No. 11-

IN THE

Supreme Court of the United States

KIA MOTORS AMERICA, INC.,
Petitioner,

v.

SHAMELL SAMUEL-BASSETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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April 18, 2012

QUESTION PRESENTED

Whether, contrary to the decisions of this Court and numerous lower courts, a state procedural rule may preclude consideration of a substantial constitutional right when application of that rule serves no legitimate state interest and is a mere subterfuge to circumvent a litigant's fundamental right to Due Process.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Kia Motors America, Inc. and Shamell Samuel-Bassett, on behalf of herself and others similarly situated.

RULE 29.6 STATEMENT

Kia Motors America, Inc. is a wholly owned subsidiary of parent company Kia Motors Corporation. Kia Motors Corporation is a publicly traded company listed on the Korea Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Kia Motors America, Inc. ("KMA") respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The Supreme Court of Pennsylvania's opinion is reported at 34 A.3d 1 and reproduced at Pet. App. 1a–115a. The decision of the Superior Court of Pennsylvania is unpublished and is reproduced at Pet. App. 116a–122a. The opinion of the Court of Common Pleas of Philadelphia County is available at 2006 WL 3949458 and is reproduced at Pet. App. 123a–202a.

JURISDICTION

The Supreme Court of Pennsylvania filed its decision on December 2, 2011 and denied KMA's Application for Reargument on January 24, 2012. Pet. App. 232a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The decision below represents a remarkable disregard of federal Due Process rights. Plaintiff brought a state-wide class action seeking, among other things, damages for out-of-pocket costs to repair allegedly defective brakes in KMA's cars. On the eve

of trial, the lower court (correctly) entered an order calling for individualized claims proceedings to determine class members' relief in the event that plaintiff prevailed. This order followed KMA's timely objection to calculating damages on a collective, class-wide basis, and plaintiff's candid concession that class members would have to prove their individualized entitlement to damages—a concession that made perfect sense considering that not all of the 9,402 class members paid the exact same amount for repair costs. Indeed, some did not pay anything at all. After this order was entered, trial proceeded and the jury ultimately returned a verdict awarding $600 in damages—approximately the amount of expenditures incurred by the named plaintiff during the warranty period. So far, proceedings were not out of the ordinary.

Then this: the trial court inexplicably contravened its prior order and *sua sponte* jettisoned its guarantee of claims proceedings. Instead, it "molded" the verdict to apply to *every* class member, multiplying $600 by the class size to arrive at a $5.6 million windfall judgment. To put this amount in perspective, KMA later settled the same claims in another lawsuit by plaintiffs in 47 other states and, after individualized consideration, paid out a total of only $62,925.[1] Its liability in Pennsylvania alone is now 100 times larger for a class that is 16 times smaller.

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[1] The case encompassed a class of 156,648 members. The actual claims rate was 1.5% based on claim forms returned to the claims administrator. Def. [KMA]'s Final Report to Court re Class Action Settlement, at 2, *Santiago* v. *Kia Motors of Am., Inc.*, Case No. 01 CC 01438 (Ca. Super. Ct. Nov. 3, 2006) ("*Santiago* Report"). In fact, the case below was actually settled on identical terms. When the parties reported the settlement to the trial court, however, the court refused to accept the

The trial court's award is deeply flawed. KMA therefore immediately filed a post-trial motion challenging the decision on Due Process and other grounds, arguing that its liability to nearly 10,000 people does not hinge on the happenstance of one particular plaintiff's individual expenses. The promised claims proceedings, KMA stressed, must be conducted, consistent with Due Process and the trial court's own order. But the Pennsylvania courts nonetheless held that the state's contemporaneous-objection rule barred consideration of KMA's federal constitutional claim. This was so, they asserted, because KMA had not *re*-raised its objections after it had already done so—repeatedly—and before it did so again in timely post-trial motions.

As explained below, these decisions are clearly erroneous—they rely on a thinly-veiled excuse for disregarding a profound violation of Due Process, and they are in direct conflict with this Court's settled precedent. Awarding millions of dollars to unnamed class members who did not prove a single penny's worth of harm is unconstitutional, and the ostensible grounds for the state court decisions—that KMA waived its federal constitutional rights—is demonstrably baseless and inconsistent with reality and any notion of fairness. Because only this Court can remedy the Pennsylvania courts' wayward analysis, certiorari should be granted and the decision below summarily reversed. Alternatively, the Court should grant plenary review.

A. Factual Background.

This case arises out of a claim that, in the late 1990s, KMA sold its Sephia model sedans with

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settlement and compelled the parties to try the case. *See also infra* n.7.

defective brakes. In particular, plaintiff alleged that the brakes' inability to dissipate heat properly caused brake pads and rotors to wear down prematurely, requiring replacement. See, *e.g.*, Pet. App. 3a–4a, 36a. (The class made no allegations that the brakes failed to stop vehicles safely.)

Named plaintiff Shamell Samuel-Bassett bought a Sephia from KMA in October 1999, Pet. App. 2a, and claimed that her brakes required replacement pads and rotors after 4,000 miles and frequently thereafter, *id.* at 158a–159a. Her brake pads and rotors were replaced eight times within the warranty period (36 months/36,000 miles). *Id.* at 158a–159a. Some of these repairs, including the first three, were done for free; others were not. *Id.* at 159a n.82. In total, Bassett incurred just under $600 in out-of-pocket expenses related to her Sephia's brake issues. *Id.* at 119a.

Not everyone who bought a Sephia at the same time had the same experience. Actual expenditures varied dramatically: Bassett paid about $600 out of pocket during the warranty period; many others incurred no costs at all because they did not experience brake problems or because KMA repaired their brakes for free. See, *e.g.*, Pet. App. 62a ("KMA covered some of the brake component replacements under good will and brake coupon programs").[2] Different model years also differed in many respects, including the rates at which warranty claims were

[2] KMA, as a matter of policy, paid brake warranty claims submitted by the independently owned Kia dealerships. The decision to repair any customer's brakes under warranty was solely the decision of each dealership. KMA did not challenge such claims or audit them.

filed.[3] *Id.* at 29a n.14. And brake problems varied widely across consumers: Bassett's brakes wore down relatively quickly, but others did not experience problems until much later. *Id.* at 102a n.2 (Saylor, J., dissenting). Indeed, "each vehicle was driven differently by different drivers in different locations and the vehicles manifested varying symptoms." *Id.* at 223a.

B. Proceedings Below.

1. This case began over a decade ago. In January 2001, Bassett brought suit on behalf of herself and a putative class of Pennsylvania residents who, she claimed, were similarly situated because they bought a Kia Sephia around the same time that she did. Pet. App. 2a. She sued for breach of warranty and claimed compensatory damages in the form of "out-of-pocket repair costs." *Id.* at 4a.[4]

In 2004, Bassett moved for class certification.[5] Pet. App. 5a. KMA strenuously objected on numerous

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[3] The vehicles in question were sold over 4 model years during which Kia made 13 design changes to the brake system. Class members' experiences were affected by design improvements over the 4 model years.

[4] Bassett also sought additional categories of damages, including those for the allegedly diminished value of her Sephia. Pet. App. 36a–37a. The jury, however, found that she only sustained damages for out-of-pocket expenses.

[5] Shortly after this case was filed, KMA removed it to federal court. A class was certified, *Samuel-Bassett* v. *Kia Motors Am., Inc.*, 212 F.R.D. 271 (E.D. Pa. 2002), and KMA appealed. The Third Circuit vacated and remanded to determine whether there was subject matter jurisdiction. *Samuel-Bassett* v. *Kia Motors Am., Inc.*, 357 F.3d 392, 403 (3d Cir. 2004). The parties subsequently agreed that the amount-in-controversy requirement was not met, and the case was remanded back to Pennsylvania state court. Pet. App. 5a.

grounds, including that Bassett's experience was anything but "typical" and that any allegedly common issues did not predominate over individual ones. See, *e.g.*, *id.* at 34a–41a. KMA emphasized the necessarily individualized "inquiries into the repair and ownership histories of each class member." Supplemental Mem. of Law of Def. [KMA] in Opp'n to Pltf.'s Mot. for Class Certification, at 11 (July 8, 2004). Class members had "experienced varying treatment in seeking replacement of brake pads and rotors," and KMA "covered some of the brake component replacements under good will and brake coupon programs." Pet. App. 56a, 62a; see also, *e.g.*, *id.* at 38a ("individual expenditures result[ed] from varying attempts to repair the defect"). As a result of the free replacements, not all class members incurred the same damages, and some incurred none at all. See, *e.g.*, *id.* at 102a (Saylor, J., dissenting).

