meaning of the contract language to determine the parties' intent at the time they entered into the agreement. *Hearst Commc'ns, Inc., v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

Initially, the plain meaning rule meant that a court would only look to evidence of the parties' intent as shown by the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations if the contract was ambiguous on its face. *Berg v. Hudesman*, 115 Wn.2d 657, 666, 801 P.2d 222 (1990). However, in *Berg*, the Washington Supreme Court "reject[ed] the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible." 115 Wn.2d at 669. The Supreme Court has since further clarified *Berg*, providing that "surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of specific words and terms used' " in a contract. *Hearst*, 154 Wn.2d at 503 (emphasis omitted) (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)).

In interpreting an insurance contract, its specific language "must be given fair, reasonable, and sensible construction as would be given by an average insurance purchaser." *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 379 (1995). Accordingly, "[u]ndefined terms in an insurance contract must be given their 'plain, ordinary, and popular' meaning." *Panorama Vill. Condo. Owners v. Allstate Ins.*, 144 Wn.2d 130, 139, 26 P.3d 910 (2001) (quoting *Boeing*

Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990)). In determining the plain or ordinary meaning of a word, courts look to standard English dictionaries. *Panorama*, 144 Wn.2d at 139.

In its motion for summary judgment, Standard asserted that Lundquist ignored key policy terms and that the "undisputed facts" demonstrated that the parties did not intend "Insured Earnings" to include TRI pay or employer benefit contributions. This, Standard, maintained, was sufficient to support the grant of summary judgment. But, as noted above, the facts at issue were not undisputed. Rather, Lundquist provided considerable evidence to the contrary. Because we consider the evidence in the view most favorable to the nonmoving party, genuine issues of material fact remain as to Standard and SSD's intent to include or exclude TRI and employer benefit contributions from the meaning of "Insured Earnings."

As noted above, Lundquist appropriately introduced extrinsic evidence to help determine the meaning of specific contract language. Both parties assert that the language of the contract is unambiguous, and yet in disputing the plain, ordinary, and popular meanings of the terms "contract salary" and "earnings," present contradictory results. A similar dispute exists as to the parties' intent in forming the contract. Lundquist provided evidence that SSD supplied documents to employees describing the disability policy consistent with Lundquist's interpretation, testimony from a school financing expert statement that TRI pay is part of a teacher's base salary, a declaration that SSD submitted a Standard form including both TRI and the employer's pension contributions in his annual

earnings, and that the CBA established TRI as a part of Lundquist's annual salary. Given this evidence, reasonable minds could easily differ on whether SSD and Standard intended to include TRI and employer contributions under "Insured Earnings."

Because the trial court's findings of fact are nullities and we consider the evidence in the view most favorable to the nonmoving party, genuine issues of material fact remain as to the interpretation of policy language. Because genuine issues of material fact remain, summary judgment is not appropriate for either party.

2. IFCA Claim

Lundquist also asserts that the trial court erred by improperly granting summary judgment on his IFCA claim. Standard disagrees, asserting that Lundquist's IFCA claim fails as a matter of law. Summary judgment on the IFCA claim is not appropriate because, without a determination regarding the policy language, genuine issues of material fact remain as to Lundquist's IFCA claim.

Washington's IFCA allows an insured "who is unreasonably denied a claim for coverage or payment of benefits" to recover damages and costs. RCW 48.30.015(1). To prevail on such a claim, the plaintiff must prove: (1) an unreasonable denial; (2) actual damage; and (3) proximate causation. WPI 320.06.01. IFCA's private cause of action is not available "in the absence of any unreasonable denial of coverage or benefits." *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 672, 389 P.3d 476 (2017).

Standard asserts that Lundquist failed to provide evidence of an unreasonable denial of benefits because Standard paid Lundquist the benefits he was due, which do not include TRI or employer contributions to retirement or healthcare. Without evidence of an unreasonable denial, Standard contends, Lundquist's claim fails as a matter of law. But because genuine issues of material fact remain as to whether the policy included TRI and employer contributions, Lundquist's assertion of unreasonable denial does not necessarily fail. The trial court erred in granting summary judgment on Lundquist's IFCA claim.

Decertification

Lundquist contends that the trial court erred in disregarding the law of the case and decertifying the class. Standard again disagrees, asserting that the law of the case doctrine does not apply and that Lundquist failed to meet the CR 23 criteria to establish a class. First, the law of the case doctrine does not apply. Next, because Lundquist dropped 16 of the 18 school districts in his motion for summary judgment, attempting to litigate the class action piecemeal and failing to satisfy the CR 23(a) requirements, we conclude that the trial court did not abuse its discretion in decertifying the class.

We review class certification for manifest abuse of discretion. *Pellino v. Brick's Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011). "We will uphold the trial court's decision if the record shows that the court considered the criteria for class certification, and the decision is based on tenable grounds and is not manifestly unreasonable." *Pellino*, 164 Wn. App. at 682. A class certification

order is interlocutory and is always subject to later modification or decertification. *Weston v. Emerald City Pizza LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007).

1. Law of the Case

Lundquist first maintains that the trial court erred in decertifying the class because, in reversing the first trial judge's certification, the second trial judge disregarded the law of the case. Standard disagrees. Both parties cite to federal cases when addressing the doctrine. Because the Washington law of the case doctrine applies to appellate decisions, which are not at issue here, the doctrine does not apply.

