IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID MOELLER, Respondent, v. farmers insurance company of washington and farmers insurance exchange, Petitioners.	NO. 84500-0 EN BANC Filed December 22, 2011

STEPHENS, J.—In this class action against Farmers Insurance Company of Washington and Farmers Insurance Exchange (Farmers), we must decide if a contract between an auto insurer and its insured provides coverage for the diminished value of a postaccident, repaired car. This case also requires us to consider whether the class here was properly certified. We affirm the Court of Appeals and hold that the policy language at issue allows recovery for diminution in value and that the class was properly certified.

Facts and Procedural History

In November 1998, David Moeller's 1996 Honda Civic CRX was damaged in a collision. Moeller had an insurance policy through Farmers. The parties cite the following portions of the insurance contract as relevant:

> **DEFINITIONS**
> . . . .
> **Accident** or **occurrence** means a sudden event, including continuous or repeated exposure to the same conditions, resulting in **bodily injury** or **property damage** neither expected nor intended by the **Insured person**.
> . . . .
> **Damages** are the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**.
> . . . .
> **Property damage** means physical injury to or destruction of tangible property, including loss of its use.
> . . . .
> **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.
> . . . .
> **Additional Definitions Used in This Part Only**
> . . . .
> 2. **Loss** means direct and accidental loss of or damage to **your Insured car**, including its equipment.
> . . . .
> **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.
> . . . .
> **Payment of Loss**
> We may pay the **loss** in money or repair or replace damaged or stolen property.

Suppl. Br. of Resp't at 3; *see also* Pet. for Discretionary Review at 2.

Farmers chose to repair Moeller's damaged car. Moeller authorized the

repair and did not request an appraisal of his loss.[1] Moeller acknowledged that the repairs were complete and acceptable. Farmers paid the repair cost, less Moeller's $500 deductible.

In May 1999, Moeller brought suit on behalf of himself and other similarly situated Farmers policy holders in Washington State. He asserted a breach of contract claim on the grounds that Farmers failed to restore his vehicle to its "pre-loss condition through payment of the difference in the value between the vehicle's pre-loss value and its value after it was damaged, properly repaired and returned." Clerk's Papers (CP) at 435.[2]

In September 2002, following a hearing that extended over four days, the trial court granted Moeller's motion for class certification. The court noted that one factor, the likelihood of difficulty in managing the class action as proposed, was "heavily disputed," CP at 1597, but found certification appropriate. The Court of Appeals denied discretionary review of the certification order.

Several months later, Farmers successfully moved for summary judgment, arguing that Moeller's diminished value claim was precluded by the language of the insurance policy. Moeller appealed, and Farmers cross-appealed the class certification. The Court of Appeals reversed the trial court's grant of summary judgment and affirmed its class certification. *Moeller v. Farmers Ins. Co.*, 155 Wn.

[1] The policy allows the insured to demand an appraisal if he or she disputes Farmers' valuation of loss.

[2] Moeller made a number of other claims, including insurance bad faith and Consumer Protection Act, chapter 19.86 RCW, violations, but those are not before us.

App. 133, 229 P.3d 857 (2010). Farmers filed a petition for review with this court, which was granted. *Moeller v. Farmers Ins. Co.*, 169 Wn.2d 1001, 234 P.3d 1172 (2010).

Analysis

This case concerns coverage for the diminished value of a repaired vehicle after a collision. In the past decade, many courts and state legislatures have considered this issue, with varying results. *See* Janet L. Kaminski, *Insurance Claim for Car's Diminished Resale Value*, State of Conn. Gen. Assembly Office of Legislative Research Report (Jan. 3, 2007) at 2, http://www.cga.ct.gov/2007/rpt/2007-R-0011.htm. The question boils down to what it means to pay for loss to an insured's car, i.e., whether it means just restoring the vehicle to usable condition or also encompasses lost value.

As the Court of Appeals recognized, courts have split on this issue, though the split must be viewed in light of the specific policy language at issue and how the issue was framed in a particular case. *Moeller*, 155 Wn. App. at 144 n.10. The Court of Appeals found persuasive the view of courts such as those in Oregon and Georgia, which have held that diminished value is a covered loss and is not excluded by limits of liability or payment of loss provisions similar to the provisions found in the contract here. *Id*. at 144 n.10, 145 n.11. For the reasons explained below, we agree with the Court of Appeals, though we find the question closer than the Court of Appeals did. It appeared to hold the Farmers policy unambiguously

provided diminished value coverage. We instead find the limiting language in the policy ambiguous and accordingly construe it most favorably to the insured. We also affirm the class certification.