Everyone agreed about this. Plaintiff's counsel, for example, recognized at the certification hearing that "individual class members paid varying out-of-pocket costs for brake repairs." Pet. App. 37a. The trial court likewise acknowledged that "some aspects of individual damages determinations" existed, including "potential differences in individual damages claims based upon individual experiences and costs associated with attempts to repair the vehicle." *Id.* at 224a; see also *Samuel-Bassett* v. *Kia Motors Am., Inc.*, 212 F.R.D. 271, 281 (E.D. Pa. 2002) (damages such as out-of-pocket expenditures were "reliant upon 'the intangible, subjective differences of each class member's circumstances,' and would likely require additional hearings to determine given that some individuals have undoubtedly expended more monies and incurred higher parts and labor costs to repair their vehicles than others.").

The trial court nevertheless certified a class of "'[a]ll residents of the Commonwealth of Pennsylvania who purchased or leased model year [1997-2000] Kia Sephia automobiles for personal, family or household purposes for a period of six years preceding the filing of the complaint in this action.'" Pet. App. 5a. Unsurprisingly, the court did not consider damages to be one of the common issues that purportedly predominated over individual ones. *Id.* at 222a–224a. That is because out-of-pocket damages are distinctly individualized.

2. Discovery confirmed that class members' damages varied wildly. KMA, therefore, submitted a pretrial memorandum in which it explained that "[t]he degree to which, if at all, named plaintiff Bassett, or any other class member, suffered damages," including "whether or not the class member was required to pay out-of-pocket for any brake repairs," "is an individual issue that must be explored, individually." Pre-Trial Mem. of Def. [KMA], at 16 (Feb. 24, 2005) (emphasis omitted). KMA stated that it would "explore these and other issues with regard to alleged damages in future proceedings involving unnamed class members, if necessary." *Id.* With respect to jury interrogatories, moreover, KMA proposed two questions on common liability and noted that plaintiff's proposals "represent[ed] individual issues that would have to be resolved class-member by class-member in future individual proceedings, should plaintiffs prevail in the trial of any common issues." *Id.* at 17.

KMA also moved to bifurcate the trial into distinct proceedings on common and individual issues. Pet. App. 66a. Damages were just one of many topics that KMA identified as individual. See, *e.g.*, *id.* at 71a.

The trial court heard argument on the motion to bifurcate the day trial began. At the hearing, the court and plaintiff's counsel agreed that individual claims proceedings would be necessary following trial in the event that plaintiff prevailed:

> "THE COURT: And [the] verdict will then set the upper limit of what [KMA] has to pay and then *people will have to prove that they fit within whatever requirements qualify them to receive that upper limit*, and if they had to pay twice or three times as much, it's because of the defect, they're out of luck, right?
>
> "[CLASS COUNSEL]: That's correct.
>
> "THE COURT: Okay."

Pet. App. 105a (Saylor, J., dissenting) (emphasis added) (alterations in original). Consistent with that understanding, the court declined KMA's invitation to separate out the full panoply of individual issues identified in KMA's motion to bifurcate, and denied the motion. *Id.* at 203a. But, because damages (if any) differed wildly among class members, the court simultaneously ordered that "[e]ach class member's entitlement to recover if plaintiff class prevails, shall be determined at claims proceedings." *Id.*

3. The trial lasted ten days, during which Bassett put on two sources of "proof" as to out-of-pocket damages. First, she called an engineering expert, who offered an estimate of $1,005 in damages for a hypothetical owner based on a series of absurd assumptions, including that every class member actually incurred repair expenses; every class member drove his or her car 100,000 miles; every class member needed exactly five repairs; and every class member paid roughly $200 out of pocket for each of those repairs. Pet. App. 62a, 105a–106a; Tr.

of Jury Trial, Day 3, Afternoon Session, at 23–26 (May 19, 2005). Second, and in direct contradiction of the expert's theory, the jury learned that Bassett herself had incurred only about $600 in out-of-pocket expenses on repairs. Pet. App. 119a. Muddying the water further, Bassett's counsel told the jury during closing that "'proof and evidence that we present to you as to [Bassett] should be considered by you as evidence for the entire Class.'" *Id.* at 107a (Saylor, J., dissenting) (emphasis omitted).

For its part, KMA did not repeatedly re-raise the issue of how to calculate each class member's individualized damages. There was no need because the court had already informed the parties that each class member's right to recover would be determined in separate proceedings if the class prevailed and that the verdict would simply "set the upper limit" that each member could claim. With the issue resolved in its favor, KMA had no reason to make additional objections, or to attempt to re-open an issue on which it had already prevailed.

The jury subsequently returned a verdict for Bassett on two claims and awarded damages of $600, the amount she had personally spent on her own repairs.[6] See, *e.g.*, Pet. App. 119a. As the courtroom

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[6] Bassett had brought four separate claims: (1) breach of KMA's express warranty, which provided that Sephias were "'free from defects in material and workmanship'"; (2) breach of implied warranty of merchantability; (3) violation of the Magnuson-Moss Warranty Improvement Act ("MMWA"); and (4) violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Pet. App. 3a–4a. The trial court denied certification of the UTPCPL claim and it is not at issue here. *Id.* at 7a n.6. The jury found no breach of implied warranty but found KMA liable for breach of express warranty and violation of the MMWA. *Id.* at 6a–7a. The MMWA (which requires a

was packing up, however, the trial court *sua sponte* aggregated that award for *every* class member. *Id.* at 7a. In "molding" the verdict, the court multiplied Bassett's $600 repair damages by the number of class members (9,402), yielding a compensatory damages award of $5,641,200. *Id.* The court then added attorneys fees and expenses of $4,392,513, producing a judgment of over $10 million against KMA. *Id.* at 8a.

4. KMA promptly filed a motion for post-trial relief. Pet. App. 7a. It argued, among other things, that the trial court's molding of the verdict was both contrary to the court's earlier order calling for individualized claims proceedings and in violation of KMA's Due Process rights to defend itself against each claim it faced and to pay damages only based upon its actual liability. See Def. [KMA]'s Supplemental Mot. for Post-Trial Relief, at 2–6 (July 15, 2005).

In a subsequent hearing, KMA highlighted the need for claims proceedings in accordance with the court's pre-trial order. Tr. at 7–10 (July 6, 2005). But the court was dismissive, brushing off KMA's objection with the offhand remark that "[i]f you wish to hang your hat on that [order], feel free." *Id.* at 10. In another post-trial hearing, KMA again argued that its Due Process rights precluded molding the $600 verdict into a $5.6 million award and reiterated that claims proceedings could and should be instituted pursuant to the court's earlier order. Tr., Post-Verdict Motions, at 12–18, 50–52 (Sept. 26, 2005).

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showing that defendant failed to remedy a common defect without charge after being given an opportunity to cure) allows recovery of attorneys' fees and expenses and was the basis for that portion of the judgment. *Id.* at 76a–98a.