The law of the case doctrine provides that "an appellate holding enunciating a principle of law must be followed in subsequent stages of the same litigation." *State v. Merrill*, 183 Wn. App. 749, 757, 335 P.3d 444 (2014). Generally, under the doctrine, an appellate court will refuse to consider issues that were decided in a prior appeal. *Folsom v. County of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988); *Merrill*, 183 Wn. App. at 757.

Here, no appellate decision is at issue. Rather, both parties address the difference between two trial judge's rulings. Because the doctrine does not apply in such circumstances, the trial court was not bound to the first judge's decision.

2. CR 23(a)

Lundquist next asserts that the trial court erred in decertifying the class because he establishes commonality, typicality, and adequacy of representation as required by CR 23(a). Standard contends that decertification was appropriate

because Lundquist failed to satisfy any of the requirements. We conclude that the trial court did not abuse its discretion.

Class actions are specialized suits that, as a general rule, must be brought and maintained in strict conformity with the requirements of CR 23. *Oda v. State*, 111 Wn. App. 79, 92, 44 P.3d 8 (2002). "In order to certify a class action under CR 23, the plaintiffs must show numerosity, commonality, typicality, and adequacy of representation." *Pellin*o, 164 Wn. App. at 682.

A class shows numerosity if the class is so numerous that joinder of all members is impracticable. CR 23(a). Commonality is then satisfied when the alleged facts indicate that the defendant was engaged in a " 'common course of conduct in relation to all potential class members.' " *Pellin*o, 164 Wn. App. at 682 (internal quotation marks omitted) (quoting *Oda*, 111 Wn. App. at 91). Similarly, a class shows typicality if the plaintiff's claim arises from the same course of conduct that gives rise to the class members' claim and is based on the same basic legal principles. CR 23(a)(3). Lastly, the class representative must fairly and adequately protect the interests of the class. CR 23(a).

Here, as Lundquist cannot establish commonality, he fails to satisfy CR 23. Lundquist's motion seeking partial summary judgment on only two of the 18 policies within the class demonstrates that the court would be required to evaluate non-common evidence of intent as to each contract. In dropping 16 of the 18 policies, Lundquist essentially concedes that those 16 excluded policies are distinct. Because the court must examine individualized evidence to interpret

each policy, the trial court did not abuse its discretion in concluding Lundquist failed to establish commonality under CR 23(a)(2).

Because the failure to satisfy any one of the CR 23(a) criteria requires certification, the trial court did not manifestly abuse its discretion in decertifying the class.

3. CR 23(b)

Lastly, Lundquist claims that the class action is maintainable under CR 23(b)(1) and (b)(2). Because Lundquist fails to satisfy the CR 23(a) requirements, we do not reach the issue of CR 23(b).

Leave to Amend

Lundquist maintains that the trial court erred in denying his motion for leave to amend to add a CPA claim because adding the claim did not prejudice Standard. We disagree.

We review a trial court's denial of leave to amend for manifest abuse of discretion. *Ensley v. Mollmann*, 155 Wn. App. 744, 759, 230 P.3d 599 (2010). Again, "a manifest abuse of discretion arises when 'the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.' " *State v. Case*, 13 Wn. App. 2d 657, 668, 466 P.3d 799 (2020) (quoting *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017)).

Under CR 15(a), a trial court should "freely" grant leave to amend "when justice so requires." A trial court may grant such leave unless the amendment would cause undue hardship or prejudice to the opposing party. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349-50, 670 P.2d 240 (1983). "In determining

prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment." *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007).

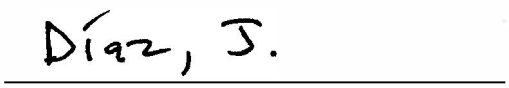
Lundquist contends that granting leave to amend would not have prejudiced Standard's ability to defend this case because the added CPA claim arose out of the same facts as the other two claims raised and the CPA claim overlapped substantially with his IFCA claim. But Lundquist fails to acknowledge that he waited until 10 days after the last hearing on the cross-motions for summary judgment and the motion to decertify to move for leave to amend, causing undue delay.

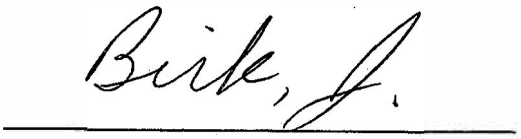
Despite actively arguing that his CPA claim arose out of the same facts as his initial claims, Lundquist does not make any showing as to why he could not have included the CPA claim earlier. And because Standard's response to Lundquist's motion for partial summary judgment and Standard's argument as to decertification were based only on Lundquist's original claims, this last-minute addition would require new discovery, new experts, and likely, new motions. Accordingly, the trial court appropriately denied his motion based on the undue delay, and therefore prejudice, the amendment would cause. On remand, however, Lundquist may again move to add a CPA claim.

Given the record in front of the trial court, we conclude that the trial court did not manifestly abuse its discretion in denying Lundquist's motion for leave to amend.

We reverse the grant of summary judgment but affirm class decertification and the denial of leave to amend based on the facts that were before the court at that time.

WE CONCUR:





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I, Anders Forsgaard, declare that I effected service of the foregoing document on the parties listed below through the Court's e-filing system.

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

DATED this 11th day of June, 2025.

/s/ Anders Forsgaard
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STOBAUGH & STRONG

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