No. 84500-0

ALEXANDER, J. (concurring in dissent)—I agree with the dissent written by Chief Justice Madsen. I write simply to express my view that the trial court committed an additional error in granting class action certification.

Farmers Insurance Company of Washington and Farmers Insurance Exchange (Farmers) contend that the trial court erred in certifying the class because David Moeller, representing the class, failed to satisfy CR 23(b)(3). I agree. Under that rule, class certification may be maintained only if the court "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule sets forth several matters pertinent to whether a trial court should find in favor of certification, including:

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

CR 23(b)(3). In this case we are concerned with subsection (D), "difficulties likely to be encountered in the management of a class action." CR 23(b)(3)(D); *see* Clerk's Papers at 1596.

The majority correctly explains that we review the trial court's decision for an abuse of discretion. Majority at 13 (citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995)). However, the majority fails to recognize that although Washington courts liberally interpret CR 23, actual, and not presumed, conformance with the rule remains indispensible. *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)). "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).

In my view, the trial court abused its discretion when it found that common issues predominate over individual ones and that a class action is superior to other methods of adjudicating the disputes. My concern is with the plaintiffs' intended method of arriving at the measure of damages. Moeller does not plan to prove his claim of breach of contract and resulting injury with evidence of the preaccident and postrepair values of class members' cars. Instead, Moeller intends to use a statistical methodology and data from car auction sales to prove that, on average, cars that are

"wrecked and repaired" sell for lower prices than do cars that are "unwrecked" and therefore, as a statistical matter, diminished value exists. Verbatim Report of Proceedings (RP) at 49. Moeller then plans to categorize and quantify the alleged average decreases in value associated with types or amounts of damage, multiply each alleged average amount by the number of class members in each damage category, and then tally the numbers to provide a class-wide "'damage[s] estimate.'" Pet. for Discretionary Review at 15 (alteration in original) (citing RP 63-64, 73-78, 91-94, 160).

The proposed measure of damages should not be permitted on a class-wide basis because individualized proofs of the preaccident and postrepair values of each damaged car should be required to ascertain which of the thousands of class members actually suffered damage caused by Farmers' failure to tender a diminished value payment. Additionally, Moeller should be required to prove how much damage each individual class member sustained. The problem with the proposed method of calculating damages is that there is no way to ensure that each car included in the model actually sustained diminished value. Significantly, Moeller admitted that the class may include cars that have been in an accident that "replicate[d]" an earlier accident, "in which case they would get no [diminished value]." RP at 77.

The proposed measure of damages also fails to take into account the scenario of a car that had dents and scratches prerepair that, when fixed with a new paint job, increased the value of the car beyond any postaccident, diminished value due to weakened metal. To account for those class members who have no viable damages

claim, the trial court would allow the plaintiffs to "lop . . . off" a percentage of Moeller's class-wide damages estimate. RP at 77. This method of calculating damages potentially allows damages to be awarded without competent proof of liability to every class member. Although the majority properly acknowledges that a car that increases in value postrepair cannot be included in the class, it dismisses Farmers' concern that "'not everyone in the class suffered damage caused by Farmers' failure to tender a diminished value payment'" as "not particularly relevant." Majority at 15, 16 (quoting in part Pet'r's Suppl. Br. at 15). Contrary to what the majority suggests, the question of whether an individual class member suffered damage is highly relevant to whether that class member is entitled to receive damages from Farmers.

Additionally, the trial plan effectively converts the damages element of Moeller's claim into an affirmative defense. This impermissibly shifts the burden to prove damages from the plaintiffs to the defendant. This offends due process. *See Sitton v. State Farm Mut. Auto Ins. Co.*, 116 Wn. App. 245, 258, 63 P.3d 198 (2003) (vacating a class-certification trial plan because its effect was to "eliminate causation as an element of plaintiffs' bad faith and Consumer Protection Act [(chapter 19.86 RCW)] claims").

I would hold that the trial court abused its discretion in certifying this class. Because the majority holds otherwise, and for the reasons set forth by Chief Justice Madsen, I respectfully dissent.

AUTHOR:
Justice Gerry L. Alexander

WE CONCUR:
Karen G. Seinfeld, Justice Pro Tem.