The trial court disagreed. A year and a half after the jury verdict, it denied KMA's post-trial motion. Pet. App. 123a–202a. Not once in its decision, however, did the court explain or even mention its May 16, 2005 order. *Id.* Nor did it address KMA's argument against "molding" the verdict. *Id.* at 70a. Instead, the court held that KMA's complaints were inadequate because, under Pennsylvania's contemporaneous-objection rule, KMA should have objected more often at trial. In support, the court offered a generic discussion of the waiver doctrine and found that KMA had not repeated its objection in response to the jury charge, the verdict sheets, the molding, or Bassett's expert testimony on repair costs (which the jury itself clearly rejected by awarding $600 rather than $1,005). *Id.* at 130a, 159a–162a, 194a–198a. The court reached this conclusion even though: (1) KMA had raised the same issue numerous times prior to trial; (2) the court itself had already held that there would be separate claims determinations for each class member; and (3) there was nothing warranting additional objections once the trial court entered the order requiring individualized claims proceedings.[7]

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[7] The trial court also took the opportunity to drive home its flagrant misperception about the amount of KMA's actual liability. In particular, it more than once described a proposed nationwide settlement offer of $16 million as "grossly inadequate" because it thought that the "true value of the case [i]s reflected in the Pennsylvania state verdict" which "[t]ranslated into a national class … is the equivalent of $120 million." Pet. App. 126a–128a & nn.3–6; 166a & nn.95–96. In reality, a nationwide class covering 47 states yielded payouts of just under $63,000. *Santiago* Report at 3. This strongly corroborates KMA's position that it replaced for free the vast majority of wear parts that needed replacement.

5. KMA appealed, again challenging the molded verdict and the lack of individualized proof of harm on Due Process and other grounds. See Br. of Appellant [KMA], at 23–26, 48–51 (Super. Ct. June 8, 2007). The Superior Court dispensed with KMA's entire appeal in a six-page unpublished opinion, however, holding in relevant part that "the jury's assessment of class damages at $600.00 was reasonable and supported by the evidence." Pet. App. 117a–122a. Like the trial court, it never mentioned the May 16, 2005 order. *Id.*

6. The Supreme Court of Pennsylvania affirmed as well. Pet. App. 1a–99a. The court readily and repeatedly acknowledged the vastly different expenditures that class members incurred for brake repairs. See, *e.g.*, *id.* at 37a ("individual class members paid varying out-of-pocket costs for brake repairs"). As the court recognized, out-of-pocket costs "likely did not reflect the actual expenses of each or even most members of the class," *id.* at 62a, and some class members paid nothing because "KMA covered some of the brake component replacements under good will and brake coupon programs," *id.*; see also *id.* at 36a, 49a, 56a.

But the supreme court declined to address whether molding a multi-million dollar, class-wide judgment comports with Due Process because, in its view, KMA had waived the argument. Pet. App. 65a, 74a–76a. In that regard, the court faulted KMA for not challenging the class expert's method of calculating damages again at trial, even though KMA had previously moved to exclude his testimony entirely as to damages and even though the court had already ordered individualized claims proceedings, obviating the need for a separate, superfluous objection to the expert's aggregation of damages. *Id.* at 65a, 171a; see

also *id.* at 65a (recognizing that his testimony was "subject to a colorable objection on the ground that it inaccurately or imprecisely captured the amount of damages for individual members of the class"). The court also asserted that KMA should have objected to the jury questionnaire, the jury charge, and the molding of the verdict, even though KMA had already raised its objection to collective proof of damages repeatedly and reasonably relied on the trial court's own order that individualized proceedings would follow—an order that was never rescinded. *Id.* at 70a–76a. In both instances, the supreme court held, such objections were necessary to "give the trial court a contemporaneous opportunity to address the alleged error." *Id.* at 65a, 76a.

Justice Saylor dissented. Pet. App. 100a–115a. The majority's decision, he observed, "relieved [class members] of the obligation to present necessary, fair, and sufficient proofs concerning an unarguably individualized form of damages." *Id.* at 102a. He forcefully highlighted the individual class members' "markedly different experiences of personal expenditure" and found "simply … no evidence of class-wide commonality relative to numerous factors affecting out-of-pocket costs." *Id.* at 102a–103a.

Allowing the class action procedural device to transform—and thereby trample—KMA's substantive rights, Justice Saylor maintained, violates Due Process. Pet. App. 113a. Indeed, "[i]t could not be argued seriously that hypothetical testimony from an automotive expert—based upon underlying assumptions that are unsupported by the record, false, counterintuitive, and/or substantially under-representative of the range of actual variables affecting plaintiff costs—could support an out-of-pocket damages verdict in any individual case." *Id.* at 108a.

To use such testimony to support a verdict for nearly 10,000 people, therefore, is "[p]lainly … incongruous with Pennsylvania substantive law governing damages" and "impacts upon [KMA]'s due process rights." *Id.* at 108a–113a.

Justice Saylor also understood that "this case should not turn on waiver" because "the record is replete with objections on KMA's part to: the class certification decision; the expert testimony upon which the hypothesized class-wide out-of-pocket expenses was based; and the trial court's failure to require individualized proof for individualized claims." Pet. App. 115a. And, he feared, it will not be so read by future litigants: "[The decision] will likely be advanced as supporting the proposition that Pennsylvania takes an unconventionally liberal approach to class certification and collectivized treatment of individualized issues in aggregate litigation" that will "yield[] trials where substantive requirements are subject to dilution and non-enforcement without substantive justification." *Id.* at 114a–115a.

7. KMA promptly sought rehearing, challenging, among other things, the state court's application of the contemporaneous-objection rule. As KMA explained, the court had "without any legitimate state interest, improperly applied the procedural doctrine of waiver to avoid deciding the issue of first impression as to whether evidence of 'estimated,' approximate, aggregate damages, is a proper substitute for proof of actual damage to individual class members." Application for Reargument of the Appellant [KMA], at 1 (Dec. 16, 2011).[8] The court denied

[8] Following remand to the trial court, KMA posted increased security on the judgment below (in light of additional attorneys'

KMA's application without explanation. Pet. App. 232a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari and summarily reverse the Pennsylvania Supreme Court's decision, which directly conflicts with this Court's settled precedent. Alternatively, the Court should grant plenary review to correct the errors in the decision below.

The Pennsylvania court's invocation of its contemporaneous-objection rule to bar consideration of KMA's Due Process rights is nothing more than "an obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129 (1945). First, KMA repeatedly objected to a class-wide calculation of damages and stopped objecting only when the trial court held that it would conduct individualized claims proceedings to determine "'[e]ach class member's entitlement to recover.'" Pet. App. 66a–67a. No sensible application of the rule would require additional, redundant objections.

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fees) and informed plaintiff's counsel that it intended to file the instant petition. Pet. for Review (In the Nature of a Writ of Prohibition), at 7–8 (Mar. 27, 2012). Despite that, plaintiff's counsel moved for immediate enforcement of the judgment. *Id.* Over KMA's various objections, including the upcoming pendency of this petition, the trial court granted plaintiff's motion without explanation and ordered immediate payment. *Id.* Plaintiff's counsel has, for the moment, taken no further steps toward acting on that enforcement order. Meanwhile, KMA has appealed the enforcement order and filed a Writ of Prohibition in the Pennsylvania Supreme Court. In any event, this Court's jurisdiction is "unaffected by [these] disposition[s]." *Wash. Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003).

Second, as this Court has held on numerous occasions, a state court can invoke a contemporaneous-objection rule to preclude consideration of federal rights only when application serves a legitimate state interest. Here, the Supreme Court of Pennsylvania undertook the wrong analysis, applying the rule only because it generally serves state interests, not because it serves any such interests in this case. Indeed, the asserted interest in "avert[ing] the time and expense of appeals or new trials" was a complete *non sequitur* because no new trial was necessary and KMA did not want an appeal, but only the individualized claims proceedings that the trial court had already promised.

The court's misapplication of the procedural bar was a transparent excuse for circumventing KMA's Due Process rights. By awarding every class member the same $600 in out-of-pocket repair expenditures that the named plaintiff incurred, the majority ran roughshod over KMA's substantive right to pay only those damages reflecting *actual* liability. The exponentially inflated class verdict is nowhere close to actual liability and awards damages even when there was no injury at all. It would be hard to find a more blatant disregard of the requirement of Due Process.

Because the decision below conflicts with settled precedent, the Court should summarily reverse and compel consideration of KMA's (meritorious) Due Process claim.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CLEAR PRECEDENT.

The procedural bar invoked by the Pennsylvania courts cannot support the judgment below.

1. As an initial matter, whether a state procedural rule is "adequa[te]" to bar the assertion of a federal

Due Process challenge "is itself a federal question." *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Weschler*, 263 U.S. 22, 24 (1923).