A. Does Farmers' insurance policy provide coverage for diminished value following postaccident repairs?

As noted, the question presented requires us to determine whether Moeller's insurance policy requires Farmers to repair a car so that it is in substantially the same *functional condition* it was preaccident, or if instead the policy requires Farmers to repair a car so that it has the same *value* it had preaccident. Because the concept of value is integral to the analysis here, the Court of Appeals understandably began with a discussion of the difference between diminished value and stigma damages. *Moeller*, 155 Wn. App. at 142.

> A vehicle suffers "diminished value" when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its preloss condition. Weakened metal that cannot be repaired is one such example. In contrast, "stigma damages" occur when the vehicle has been fully restored to its preloss condition, but it carries an intangible taint due to its having been involved in an accident.

Id. Stigma damages are generally disfavored, and Moeller claims he is not seeking stigma damages. *See* Suppl. Br. of Resp't at 12; *see also* Br. of Appellant at 5-7 (setting forth evidence that the type of damage sustained by Moeller's car could never be repaired so that a car was returned to its preaccident condition). Farmers disagrees, noting that the proof Moeller would offer includes figures showing the decreased auction value of cars that have been in an accident and that this is nothing

more than a repackaging of stigma damages. *See* Pet'r's Suppl. Br. at 13. While the parties dispute the nature of Moeller's claim in this respect, this debate has little bearing on the plain language of the policy at issue, which is the focus here. Undoubtedly, the nature of the damages Moeller claims and how they can be proved will be explored by the trial court should this case proceed to trial.

Standard of Review and Rules of Construction

Our review of a trial court's summary judgment order is de novo. In addition, the interpretation of language in an insurance policy is a matter of law. *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997). We view an insurance contract in its entirety and cannot interpret a phrase in isolation. *Id*. at 424. "When construing the policy, the court should attempt to give effect to *each* provision in the policy." *Id*. A determination of coverage involves two steps: first, "[t]he insured must show the loss falls within the scope of the policy's insured losses." *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). Then, in order to avoid coverage, the insurer must "show the loss is excluded by specific policy language." *Id*.; *see also State Farm Fire & Cas. Co. v. Ham & Rye*, LLC, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007).

The legislature has declared that the "business of insurance is one affected by the public interest." RCW 48.01.030. "Exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance, and we will not extend them beyond their clear and unequivocal meaning." *Ham & Rye*, 142 Wn. App. at

13 (citing *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998)). Thus, ambiguity is resolved in the favor of the policyholder, and exclusionary clauses are construed strictly against the insurer. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987).

Undefined terms in an insurance policy are given their ordinary and common meaning, not their legal, technical meaning. *Peasley*, 131 Wn.2d at 424. Likewise, the contract as whole "must be read as the average person would read it; it should be given a 'practical and reasonable rather than a literal interpretation', and not a "strained or forced construction" leading to absurd results." *Eurick*, 108 Wn.2d at 341 (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986)).

Grant of Coverage

The Court of Appeals explained that the policy at issue covers "loss" to the insured's car and that loss is defined in the policy as direct damage. *Moeller*, 155 Wn. App. at 142. Finding no definition of "direct" or "damage" in the policy, the Court of Appeals looked elsewhere for definitions, noting that "'direct'" means a "'causal relationship'" and "'damage'" means "'loss due to injury.'" *Id*. at 143 (quoting 11 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 156:21 (3d ed. Supp. 2009) and Webster's Third New International Dictionary 571 (1976)). Given these definitions, the Court of Appeals opined that "Moeller's collision damages have been repaired and Farmers paid for those repairs. But there remains

damage that cannot be repaired, e.g., weakened metal. Farmers has not paid for this diminished value loss." *Id.*

The majority of courts to review the coverage piece of this question have agreed that diminished value is a loss contemplated under policies using similar provisions defining loss. *Id.* at 144 n.8. This is consistent with the views of a leading commentator. "A vehicle is not restored to substantially the same condition if repairs leave the market value of the vehicle substantially less than the value immediately before the collision." 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3D § 175:47, at 175-54 (2005).

