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MADSEN, C.J. (dissenting)—Today, the court strays from fundamental rules of contract interpretation and rewrites the parties' insurance contract by applying principles of tort law instead of rules of contract construction. The insurance policy at issue plainly states that Farmers Insurance Company of Washington and Farmers Insurance Exchange (Farmers) has the right to repair a damaged vehicle *or* provide monetary compensation to the insured, at its option. Nevertheless, parting company with the vast majority of courts that have considered this issue, the majority requires Farmers to repair a damaged vehicle *and* pay compensation to the insured. Because the majority opinion creates a contractual responsibility that lies nowhere within the terms of the contract, I respectfully dissent.

Analysis

We interpret an insurance contract from the point of view of the average person purchasing insurance. *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 756, 239 P.3d 344 (2010); *Eurick v. Pemco Ins. Co*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987). However, the focus of this inquiry is necessarily tied to the actual language of the

contract. Thus, the majority errs in concluding that, from the insured's 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." Majority at 10. Nothing in the contract supports such an interpretation. In fact, the majority's construction more closely reflects tort law principles and an abstract concept of fairness. Neither of these is relevant when determining the meaning of language in an insurance contract. *Cf. Culhane v. W. Nat'l Mut. Ins. Co.*, 704 N.W.2d 287, 297 (S.D. 2005) ("[b]ecause this is a contract of insurance, 'we do not consider what measure of recovery would make the insured whole after a loss or what would be fair and reasonable compensation for the loss . . . sustained, for we are not deciding a tort claim'" (quoting *Carlton v. Trinity Univ. Ins. Co.*, 32 S.W.3d 454, 465 (Tex. App. 2000))). Instead, under the unambiguous terms of the insurance policy, Farmers satisfies its contractual responsibilities when it either repairs a damaged vehicle *or* it replaces a vehicle that cannot be repaired—it is not obligated to do both.

Farmers does not dispute the insured's (David Moeller) contention that diminished value may be a loss within the coverage provision of the contract at issue. Thus, the question is not whether such a loss must be compensated in general, but rather whether it must be compensated under the circumstances here. That is, if the insurer elects to repair the damaged vehicle, and does so to the industry standard, must the insurer also pay diminution in value. To answer this question, it is necessary to examine the limits of liability provision because, although diminished value may constitute a loss under an

insurance policy's coverage provision, an insurance company's responsibility to compensate for that loss is nevertheless "circumscribed" by limits of liability and payment of loss provisions. *Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 1000, 851 N.E.2d 701 (2006).

Under the limits of liability provision of the parties' contract, Farmers' "liability for loss shall not exceed . . . [t]he amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation." Suppl. Br. of Resp't Moeller at 3 (emphasis omitted) (setting forth policy). When a term in a policy is undefined, it is given its plain, ordinary, and popular meaning. *Holden*, 169 Wn.2d at 756. The relevant common meaning of "repair" is "to restore by replacing a part or putting together what is torn or broken **:** Fix, Mend <so neatly *repaired* that he could see no trace of the once familiar rents—T.B. Costain> <*repair* a house> <*repair* a shoe>." Webster's Third New International Dictionary 1923 (2002). This is the ordinary meaning that an average purchaser of insurance would give the term. *See Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.2d 859 (2009).

In accordance with this definition, Farmers "repairs" a damaged vehicle when it returns the vehicle to substantially the same physical condition that it was in prior to the accident by fixing and replacing damaged parts. *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. Super. Ct. 2001). "This definition of repair does not require the insurer to restore the vehicle to factory condition or even to the condition of the vehicle

before the accident." *Id.* at 290. Nor does it require the insurer to restore the vehicle to its preaccident market value. *Culhane*, 704 N.W.2d at 295 ("the ordinary meaning of the words 'repair' and 'replace' indicate something physical and tangible").

Of central importance in this case, repairing a vehicle is not synonymous with replacing a vehicle, and indeed, the insurance contract allows Farmers to "repair *or* replace" a damaged vehicle. Suppl. Br. of Resp't Moeller at 3 (emphasis added).

Farmers has likened repairing a damaged vehicle to gluing back together a broken plate, explaining that "[i]n both cases, the item is repaired when it is put in good working order again, and returned to substantially the same form as before the accident." Br. of Resp't's/Cross Appellants at 13. The majority rejects this analogy because it opines that piecing a plate back together is "inadequate from the reasonable consumer's point of view." Majority at 11 n.4. The majority's standard is wrong. A reasonable consumer's point of view is not the relevant approach. Rather, the relevant inquiry is the meaning the average purchaser of insurance would give the term, as noted, and ultimately whether the insurer has met its contractual obligation. As an ordinary consumer would understand the term, a broken plate is indeed "repaired" when it is glued back together. By definition, an item that is repaired is not new.