Indeed, for decades, it has been well-established that a "litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965). That inquiry requires evaluating the state's rule "against the circumstances of [the] particular case." *Lee* v. *Kemna*, 534 U.S. 362, 386–87 (2002). Even if a state rule is "generally sound," this Court has not hesitated to permit review of a federal question when the rule's "unyielding application … would disserve any perceivable [state] interest." *Id.* at 376, 379–80.

Mechanical enforcement of state waiver rules have been particularly susceptible to invalidation where, as here, the litigant *did* object and the only question is whether it needed to continue objecting throughout trial. In *Osborne* v. *Ohio*, for example, this Court "did not doubt the general applicability of the Ohio [r]ule … requiring contemporaneous objections to jury charges." *Lee*, 534 U.S. at 378 (citing 495 U.S. 103, 124 (1990)). But, where the party had previously argued the same point and lost, "nothing would be gained by requiring [that party] to object a second time." *Osborne*, 495 U.S. at 124. To the contrary, that would "force resort to an arid ritual of meaningless form and would further no perceivable

state interest." *Id.* (omission and quotation marks omitted). As such, the state rule could not preclude consideration of the asserted federal right.

The same reasoning underpins earlier decisions. In *Douglas*, this Court found that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected." 380 U.S. at 422. And, in *Henry*, this Court held that application of the state's contemporaneous objection rule would "serve no substantial state interest" if a delay in "presenting the objection cannot be said to have frustrated the … interest in avoiding delay and waste of time" that motivated the rule. 379 U.S. 448–49. Cf. also *Lee*, 534 U.S. at 382 (novel application of a state's rule to the facts of a case may not bar review of federal claim); *NAACP* v. *Ala. ex rel. Flowers*, 377 U.S. 288, 297–302 (1964).

2. The decision below cannot be reconciled with this settled precedent or any sense of fair play. Not only did KMA repeatedly object to a class-wide aggregation of damages based on the particular circumstances of the named plaintiff, but the trial court itself recognized the need for individualized claims proceedings and entered an order accordingly.

Arguably gilding the lily, KMA (1) objected to and opposed class certification in light of individualized damages, (2) sought bifurcation of individual issues such as damages, (3) moved to exclude Bassett's expert who opined on class members' out-of-pocket repair costs, (4) submitted a pre-trial memorandum reiterating that out-of-pocket damages are highly individualized, and (5) proposed its own jury instructions and interrogatories reinforcing the need

for second-stage proceedings.[9] "[T]he record is [thus] replete with objections on KMA's part" to imposing a one-size-fits-all damages award. Pet. App. 115a (Saylor, J., dissenting). In such circumstances, as this Court has repeatedly emphasized, a state court cannot bar a federal claim by invoking the contemporaneous-objection rule. *Lee*, 534 U.S. at 378 (concluding that an objection that "'is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests'"); *id.* at 382 (requiring "substantial[] compli[ance]").

Indeed, plaintiff herself conceded the need for individualized claims proceedings. In response to KMA's motion to bifurcate, she agreed that a plaintiff's verdict would only "'set the upper limit of what [KMA] has to pay and then people will have to prove that they fit within whatever requirements qualify them to receive that upper limit.'" Pet. App. 105a (Saylor, J., dissenting) (alteration in original). Following that concession, the trial court ordered that "[e]ach class member's entitlement to recover if plaintiff class prevails, shall be determined at claims proceedings." *Id.* at 203a.

It was only after this order was entered that KMA stopped its serial objections—only to be blindsided by

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[9] KMA vigorously contended, for example, that the instructions should make clear that any recovery was limited to amounts "'actually incurred and paid.'" Br. of Appellant [KMA], at 18 (Super. Ct. June 8, 2007). And, its proposed jury interrogatories were limited to the following two questions: "'1. Did the 1997 through 2001 Kia Sephia model automobiles share a common brake system? 2. Do you find that there was a common brake system defect across the 1997 through 2001 model year Kia Sephia automobiles?'" *Id.* at 18 n.13.

the trial court's *sua sponte* 180-degree change of heart. Regardless of whether the trial court tipped its hand during the jury charge or only the next day when it molded the verdict, KMA reasonably relied on its litany of prior objections, the court's own pre-trial order, and Bassett's concessions.[10] The Court should reject "gotcha" tactics such as this one as flatly unfair and unconstitutional.

Moreover, applying the contemporaneous-objection rule under these circumstances turns the rule on its head. When applied correctly, the rule prevents litigants from "'sandbagging'" opposing parties and courts with new arguments after the fact. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977). Here, however, KMA is the only one that was sandbagged.

3. The Pennsylvania Supreme Court's analysis fails for another reason as well. Disregarding almost a century's worth of this Court's precedent, the

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[10] The jury charge informed jurors that they were "'rendering a verdict for each class member, [and the court would thus] take care of making sure that the Class members recover.'" Pet. App. 72a. It also stated, for example, that the "'verdict is the only verdict in this claim for both sides," and "[t]here's no second day in court." *Id.* at 108a n.9 (Saylor, J., dissenting) (emphases omitted). The verdict form then asked the jury to "'[s]tate the amount of damages if any, sustained by each [c]lass member: … [f]or repair expenses, reasonably incurred, as a result of [defendant's] breach of warranty.'" *Id.* at 72a. This question was consistent with the court's May 16, 2005 order and plaintiff's concession that any damages entered would be the "upper limit" of what "each class member" could prove at claims proceedings. *See supra* at 8, 19. In any event, KMA had presented its position on these issues by offering its own proposed instructions and jury questionnaire containing just two questions on common liability. *Id.* That was enough to preserve once more any objection that KMA had on this issue; repeating it would have been superfluous. *See supra* at 17–19.

Pennsylvania court fundamentally misstated when the contemporaneous-objection rule can be invoked. According to the court below, the rule is valid simply because it "allow[s] the [trial] court to take corrective measures and thereby avert the time and expense of appeals or new trials." Pet. App. 76a. But, although these are legitimate state interests in the abstract, they are completely beside the point. The proper analysis, as this Court has directed, requires evaluating purported state interests "against the circumstances of [the] *particular case*." *Lee*, 534 U.S. 386–87 (emphasis added).

Under that inquiry, the decision below does not have a leg to stand on. Applied to this "particular case," the purported state interests of avoiding new trials and appeals are utterly irrelevant. No new trial was necessary, and KMA certainly did not want an appeal. Rather, KMA asked only that the trial court take the one course that it had already promised to take: conduct claims proceedings to determine each class member's recovery if any. See *supra* at 10. Whether or not KMA had objected on the same grounds throughout trial, the "corrective measures" KMA sought were available just the same, and at no greater "time and expense" to anyone. Pet. App. 76a; see also *Lee*, 534 U.S. at 385; *Henry*, 379 U.S. 448–49. Surely, there is no legitimate state interest in wielding a procedural rule to deny a litigant post-trial proceedings that had already been promised in a court order and remained readily available.

4. Unsurprisingly, the decision below conflicts with the holdings of numerous lower courts. As those courts have recognized, it is not enough that a state's contemporaneous-objection rule "'generally serve[] a legitimate state interest.'" *Cotto* v. *Herbert*, 331 F.3d

217, 240 (2d Cir. 2003). Instead, a state rule must serve such interest in the particular case. *Id.*; see also, *e.g.*, *Francis* v. *Miller*, 557 F.3d 894, 899–900 (8th Cir. 2009); *Hedrick* v. *True*, 443 F.3d 342, 359–63 (4th Cir. 2006); *Collier* v. *Bayer*, 408 F.3d 1279, 1284 (9th Cir. 2005); *Rummel* v. *Estelle*, 587 F.2d 651, 653–54 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 263 (1980). Only Pennsylvania has chosen to be a judicial outlier.

That is not to say, of course, that contemporaneous-objection rules have been rendered a nullity. See, *e.g.*, *Whitley* v. *Ercole*, 642 F.3d 278 (2d Cir.), *cert. denied*, 132 S. Ct. 791 (2011); *Breest* v. *Perrin*, 655 F.2d 1, 3 (1st Cir. 1981); *McClina* v. *State*, 123 S.W.3d 883, 888–90 (Ark. 2003). But the state interest must be advanced by its application in the particular case, not just in the abstract. Having charted their own path, the Pennsylvania courts should be firmly reminded of this Court's precedent.