Significantly, Farmers does not appear to dispute the notion that diminished value falls within the scope of the coverage grant in its policy, but it maintains that such coverage is foreclosed by policy language limiting Farmers' liability. The scope of the policy's coverage therefore turns on whether the limiting provisions unambiguously exclude diminished value loss.

Limitations on Coverage

The Court of Appeals held that coverage was not limited under the policy. It recognized a division of authority on this question, which has been widely considered by other courts.[3] *Moeller*, 155 Wn. App. at 144 n.10 (collecting cases). Here, the limits of liability clause provides that Farmers' liability for loss cannot exceed "[t]he amount which it would cost to repair or replace damaged [. . .]

[3] Two states have apparently resolved this question through statute, while many others have authorized policy language that expressly excludes diminished value coverage. *See* Kaminski, *supra*, at 2.

property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation." CP at 20. In other words, argues Moeller, the clause is not "an exclusion for diminished value, rather it simply cap[s] Farmers' liability at the pre-loss value of the vehicle so as to prevent financial betterment." Br. of Appellant at 9. The Court of Appeals agreed with Moeller that the term "'like kind and quality'" means "a restoration of appearance, function, and value." *Moeller*, 155 Wn. App. at 145 (emphasis omitted). Thus, it concluded the policy requires Farmers to repair Moeller's vehicle and pay him the difference in value between his repaired vehicle and its preaccident worth. This accords with a minority view holding the meaning of "repair" unambiguously includes an accounting of pre- and postaccident value. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 505-08, 556 S.E.2d 114 (2001); *Gonzales v. Farmers Ins. Co. of Or.*, 345 Or. 382, 394, 196 P.3d 1 (2008). Other courts have held that the phrase "like kind and quality" is ambiguous and therefore must be construed against the insurer. *See, e.g., Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222, 1225 (Colo. App. 2000).

Farmers claims diminished value loss is unambiguously excluded by its limits of liability and payment of loss provisions. It argues that a car is either a total loss, or it is repairable, and that an insurer meets its obligation to repair when it returns the car to good and useable condition. Pet'r's Suppl. Br. at 4-8. Farmers contends that the Court of Appeals' view reads the insurer's option to repair out of the

contract. Farmers maintains that "like kind and quality" means "if an insurer elects to repair a car and must replace parts in doing so, then the replacement parts must be of 'like kind and quality,'" or "if the insurer elects to replace a damaged car, then the replacement must be of "like kind and quality.'" *Id*. at 11 (citing *Davis v. Farmers Ins. Co. of Ariz*., 140 N.M. 249, 255, 142 P.3d 17 (Ct. App. 2006)). Likewise, Farmers contends that the Court of Appeals ignored the policy's payment of loss provision, which clearly gives Farmers the option of compensating loss by either money *or* repair *or* replacement—but, does not allow a combination of the three.

Farmers relies on "[t]he modern majority of cases [that] agree that 'repair or replace' unambiguously refers to physical restoration of the vehicle." *Davis*, 140 N.M. at 253. These courts have variously found that value was not required by a "repair or replace" policy because repair unambiguously encompasses only a concept of tangible, physical value, *see, e.g., Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 1001, 851 N.E.2d 701, 303 Ill. Dec. 514 (2006), or because a reading that encompassed value would eliminate an insurer's option to either repair or compensate with money. *See, e.g., O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. Supr. 2001); *Sims*, 365 Ill. App. 3d at 1003-04; *Davis*, 140 N.M. at 255.

For a variety of reasons, we reject this view and conclude that the minority view on the proper interpretation of the limitations at issue is the more compelling.

First and foremost, the majority view's framework ignores important presumptions in favor of the insurance consumer that are inherent in the rules of construction regarding insurance contracts. We must read an insurance contract as an average person would read it. *Eurick*, 108 Wn.2d at 341. Thus, the lens through which we view this question is from the point of view of the consumer. From this point of view, the bargain of the contract is to return the consumer to his preaccident position with respect to the value of his car. Strictly construing the limiting language of Farmers' policy, as we must, it does not convey to the average policyholder that the value of coverage may be less if Farmers repairs a vehicle rather than replacing or "totaling" it. Rather, the reasonable expectation is that, following repairs, the insured will be in the same position he or she enjoyed before the accident.

