

Statement of the Issues

1. Western National's policy limited its liability for loss to either the actual cash value of the damaged property or the "amount necessary to repair or replace the property with other property of like kind and quality." The plain meaning of "repair" is not ambiguous and does not include the concept of value. Did Western National's policy language require it to pay for diminished value in addition to the cost of repair?

Without holding that the policy was ambiguous, the trial court held both that Turbak could present to a jury evidence of post-repair diminished value, and that the jury could determine "the meaning of the term restore a vehicle to its 'former condition,'" which is not language found in the policy. (App. at 3-4.)

2. In considering Turbak's claim, Western National consulted with independent legal counsel and was twice advised that Turbak's claim for post-repair diminished value was not covered under the policy. While the issue is one of first impression in South Dakota, the majority of courts addressing the issue have held that the same policy language does not require payment for post-repair diminished value. Given no other basis for a bad faith claim, did Turbak present evidence sufficient to defeat summary judgment that Western National lacked a reasonable basis for its decision, and either knew or recklessly disregarded that it lacked a reasonable basis?

The trial court held simply that whether Western National acted in bad faith in refusing to pay Turbak's claim for post-repair diminished value was a jury question. (App. at 5.)