5. KMA thus respectfully requests that the Court grant the petition for certiorari, summarily reverse, and remand the case for further proceedings. This Court has "shown no reluctance to reverse summarily a state court decision found to be clearly erroneous," Eugene Gressman et al., *Supreme Court Practice* 352 (9th ed. 2007), and, indeed, has done so in this very context, see, *e.g.*, *Camp* v. *Arkansas*, 404 U.S. 69 (1971) (per curiam) (summarily reversing because "[p]etitioner's alleged procedural default does not bar consideration of his constitutional claim in the circumstances of this case"); *Parrot* v. *City of Tallahassee*, 381 U.S. 129 (1964) (per curiam). The decision below warrants precisely the same treatment.

II. THE DECISIONS BELOW VIOLATE DUE PROCESS.

1. The erroneous application of the contemporaneous-objection rule conceals a more egregious problem: By awarding millions in class-wide damages based on the unique experience of one named plaintiff, the decision below violates KMA's Due Process rights.

As the Second Circuit has explained, "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). Such a procedure "offends … the Due Process Clause" because it "is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.*

Other courts have similarly found that aggregate proof of inherently individualized harm is improper and impermissibly alters defendants' substantive rights. See, *e.g.*, *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342–45 (4th Cir. 1998); *In re Fibreboard Corp.*, 893 F.2d 706, 709–12 (5th Cir. 1990); *In re Hotel Tel. Charges*, 500 F.2d 86, 89–90 (9th Cir. 1974); 2 Joseph McLaughlin, *McLaughlin on Class Actions* § 8:16 (8th ed. Supp. 2011) ("The purported substitution of the 'class as a whole' for its individual members on damages issues would almost inevitably violate … due process…."); *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam) ("due process requires that class actions not be used to diminish the substantive

rights of any party to the litigation"); see also *Bell Atl. Corp.* v. *AT&T Corp.*, 339 F.3d 294, 304–08 (5th Cir. 2003); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187–93 (3d Cir. 2001).[11]

These authorities are consistent with this Court's precedent. Indeed, just last Term, this Court forcefully rejected class actions that seek to sweep away litigants' rights through "Trial by Formula." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011).

The decision below plainly contravenes this line of authority. The Pennsylvania court, of course, readily acknowledged that class members had drastically different experiences and incurred drastically different costs (often zero). See, *e.g.*, Pet. App. 37a ("individual class members paid varying out-of-pocket costs for brake repairs"); *id.* at 62a (out-of-pocket costs "likely did not reflect the actual expenses of each or

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[11] The Supreme Court of Pennsylvania purported to blunt the import of its decision to duck the Due Process question by implying that the trial court's molded verdict simply took one side of a heated debate. Pet. App. 62a–64a. It did not. In truth, none of the cited jurisdictions goes nearly as far as the decision below. In *Hilao* v. *Estate of Marcos*, damages were awarded through an intensive process in which a random sample of plaintiffs were chosen and deposed to determine damages, and all claimants submitted individualized proof-of-claim forms. 103 F.3d 767 (9th Cir. 1996). Even then, the majority acknowledged, over a dissent, that this procedure raised "serious questions" of Due Process. *Id.* at 785. And, in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, the First Circuit made clear that "the district court will conduct further proceedings ('[t]he actual prove-up') to allow specific class members to 'make their claim.'" 582 F.3d 156, 197 n.33 (1st Cir. 2009), *cert. dismissed*, 131 S. Ct. 60 (2010). Nothing—be it an "actual prove-up" or any other individualized procedure—is contemplated below.

even most members of the class"); *id.* ("KMA covered some of the brake component replacements under good will and brake coupon programs"); *id.* at 36a, 49a, 56a. The trial court's "formula"—multiplying the named plaintiff's atypical out-of-pocket expenses by the number of class members—thus has no basis whatsoever in fact. Not every class member has a right to $600, and many have a right to nothing. By reversing itself and molding Bassett's verdict on behalf of the entire class, the trial court artificially increased KMA's liability exponentially.

This is not just theoretical; it is easily demonstrable. The issues with the Sephia's brakes have triggered more lawsuits than this one. Most notably, a class action in California encompassed 47 states nationwide.[12] After settlement called for a form of individualized claims processing, KMA's total liability—for all plaintiffs in all 47 states—was $62,925. That amount is roughly *one percent* of the $5.6 million award issued to Pennsylvania plaintiffs alone. There is no better illustration of the fact that resting KMA's sizeable financial liability on the happenstance of one individual does not comport with Due Process.

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[12] Excluded were Pennsylvania, Florida, and New Jersey. The one-state class in Florida has been decertified. *See* Reply Br. of the Appellant [KMA], at 20–21 (Pa. Jan. 21, 2009) (citing *Butler* v. *Kia Motors Am. Corp.*, 999 So. 2d 644 (Fla. 2008)). In New Jersey, after a jury returned a verdict of $750 per class member in repair expenses, the trial court set the verdict aside. The court ordered that such damages could not be determined class-wide and instead each class member's out-of-pocket repair costs had to be determined individually. KMA's liability in the New Jersey action has been limited to whatever damages are proved during the individualized claims process. *See Little* v. *Kia Motors Am., Inc.*, No. A-0407-11T3, 2012 WL 1069089 (N.J. Super. Ct. App. Div. Apr. 2, 2012).

2. This is just the sort of result that Congress has sought to prohibit. In enacting the Class Action Fairness Act, Congress explained that "most class actions are … adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision." S. Rep. No. 109-14, at 4 (2005). Congress was particularly concerned with "state courts whose judges have reputations for readily certifying classes." *Id.*

Pennsylvania is already a jurisdiction with such a reputation. See, *e.g.*, *The City of Unbrotherly Torts*, Wall St. J., Dec. 3, 2011 (noting that Philadelphia state court is a "destination of choice" for plaintiff classes due to fewer settlements and higher verdicts); see also Am. Tort Reform Found., *Judicial Hellholes 2011-2012*, at 3–8 (2011) (listing Philadelphia as the number one "judicial hellhole"); *id.* at 2 ("Judicial Hellholes have been considered places where judges systematically apply laws and court procedures in an unfair and unbalanced manner.") (emphasis omitted); *id.* at 3 ("Of greatest concern is the Complex Litigation Center (CLC) in Philadelphia, where judges have actively sought to attract personal injury lawyers from across the state and the country."). If left to stand, the decision below reinforces Pennsylvania's role as a national outlier. See Pet. App. 114a–115a (Saylor, J., dissenting) (this decision "will likely be advanced as supporting the proposition that Pennsylvania takes an unconventionally liberal approach to class certification and collectivized treatment of individualized issues in aggregate litigation").

This Court should reject that result. The decision below flies in the face of this Court's precedent and

that of numerous other authorities. Because the waiver decision was "an obvious subterfuge," improperly invoked to circumvent KMA's Due Process rights, this Court should summarily reverse or, at a minimum, grant plenary review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and summarily reverse the decision below, or alternatively, the Court should accept the case for plenary review.

Respectfully submitted,

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April 18, 2012

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APPENDIX

APPENDIX A

SUPREME COURT OF PENNSYLVANIA.

SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Appellees

v.

KIA MOTORS AMERICA, INC.,
Appellant.

SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Appellees

v.

KIA MOTORS AMERICA, INC.,
Appellant.

SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Appellees

v.

KIA MOTORS AMERICA, INC.,
Appellant.

Argued April 15, 2009.
Decided Dec. 2, 2011.

BEFORE: CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, GREENSPAN, JJ.

OPINION

Chief Justice CASTILLE.[1]

Appellant, an automobile manufacturer who unsuccessfully defended a class action lawsuit for breach of express warranty, appeals the Superior Court's decision to affirm the certification of the class by the trial court, and the amount of damages and litigation costs awarded to the class. Costs included a significant legal fee, entered pursuant to the Magnuson-Moss Warranty Improvement Act (the "MMWA"), 15 U.S.C. § 2310(d)(2). For the reasons that follow, we affirm in part and reverse in part, with reversal being limited to the lower courts' approval of an enhancement of class counsel's legal fee by application of a risk multiplier to the amount of the lodestar;[2] and we remand to the trial court for adjustment of the attorneys' fee award in accordance with this Opinion.