Farmers contends that the phrase "like kind and quality" carries with it no concept of value but simply means any repairs will be made with parts of like kind and quality. But even Farmers' interpretation does not rule out a reading of the contract that reasonably assumes that repairs of like kind and quality will return the car to its preaccident value. Certainly, an average consumer would expect to be put in the same position whether his or her car was "totaled" or repaired. Moreover, under the policy, the phrase "like kind and quality" applies to replacement as well as repair. Farmers does not contend that in replacing a damaged car or damaged equipment, an acceptable substitute is a replacement that has suffered an accident.

This would put the insured in the position he found himself in *after* the accident, not before. We find the limits of liability provision ambiguous at best. Because ambiguities are construed against the insurer, this clause does not relieve Farmers from covering a diminution in value between a preaccident and postrepair vehicle. *Accord Hyden*, 20 P.2d at 1225; *Mabry*, 274 Ga. at 505-08.[4]

Farmers claims that Moeller's reading of the limits of liability clause means Farmers loses its option to repair instead of "totaling out" the car. But under Moeller's reading, Farmers retains that option; it is merely that either option must result in coverage of equal value to the insured. Likewise, the plain language of the payment of loss provision also does not foreclose coverage. While the provision is phrased in the disjunctive, giving Farmers the option to either compensate by monetary payment *or* repair, the word "or" does not render the options mutually exclusive. For example, the policy recognizes that loss may be recouped when a car is damaged *or* stolen. Clearly, a car may be both damaged and stolen, with losses stemming from each occurrence. It is also reasonable to anticipate situations where some losses are repaired, others replaced, and some compensated with cash, as when a heavily customized car is damaged. The insurer may fix the car but replace or pay cash for the custom equipment. The plain language of the payment of loss

[4] While the Court of Appeals appeared to find the clause "like kind and quality" unambiguous, we think the question is closer, as Farmers' reading of the policy is not unreasonable. This is not to suggest it is *equally* reasonable to read the concept of value entirely out of the policy. For example, we find unpersuasive Farmers' analogy to fixing a broken plate by gluing it back to together. Br. of Resp'ts/Cross-Appellants at 13. While this may fully restore the functionality of the plate, it seems plainly inadequate from the reasonable consumer's point of view.

provision does not foreclose coverage for diminished value when repairs are made.

As the Court of Appeals noted, some of the cases relied upon by Farmers as expressing the majority view involved contracts that explicitly gave the insurer the option of choosing between repair or cash compensation for the value of the car, the *lesser* of the two. *Moeller*, 155 Wn. App. at 144 n.10; *see, e.g., O'Brien*, 785 A.2d at 285. Significantly, this policy includes no such language. Other cases in the majority camp also fail to address the ambiguity caused by the policy's promise to repair or replace with "like kind and quality." *See, e.g., id.* at 288-91 (focusing its ambiguity discussion on propriety of extrinsic evidence); *Bickel v. Nationwide Mut. Ins. Co.*, 206 Va. 419, 423-24, 143 S.E.2d 903 (1965) (omitting ambiguity discussion altogether). Still others frame much of their analysis around the notion that stigma damages are disfavored, but this is a measure of damage Moeller does not seek. *See, e.g., Davis*, 140 N.M at 253-54 (citing a number of cases that take issue with a claim for stigma damages).

Because the average insurance consumer would read Farmers' policy to provide coverage of equal value when a car is repaired, replaced, or "totaled," the coverage provision encompasses diminished value loss, and the limits of liability and payment of loss provisions do not unambiguously exclude it. We affirm the Court of Appeals and hold that under the terms of the policy at issue, Farmers' policy provides coverage for diminished value after a car is repaired.

B. Did the trial court properly certify the class?

A trial court's decision to grant 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). Abuse of discretion occurs only when a trial court's decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer v. Sto Indus. Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (quoting *Assoc. Mortg. Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976)).

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."'" *Weston v. Emerald City Pizza, LLC*, 137 Wn. App. 164, 168, 151 P.3d 1090 (2007) (alterations in original) (quoting *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.3d 665 (2002) (quoting *Brown v. Brown*, 6 Wn. App. 249, 256-57, 492 P.2d 581 (1971))). A class is always subject to later modification or decertification by the trial court, and hence the trial court should err in favor of certifying the class. *Id*.