Nonetheless, the majority takes the position that the insurer must also pay diminution in value attributable to the difference between the value before the accident and the value of the repaired vehicle to compensate the insured for damage that cannot be repaired. However, while "[d]iminution in value can be compensated, . . . it cannot be

'repaired' or 'replaced.'" *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 248 (Ind. 2005). Unfortunately, the majority tortures the meaning of "repair" by extending it to damage that, by its very nature—and by Moeller's own admission—simply cannot be repaired. *See O'Brien*, 785 A.2d at 290-91 ("[a]scribing to the phrase 'repair or replace' an obligation to compensate the insured for things that cannot reasonably be repaired or replaced violates the most fundamental rule of contract construction"). The majority decision is based on the fallacy that collision damages may be repaired and paid for by the insurer, but that damage remains that cannot be repaired, e.g., weakened metal, and therefore the insurer must also pay for diminution in value. The policy provides an either/or proposition. Either repair or replacement—not both.

The inclusion of the phrase "like kind and quality" in Moeller's insurance policy does not compel a different conclusion. First, the surrounding context indicates that the phrase applies only to replacement—not repair—of damaged vehicles. "The phrase 'repair . . . with other of like kind and quality' is nonsensical, indicating that 'like kind and quality' was not meant to modify "repair.'" *Davis v. Farmers Ins. Co. of Ariz.*, 2006-NMCA-009,140 N.M. 249, 142 P.3d 17 (2006)); *accord Allgood*, 836 N.E.2d at 247-48.[1] Second, even if, as Moeller contends, the term "quality" connotes value, the phrase "like kind and quality" does not mean equal value. "Quality" is modified by the term "like," which the average purchaser of insurance would understand to mean "the same as *or* similar to." Webster's, *supra,* at 1310 (emphasis added).

[1] Farmers' contractual responsibilities when it opts to replace a damaged vehicle are not at issue in this case.

The majority further departs from the clear contractual language by reading out of the contract Farmer's option to repair a damaged vehicle. Both the payment of loss provision and the limits on liability provision are phrased in the disjunctive and plainly contemplate two distinct options: repairing a damaged vehicle or making a monetary payment to the insured.[2] *See Bickel v. Nationwide Mut. Ins. Co.*, 206 Va. 419, 422, 143 S.E.2d 903 (1965) ("when a damaged automobile cannot be repaired it is a total loss, and the liability of the insurer is the difference in the actual cash value of the car immediately before and after the accident, less the amount stipulated in the deductible clause," but if the vehicle "can be repaired, the liability of the insurer is to pay only the cost of repairs, less the amount provided for in the deductible clause"); *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 1416-17, 246 Cal. Rptr. 593 (1988) (if repair "places the automobile substantially in its pre-accident condition," insurer may elect to repair the vehicle; if not, vehicle is considered a total loss and insurer is liable for pre-accident market value); 15 George C. Couch, Couch Cyclopedia of Insurance Law § 54:29, at 432 (Ronald A. Anderson, 2d ed. 1983) ("[w]here the insurer, in the exercise of its option to repair, restores the automobile to its normal running condition, there is by hypothesis no total loss of the insured vehicle").

However, the majority decides that where complete repairs cannot return the vehicle to its preaccident condition and market value, Farmers may no longer fulfill its contractual obligation by repairing the damaged vehicle in accord with the terms of its

[2] The policy states, for example: "We may pay the loss in money *or* repair or replace damaged or stolen property." Suppl. Br. of Resp't Moeller at 3 (emphasis omitted and added).

contract. Instead, the majority concludes, Farmers must both repair the vehicle *and* make a monetary payment to the insured. The insurance policy contains no such requirement, and it is untenable under language that gives Farmers the right to repair or replace, at its option. Today's decision not only eliminates Farmers' contractual right to repair the vehicle, it also creates a new obligation with no basis whatsoever in the contract. In contrast to the majority, other courts have correctly declined to render the language of similar contracts meaningless. *See Allgood*, 836 N.E.2d at 248 (policy language allowing insurer to choose between repairing or paying cash value of damaged vehicle would be meaningless if insurer were required to repair vehicle and compensate insured for diminution in value); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 498, 579 S.E.2d 132 (2003) (same); *Driscoll v. State Farm Mut. Auto Ins. Co.*, 227 F. Supp. 2d 696 (E.D. Mich. 2002) (same); *Sims*, 365 Ill. App. 3d at 1004 (same); *Bickel*, 206 Va. at 423 (same).