Case History

Appellee Shamell Samuel-Bassett, on behalf of herself and others similarly situated (the "class"), filed this class action lawsuit in January 2001, in the Philadelphia Court of Common Pleas. Bassett alleged that, in October 1999, she purchased a model year 2000 Sephia from appellant Kia Motors America, Inc., ("KMA" or the "manufacturer") with an extended warranty of sixty months or 60,000 miles.[3]

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[1] This matter was reassigned to this author.

[2] The lodestar is "the product of reasonable hours times a reasonable rate." *City of Burlington v. Dague*, 505 U.S. 557, 559, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

[3] KMA is the American division of parent company Kia Motors Corporation ("KMC") of Seoul, Korea. KMA is an organization selling products designed and engineered by KMC in Korea.

The purchase contract included the manufacturer's standard warranty clause, which stated that: "[KMA] warrants that your new [Sephia] is free from defects in material and workmanship," subject to several terms and conditions.

According to the complaint, Bassett experienced malfunctioning of her Sephia's brakes within 17,000 miles of use, which manifested as an inability to stop the vehicle, increased stopping distances, unpredictable and violent brake pedal pressures, brake lockup and vibration, and general interference with control of the vehicle. She attributed these manifestations to a defect in the design of the Sephia's brake system causing inadequate heat dissipation, premature wear of the brake pads, and warping of the rotors.[4] KMA's authorized dealerships attempted five repairs on Bassett's vehicle between January and October 2000, replacing brake pads and rotors on four of five occasions. According to Bassett, she sought to rescind her purchase contract but KMA refused her demand. Bassett claimed that, although KMA was aware of the defect in the brake system, KMA failed to correct the defect and failed to honor the warranty by charging her for the required repairs and replacements. Further, Bassett alleged that the defect in the brake system's design was common to all model year 1995 to 2001 Sephias. She claimed that all members of the

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Notes of Testimony ("N.T."), 5/18/05, Vol. 1, at 81; N.T., 5/23/05, Vol. 1, at 48.

[4] The Sephia's brake system was designed as follows: the caliper—a part fixed to the body of the car—forced the brake pads to clamp against the rotor; the rotor was attached to the wheel of the vehicle and rotated along with the wheel. Braking occurred as a result of friction between the surface of the brake pads and the rotor. N.T., 7/15/04, at 147.

class experienced premature wear and malfunction of the brakes, needing repairs within the first 20,000 miles of purchase. According to the complaint, all repair attempts were ineffective, most were not covered by KMA under the warranty, and the members of the class incurred damages of a similar nature to Bassett's.

The complaint stated four causes of action: breach of express warranty, breach of implied warranty of merchantability, violation of the MMWA, and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Bassett claimed that each member of the class was entitled to compensatory damages for out-of-pocket repair costs, loss of use costs, loss of resale value, funds for permanent repair of the vehicle, treble damages, and costs of litigation, including legal fees. Finally, Bassett requested an injunction compelling KMA to notify all class members of the potential danger for personal injury deriving from the Sephia's brake defect, and to provide free repair and replacement of the affected brake systems.

In February 2001, counsel for KMA filed a notice to remove the action to the U.S. District Court for the Eastern District of Pennsylvania, invoking that court's diversity jurisdiction. The parties then filed an amended complaint and answer with the federal court. Bassett's amended federal court complaint restated the allegations in her original state court complaint, and KMA answered denying all allegations and asserting forty-seven boilerplate affirmative defenses. The manufacturer sought dismissal of the amended complaint. In due course, the district court certified the class on all of Bassett's claims except her UTPCPL claim. *See Samuel-Bassett v. Kia*

Motors Am., Inc., 212 F.R.D. 271 (E.D.Pa.2002). KMA appealed and the U.S. Court of Appeals for the Third Circuit, which raised the issue of jurisdiction *sua sponte*, vacated the lower court's certification decision, and remanded for a determination of whether the parties met the amount in controversy required to establish diversity jurisdiction. *See Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392 (3d Cir.2004). In light of the Third Circuit's decision, the parties agreed that the jurisdictional requirement had not been satisfied and, on April 8, 2004, the district court remanded the case to the Philadelphia County Court of Common Pleas.

Following remand, in May 2004, Bassett filed her motion for class certification with the Philadelphia Court of Common Pleas. Bassett's motion for class certification filed in state court simply incorporated by reference the motion she originally filed in federal court. *Compare* Pa.R.C.P. Nos. 1702.1708 *with* Fed.R.Civ.P. 23(a)(b). In September 2004, the trial court granted Bassett's motion for class certification in part. The court certified the following class as to the breach of express warranty, breach of implied warranty of merchantability, and MMWA claims:

> All residents of the Commonwealth of Pennsylvania who purchased or leased model year 1995-2001 Kia Sephia automobiles for personal, family or household purposes for a period of six years preceding the filing of the complaint in this action.

Certification Order, 9/17/04, at 1. Following discovery, the parties stipulated that KMA did not begin selling the Sephia in the United States until 1997. Bassett also conceded that the 2001 model Sephia had undergone substantial redesign that corrected

the alleged brake defect. Consequently, the class was limited to purchasers of 1997 to 2000 Sephias. Class certification was denied as to the UTPCPL claim, and Bassett was permitted to proceed alone on that count. Bassett was designated class representative and her attorneys were appointed counsel for the class. Subsequently, KMA asked the trial court to certify the September 17, 2004, order granting class certification for interlocutory appeal, but its request was denied in November 2004.

Bassett notified the class of the action against KMA. The parties then filed various motions *in limine* and proposed findings of fact in anticipation of trial. In addition, KMA filed a motion to bifurcate, which the trial court denied. Tr. Ct. Order, 5/16/05. Subsequently, the parties proceeded to trial.

The trial took place between May 16 and May 27, 2005. At the conclusion of Bassett's case, KMA moved for compulsory nonsuit, but the court denied the motion. Notes of Testimony ("N.T."), 5/23/05, Vol. 5, at 55-60. KMA renewed its request for summary relief at the end of its case, moving for a directed verdict on the warranty and MMWA claims. After argument, KMA withdrew its request in part, and the trial court denied the remainder of the motion.[5] N.T., 5/25/05, Vol. 7, at 13-28. On May 27, 2005, the jury rendered a verdict in favor of the class on the claim for breach of express warranty and awarded

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[5] After closing remarks, the parties stipulated that in the event the jury rendered a verdict in favor of the class on the breach of warranty and MMWA claims, Bassett's individual recovery would be trebled under the UTPCPL up to $10,000, without the necessity for separate proof. The parties also agreed that Bassett would not file a request for legal fees separate from the class. Stipulated Order (UTPCPL Claim), 5/25/05.

damages in the amount of $600 per class member. The court molded the verdict to account for the 9,402 class members to which the parties had stipulated, and recorded a verdict of $5,641,200. Subsequently, the trial court denied the class's request for injunctive relief.

On June 10, 2005, KMA—represented by new counsel—filed a post-trial motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. *See* Pa.R.C.P. No. 227.1. On September 26, 2005, the trial court held a hearing on KMA's motion, at the end of which it directed the manufacturer to file an addendum indicating where issues raised in the motion had been preserved; KMA complied. The trial court issued no further order to dispose of the request for post-trial relief within 120 days of filing and, therefore, upon praecipe of the class, the prothonotary entered judgment on the molded jury verdict on October 25, 2005. *See* Pa.R.C.P. No. 227.4(1)(b). KMA appealed the judgment to the Superior Court and the class filed a cross-appeal.[6] In December 2005, the trial court ordered the parties to file concise statements of matters complained of on appeal. Pa.R.A.P. 1925(b). Both parties complied with the trial court's order in a timely manner and the court issued its Rule 1925(a) opinion on December 29, 2006.