CR 23(a), which concerns the familiar prerequisites for certification involving numerosity, commonality, typicality, and fair and adequate protection of class interests by the class representative, is not at issue here. Instead, the challenge to certification arises from the requirements to maintain a class action under CR 23(b). A class action may be maintained under CR 23(b)(1), (2), or (3). Here, Moeller

sought to maintain his class action under both CR 23(b)(2), governing actions for injunctive relief, and CR 23(b)(3), governing actions for damages. The trial court denied certification under CR 23(b)(2), finding the "requested relief, as pled, is predominately a claim for damages, not equitable relief." CP at 1596. Moeller does not challenge that conclusion. The court did, however, certify the action under CR 23(b)(3), and it is that ruling that concerns us here.

CR 23(b)(3) requires the court to find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. CR 23(b)(3)(A)-(D) lists "matters pertinent to the findings," including subsection (D), which requires the court to consider the difficulties likely to be encountered in management of a class action.

Farmers contends that the trial court abused its discretion in certifying the class under CR 23(b)(3) because it did not first require Moeller to prove Farmers' liability as to every member of the class. Pet'r's Suppl. Br. at 15. "The court disregarded Moeller's admission that not everyone in the class suffered damage caused by Farmers' failure to tender a diminished value payment, and failed to acknowledge that this admission means Moeller cannot establish class-wide liability." *Id*. (footnote omitted). It is a violation of due process, argues Farmers, to allow Moeller to proceed with a plan to obtain a class-wide award of damages because it would allow damages to be awarded before individual class members prove they suffered damage by Farmers. *Id*.

Farmers exaggerates Moeller's "admission." Moeller points out that the trial court took care to address Farmers' concerns regarding proof of damages and did not find them persuasive enough to bar class certification. Suppl. Br. of Resp't at 15. In addition, Moeller contends he has not actually admitted that some class members have no claim. His "admission" was merely a discussion of how he would arrive at a measure of class-wide damages, taking into account any hypothetical class member whose car might have been in a previous accident and thus experienced no diminution in value. Answer to Pet. for Review at 13-15.

Moeller is correct that the claimed admission is not particularly relevant. It arises, as Moeller states, in the context of a discussion as to how the class will provide an accurate estimate of class-wide damages. *See* Report of Proceedings (RP) (June 27, 2002) at 69-103. Moeller is also correct that the trial court specifically noted that class certification would not impede Farmers' ability to defend against individual claims, presumably encompassing a defense based on lack of damages.

> After carefully and closely considering all of these factors, my decision is that a class action is a superior, although not perfect means, for policyholders to pursue any claims they may have for inherent diminished value against Farmers. The Court finds that such an action should not, and will not, impede Farmers' ability to investigate particular class members [sic] claims, and present evidence on individual claims supporting defenses unique to each claim and defend against the nature and extent of damages, if any, in this Court.

CP at 1581.

Farmers' due process argument relies on *Sitton v. State Farm Mutual*

Automobile Insurance Co., 116 Wn. App. 245, 258 & n.33, 63 P.3d 198 (2003). But *Sitton* is distinguishable from this case. There the trial court accepted a bifurcated trial plan that ultimately resulted in damages being determined before causation. *Id.* at 258-59 & n.33. This proved problematic for the *Sitton* court, which did not reverse the trial court's certification decision under CR 23(b)(3), but did vacate the trial plan. *Id*. at 261. Here, although Moeller established his mathematical model for determining a figure for aggregate, class-wide damages, RP (June 27, 2002) at 69-104, there is no indication that damages would be proved or awarded before causation is determined.

The standard for class certification is abuse of discretion. The trial court heard four days of oral argument on this issue and considered extensive briefing. *See* CP at 1573. Nothing in the record supports the proposition that the trial court's decision is unreasonable or untenable. We hold that the trial court did not abuse its discretion in certifying the class under CR 23(b)(3).

Conclusion

We affirm the Court of Appeals. The trial court did not abuse its discretion in certifying the class under CR 23(b)(3), and Farmers' policy encompasses coverage for diminished value loss.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:
Justice Mary E. Fairhurst

Justice Charles W. Johnson

Justice Tom Chambers

Justice Susan Owens