The majority dismisses the clear implication of the disjunctive phrasing in the insurance policy through a contrived interpretation of clearly worded provisions. The majority points out that the term "or" is also used in the phrase "damaged or stolen property" and says that an insured whose vehicle was both damaged and stolen would be able to recover under the terms of this policy. Majority at 12. From this, the majority concludes that "or" is an *inclusive* disjunctive.

It is axiomatic that an insurance policy "should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd

conclusion, or that renders the policy nonsensical or ineffective." *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dist. Util. Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988). It does not follow, as the majority apparently believes, that every use of the term "or" in this policy is inclusive. Indeed, it would be absurd to conclude that under the payment of loss provision, Farmers must both repair *and* replace a damaged vehicle—particularly when the limits of liability provision plainly states that Farmers' liability shall not exceed the cost of repairing *or* replacing the damaged property. But following the majority's logic, this provision would have to be read as saying that "Farmer's liability shall not exceed the cost of repairing and replacing damaged property." The absurdity of this reading is obvious, but it demonstrates why one potentially inclusive use of "or" does not mean every time the word is used in a policy it is inclusive.

The majority also concludes that the policy language is ambiguous and accordingly undertakes to construe this language in the insured's favor. The majority finds ambiguity on the basis that the average consumer's "reasonable expectation is that, following repairs, the insured will be in the same position he enjoyed before the accident." Majority at 11. This is deeply flawed analysis. First, as we recently affirmed, "in Washington the expectations of the insured cannot override the plain language of the contract." *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005) (citing *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996)). In *Findlay*, 129 Wn.2d at 378, the court observed that "[t]he 'reasonable expectation' doctrine has never been adopted in Washington," but "[r]ather, insurance

policies are to be construed as contracts." Under this state's law, there is absolutely no legitimate ground to find ambiguity in the parties' contract based on the conclusion that an insured has or should have a reasonable expectation that a vehicle will be in the same position as before repairs are made. Moreover, the majority's logic is flawed in any event because the fact that repairs are made will always mean that the insured will not be in the same position as before the vehicle is damaged.

The second reason why the majority's approach is deeply flawed is because to apply the principle that an ambiguity in an insurance contract is to be resolved in favor of the insured, there must be an ambiguity in the first place. "If policy language is clear and unambiguous, the court may not modify the contract or create an ambiguity." *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993); *see also O'Brien*, 785 A.2d at 288 ("we will not torture policy terms to create an ambiguity where an ordinary reading leaves no room for uncertainty"); *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. Super. Ct. 1982) ("when the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented").

An insurance policy is ambiguous only if the language "is fairly susceptible to two different reasonable interpretations." *Am. Star Ins. Co.*, 121 Wn.2d at 874. There is nothing ambiguous about language stating that the insurer has the option or repairing *or* replacing the damaged property. Indeed, in *Siegle v. Progressive Consumers Insurance*

Co., 819 So. 2d 732 (Fla. 2002) the court observed that no court has found similar contractual language to be ambiguous and a number of courts have explicitly found it to be unambiguous.

The overwhelming majority of courts addressing this issue have concluded that similarly worded limitations of liability provisions require the insurer to return the vehicle to substantially the same physical condition that it was in prior to the accident but do not require the insurer to return the vehicle to its preaccident market value. *E.g., O'Brien*, 785 A.2d at 290 ("[t]his obligation includes neither diminution in value resulting from a 'market psychology' nor that resulting from the minute physical imperfections that are inherent to any repair, so long as the repairs have been completed in a workmanlike manner and the vehicle has been returned to substantially the same form as before the accident"); *Carlton*, 32 S.W.3d at 464 ("[i]n common usage, 'repair' means 'to restore by replacing a party or putting together what is torn or broken' or, stated slightly differently, '[t]o bring back to good or usable condition'" and "[t]here is no concept of 'value' in the ordinary meaning of the word[] [repair]" (first alteration in original) (footnote omitted) (quoting policy)); *Pritchett v. State Farm Mut. Auto Ins. Co.*, 834 So. 2d 785, 795 (Ala. Civ. App. 2002) ("the most appropriate interpretation of the 'repair the damaged property or part, or replace the property or part' provision requires that State Farm return the damaged automobile to substantially the same physical and operating condition as it occupied before the collision that caused the damage but that, under the unambiguous language of the insurance policy, State Farm is not required to restore the automobile's