In parallel, on June 6, 2005, Bassett filed a motion for attorneys' fees. After several postponements, the trial court held a hearing on the motion on Sep-

[6] Bassett appealed the decision of the trial court to deny certification of the UTPCPL claim and the Superior Court affirmed. *See* Super. Ct. Op., 10/24/07, at 5 (citing *Debbs v. Chrysler Corp.*, 810 A.2d 137 (Pa.Super.2002)). Bassett did not seek allowance of appeal in this Court. No UTPCPL-related issue is before us.

tember 13, 2005. In January 2006, the court granted the motion and awarded class counsel $4,125,000 in fees, and $267,513 in costs and expenses of litigation. KMA separately appealed this order to the Superior Court in February 2006.

In October 2007, the Superior Court addressed the parties' initial cross-appeals, affirming the lower court's decision with respect to the class action verdict on the basis of the trial court's Rule 1925(a) opinion. *See Samuel-Bassett v. Kia Motors Am., Inc.*, No. 3048 EDA 2005, at *2-5, 944 A.2d 811 (Pa.Super. Oct. 24, 2007). However, the Superior Court remanded for a supplemental Rule 1925(a) opinion on KMA's challenge to the award of legal fees. The trial court filed its supplemental Rule 1925(a) opinion in November 2007 and, in February 2008, the Superior Court affirmed in a brief unpublished decision, extensively quoting from the trial court's opinion. *See Samuel-Bassett v. Kia Motors Am., Inc.*, No. 537 EDA 2006, at *3-7, 951 A.2d 1225 (Pa.Super. Feb. 8, 2008). KMA filed petitions for allowance of appeal from the Superior Court's October 2007 and February 2008 decisions.

We granted allocatur and consolidated the appeals to address the following issues, as stated by KMA:

> 1. Whether, in an issue of first impression, the lower courts disregarded class action procedures and fundamental principles of Pennsylvania contract law by presuming that a class action could be pursued based solely on proof of breach of the named plaintiff's individual express limited warranty contract, as evidence of proof of breach as to all other limited warranty contracts for all the other members of the class?

2. Whether long-standing Supreme Court precedent requires reversal of the judgment improperly entered and affirmed in favor of all class members, in circumstances where the trial court accepted proof of breach of the named plaintiff's express limited warranty contract as proof of breach as to all limited warranty contacts as to all other members of the class, even where the only class-wide evidence was that the defendant had honored its express warranty?

3. Whether, in an issue of first impression, the trial court violated the defendant's due process rights by entering judgment for the entire range of class members without requiring proof of breach of all of their express limited warranty contracts?

4. Whether as a matter of first impression, an attorneys' fee award made pursuant to the [MMWA] cannot be entered after entry of judgment where: (i) the MMWA requires that fee awards be entered as "part of the judgment," and where (ii) Plaintiff voluntarily took judgment on the underlying verdict, and thus disposed of all claims (including the Plaintiff's unresolved claim for attorneys' fees) before the trial court entered the fee award?

5. Whether under Pa.R.A.P. 1701, a trial court lacks jurisdiction to enter a fee award after judgment has been entered and a notice of appeal has been filed?

6. Whether, as a matter of first impression, the courts of Pennsylvania are required to follow United States Supreme Court precedent regarding the interpretation of federal fee shifting

> statutes when interpreting the fee shifting provision of the MMWA, and, if so, whether the trial court's decision to add a $1 million "risk multiplier" bonus to the fee award violates controlling United States Supreme Court precedent?

Samuel-Bassett v. Kia Motors Am., Inc., 598 Pa. 104, 954 A.2d 565 (2008); *Samuel-Bassett v. Kia Motors Am., Inc.*, 598 Pa. 105, 954 A.2d 566 (Pa.2008).[7] Shorn of the argumentative framing by KMA, we view these issues as raising five narrow and distinct questions that we will address individually: 1) whether the class was properly certified; 2) whether evidence was sufficient to support the jury's verdict and whether the verdict was against the weight of the evidence; 3) whether the jury's verdict was properly molded to account for the 9,402 members of the class; 4) whether the trial court had authority to award attorneys' fees after Bassett entered judgment on the class verdict; and 5) whether the risk multiplier was properly applied to an award of counsel fees under the MMWA.[8]

I. Class Certification

KMA's first claim is that the trial court certified the class in error because Bassett failed to prove: that questions of law and fact were common to the class, that the common questions predominated over indi-

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[7] In their appellate briefs, both KMA and the class address issues 1 and 2 together, and also 4 and 5 together. We will address questions 4 and 5 together because they raise substantially the same issue. However, we will address issues 1 and 2 separately as they raise distinct issues, as will become apparent from our analysis, *infra.*

[8] The record will be developed further *infra*, as necessary to resolve the issues on appeal.

vidual issues, that Bassett's claims were typical of the class claims, and that Bassett was an adequate class representative.

Class certification presents a mixed question of law and fact. *Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 603 Pa. 198, 983 A.2d 652, 663 (2009) ("*Liss*"). The trial court is vested with broad discretion in deciding whether an action may be pursued on a class-wide basis and, where the court has considered the procedural requirements for class certification, an order granting class certification will not be disturbed on appeal unless the court abused its discretion in applying them. *Id.; Kelly v. County of Allegheny*, 519 Pa. 213, 546 A.2d 608, 610 (1988). *See also In re Community Bank of Northern Virginia*, 622 F.3d 275, 290 (3d Cir.2010). An abuse of discretion will be found if the certifying court's "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact;" the trial court must have "exercised unreasonable judgment, or based its decision on ill will, bias, or prejudice." 622 F.3d at 290; *In re E.F.*, 606 Pa. 73, 995 A.2d 326, 329 (2010). *See also Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 599 Pa. 568, 962 A.2d 653, 659 (2009). The existence of evidence in the record that would support a result contrary to that reached by the certifying court does not demonstrate an abuse of discretion by that court. *In re E.F.*, 995 A.2d at 329. In deciding whether class action procedural requirements were misapplied or "an incorrect legal standard [was] used in ruling on class certification," we review issues of law subject to plenary and *de novo* scrutiny. *See Delaware County v. First Union Corp.*, 605 Pa. 547, 992 A.2d 112, 118 (2010).

For the trial court, the question of whether a class should be certified entails a preliminary inquiry into the allegations of the putative class and its representative, whose purpose is to establish the identities of the parties to the class action. Pa.R.C.P. No. 1707 cmt. (certification process "is designed to decide who shall be the parties to the action and nothing more"). *See generally Liss*, 983 A.2d at 663; *Bell v. Beneficial Consumer Disc. Co.*, 465 Pa. 225, 348 A.2d 734, 739 (1975). As a practical matter, the trial court will decide whether certification is proper based on the parties' allegations in the complaint and answer, on depositions or admissions supporting these allegations, and any testimony offered at the class certification hearing. *See* Pa.R.C.P. No. 1707 cmt. The court may review the substantive elements of the case only "to envision the form that a trial on those issues would take." *Hohider v. United Parcel Serv.*, 574 F.3d 169, 175-76 (3d Cir.2009); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165-68 (3d Cir.2001); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 154 (Pa.Super.2002) (perceived adequacy of underlying merits of a claim should not factor into certification decision). Any "consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues" at the liability stage. *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 320 n. 22 (3d Cir.2008). Even if the class is certified, before a decision on the merits, the certification order "may be revoked, altered or amended by the court on its own motion or on the motion of any party." Pa.R.C.P. No. 1710(d). *See Janicik v. Prudential Ins. Co.*, 305 Pa.Super. 120, 451 A.2d 451, 454-55 (1982) (court

has extensive powers to protect absent class members and to ensure efficient conduct of class action).

Pursuant to Pennsylvania's civil procedure rules, the trial court may allow a representative to sue on behalf of a class if, the class is numerous ("numerosity"); there are questions of law or fact common to the class ("commonality"); the claims of the representative are typical of the class ("typicality"); the representative will fairly and adequately protect the interests of the class ("adequate representation"); and a class action is a fair and efficient method for adjudicating the parties' controversy, under criteria set forth in Rule 1708. Pa.R.C.P. No. 1702. Among the Rule 1708 criteria for determining whether the class action is a fair and efficient method of adjudication is "whether [the] common questions of law or fact predominate over any question affecting only individual members" ("predominance"). Pa.R.C.P. No. 1708(a)(1) (also listing six factors in addition to predominance). The class "is in the action until properly excluded" by, *e.g.*, an order of court refusing certification or an order de-certifying the class. Pa.R.C.P. No. 1701(a) & cmt.; *Bell*, 348 A.2d at 736 (same).