value"); *Rezevskis v. Aries Ins. Co*., 784 So. 2d 472, 474 (Fla. Ct. App. 2001) ("[p]ursuant to the 'repair or replace' limitation of liability in the Aries policy, the insurer's responsibility is limited to the amount necessary to return the car to substantially the same condition as before the loss"); *Wildin v. Am. Family Mut. Ins. Co*., 249 Wis. 2d 477, 484, 638 N.W.2d 87 (2001) (where physical damage to the vehicle is such that no repair could return the vehicle to its preloss condition, insurer "may choose to repair a vehicle even if all possible repairs do not restore the vehicle to its pre-collision market value"); *Siegle v. Progressive Consumers Ins. Co*., 788 So. 2d 355, 360 (Fla. Dist. Ct. App. 2001) ("to repair is to 'restore to a good condition'" (quoting Merriam Webster's Dictionary 621 (1994)); *Sims*, 365 Ill. App. 3d at 1002 ("[b]y their definitions and the common understanding of the terms, 'repair' and 'replace' mean to restore something to its former condition, not to its former value"); *Allgood v. Meridian Sec. Ins. Co*., 836 N.E.2d 243, 248 (Ind. 2005) ("[d]iminution in value can be compensated, but it cannot be 'repaired' or 'replaced'"); *Hall v. Acadia Ins. Co.*, 801 A.2d 993, 995, 2002 Me. 110 ("[t]he act of repairing an object typically focuses upon restoring the object's function and purpose, and not upon returning the object to its earlier worth or value").

The majority attempts to distinguish this case in order to avoid the clear weight of authority in Farmers' favor. First, the majority relies on language in other automobile insurance policies that explicitly limit the insurer's liability to the "lesser of" the costs of repairing the vehicle or paying its preaccident cash value. Majority at 8. However, because the policy at issue states that Farmers' liability "shall not exceed" the cost of

repairing or replacing the damaged vehicle, it necessarily authorizes Farmers to elect the lesser of the two options. Next, the majority critically distinguishes cases from other jurisdictions on the ground the courts ignored the "ambiguity" of the policy language. *Id*. at 12-13. But this policy is simply not ambiguous.

Finally, the majority contends that decisions addressing "stigma damages" are inapposite because Moeller is not seeking stigma damages. Not so. Although Moeller claims that he is seeking only compensation for tangible damage that defies repair—such as weakened metal and stressed parts—and not for intangible reputational damage (i.e., stigma), he nonetheless contends that the measure of damages is the difference in market value between preaccident and postaccident vehicles—a discrepancy that may reflect tangible damage, stigma, or both. As Farmers explains, Moeller "proposed no method of distinguishing between purchase prices (a) based on alleged non-repairable damage, (b) based on consumer perceptions that damaged and subsequently repaired cars are less valuable than ones that have never been damaged, or (c) based on some combination of both." Pet'rs' Suppl. Br. at 13.

In any event, the reasoning animating stigma cases is equally applicable in the context of inherently irreparable physical damage. In particular, just as stigma defies repair and thus falls outside an insurer's contractual responsibilities, so too does the physical damage that allegedly remains once a structurally damaged vehicle has been repaired to the best of industry standards.

In addition, and fundamental to this case, requiring an insurer to compensate the

insured for diminished value is completely at odds with the precise disjunctive terms used in the automobile insurance policy at issue, regardless of whether this diminished value results from stigma or tangible imperfections. Indeed, a number of jurisdictions have declined to hold insurers liable for diminished value attributable to irreparable physical damage. *See, e.g.*, *O'Brien*, 785 A.2d at 290 ("[u]nder the 'repair or replace' limitations on the policy," the insurer's "obligation . . . includes neither diminution in value resulting from a 'market psychology' nor that resulting from the minute physical imperfections that are inherent to any repair"); *Wildin*, 249 Wis. 2d at 486 (affirming lower court decision denying compensation for diminished value due to irreparable structural damage); *cf. Johnson v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 1, 2, 754 P.2d 330 (Ct. App. 1988) (upholding trial court ruling denying compensation for diminished value where it was unknown whether the decrease in market value was due to physical imperfections, stigma, or both).

The plain language of the policy permits the insurer to repair the vehicle or replace it, at the insurer's option. It does not require the insurer to repair the vehicle and also replace any diminution in value. If the vehicle can be repaired, then repair consonant with the industry standard satisfies the insurer's obligation under the contract. No more is required.

Because today's opinion flies in the face of the clear terms of the contract, I respectfully dissent.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson

Justice Gerry L. Alexander

Karen G. Seinfeld, Justice Pro Tem.