During certification proceedings, the proponent of the class bears the burden to establish that the Rule 1702 prerequisites were met. *Kelly*, 546 A.2d at 612. The burden is not heavy at the preliminary stage of the case. *Clark v. Pfizer Inc.*, 990 A.2d 17, 24 (Pa.Super.2010). Indeed, evidence supporting a *prima facie* case "will suffice unless the class opponent comes forward with contrary evidence; if there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion." *Id.; Debbs*, 810 A.2d at 153-54; *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184, 191 (Pa.Super.2002), *appeal denied*, 573 Pa. 694,

825 A.2d 1259 (2003); *Cambanis v. Nationwide Ins. Co.*, 348 Pa.Super. 41, 501 A.2d 635, 637 (1985). It is essential that the proponent of the class establish requisite underlying facts sufficient to persuade the court that the Rule 1702 prerequisites were met. *Kelly*, 546 A.2d at 612.

The trial court prepared a certification memorandum dated September 17, 2004, explaining its class certification decision ("Certification Memo."), and addressing each disputed issue, of commonality, predominance, typicality, and adequacy of representation, as follows. First, respecting commonality, the trial court noted that the theory of liability of the putative class centered on KMA selling one vehicle "with a uniformly defective braking system that affected all drivers" and on KMA's unsuccessful attempts to remedy the defective vehicles in a similar manner, *i.e.*, by replacing brake pads and rotors every few thousand miles. The court listed the common questions of law identified in the complaint, which included whether the Sephias possessed the brake system defect alleged; whether KMA lacked the means to repair the defect; whether the defect constituted breach of express and implied warranties and violation of the MMWA; and whether members of the class were entitled to actual damages and/or an injunction. The court found that sufficient evidence of record supported Bassett's allegations that KMA knew its Sephia vehicles required premature and frequent replacement of brake pads and rotors. According to the court, with the evidence offered, Bassett met her burden of proof for class certification with regard to three claims: breach of express warranty, breach of implied warranty, and violation of the MMWA. Certification Memo., 9/17/04, at 7 (citing *Weismer v. Beech-Nut Nutrition Corp.*, 419 Pa.Super.

403, 615 A.2d 428, 431 (1992): *Janicik, supra*).[9] The trial court was also persuaded that common questions outweighed individual questions of law and fact, and rejected KMA's claims that the proposed class included owners of Sephias with several brake design models, and that individual driving habits, road conditions, and other causes could not be excluded as proximate causes for any harm suffered by the putative class members. *See* Pa.R.C.P. No. 1708(a)(1); Certification Memo., 9/17/04, at 7-8 (citing *Weismer, supra*; *D'Amelio v. Blue Cross of Lehigh Valley*, 347 Pa.Super. 441, 500 A.2d 1137 (1985)). Respecting the typicality requirement of Rule 1702, the court agreed with Bassett that her claims indeed were typical of the class. Certification Memo., 9/17/04, at 13-14 (citing *DiLucido v. Terminix Int'l Inc.*, 450 Pa.Super. 393, 676 A.2d 1237, 1242 (1996)).

Finally, with regard to the adequacy of representation prong, the trial court concluded that, contrary to KMA's arguments, Bassett did not have a conflict of interest in the maintenance of the class, and that her financial resources and legal representation were adequate. Specifically, the court rejected KMA's claim that Bassett was an inadequate representative because she had a conflict of interest arising from potential, not-yet-asserted Lemon Law and personal injury claims (resulting from a brake-related accident) that other class members did not share. The court concluded that, instead, Bassett's personal injury made her "a more zealous advocate on behalf

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[9] The trial court denied class certification as to appellee's fourth count on the ground that reliance was an element of any UTPCPL claim and class-wide evidence was not apt to prove reliance. Certification Memo., 9/17/04, at 10 (citing *Weinberg v. Sun Co.*, 565 Pa. 612, 777 A.2d 442 (2001)).

of the class." Certification Memo., 9/17/04, at 14-16 (citing *Janicik, supra*).

The trial court further addressed class certification issues in its Pa.R.A.P. 1925(a) opinion. In addition to incorporating by reference its September 2004 certification memorandum, the court stated that the evidence introduced at trial confirmed that a class action was the most appropriate means to present the class's claims, that class counsel was able to present the issues to the jury fully, and that the jury was able to decide all issues before them "sincerely, productively, appropriately and justly." According to the court, separate trials on the 9,402 claims of the class members, claiming damages of only $600 each, would have placed a strain on the courts and effectively "seal[ed] shut" the doors to the courtroom in violation of the Pennsylvania Constitution. The effect would have been a windfall for KMA as numerous class members failed to bring their cases to trial. The court concluded that the class had met the Rule 1702 and 1708 prerequisites for class certification, and relied on its September 2004 opinion for analysis of the individual certification issues.

On appeal to this Court, KMA argues that Bassett failed to establish that common questions of law and fact existed, that these common issues predominated over individual issues, that her experience was typical of the class, and that she was an adequate representative of the class.

A. Commonality and Predominance

KMA claims that Bassett did not meet either the commonality or the predominance prerequisites for certifying the class, raising the same arguments in support of both claims. According to KMA, the trial

court certified the class on a record that contained proof of Bassett's "anecdotal" experience but no evidence that KMA had breached its express warranty with respect to all class members or that the class members sustained out-of-pocket costs as a result.[10]

KMA states that to prove liability for breach of express warranty, Bassett had to submit evidence for each absent class member. KMA states that Bassett's evidence of her personal experience, expert testimony and internal documents regarding a defect present in all 1997-2000 Sephias, and warranty brake repair data were not probative to satisfy Bassett's burden of proof with regard to all the elements of a breach of warranty cause of action for the class. Without specifying whether it is addressing the certification hearing or the trial testimony, KMA attacks Bassett's evidence as not credible and not probative. Thus, KMA challenges the conclusion of Bassett's expert witness that the Sephias suffered from a common defect, on the basis that he personally inspected only two vehicles rather than all the vehicles in the class. According to KMA, warranty repair statistics did not cure any deficiencies in the expert's testimony regarding the existence of a defect and, instead, showed only that "KMA honored its express warranty" by routinely covering brake repairs to Sephia vehicles.

Moreover, KMA argues that reliance, manifestation, notice, and opportunity to cure are elements of proof in a breach of express warranty action, and that Bassett failed to prove them with respect to the class claims. According to KMA, Bassett was required to produce evidence that each absent class member was

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[10] The jury found in favor of the class on the breach of express warranty and KMA's appeal addresses that claim only.

aware of and relied on KMA's express warranty, yet the record lacks any such proof respecting class members other than Bassett. KMA's Brief at 19-20 (citing *Goodman v. PPG Indus., Inc.*, 849 A.2d 1239, 1245-46 (Pa.Super.2004), *aff'd per curiam*, 584 Pa. 537, 885 A.2d 982 (2005) (buyers could not enforce warranty made by third party to seller)). KMA also argues that Bassett offered no evidence that each class member notified KMA of a covered defect, provided opportunity to cure, or that KMA failed or refused to cure the brake defect. *Id.* at 20-22 (citing 13 Pa.C.S. § 2607(c)(1) ("buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy")). KMA reiterates that simply proving the existence of a defect based on consumer expectations of brake pad longevity is insufficient evidence that KMA breached its express, rather than an implied, warranty. *Id.* at 20-21 (citing *Olson v. Ford Motor Co.*, 258 Ga.App. 848, 575 S.E.2d 743, 746 (2002) (dealership not liable to plaintiff who refused to let dealership repair vehicle); *Hasek v. DaimlerChrysler Corp.*, 319 Ill.App.3d 780, 253 Ill.Dec. 504, 745 N.E.2d 627, 638 (2001) (engine noise, without further indication of defect, is not enough to establish liability for breach of express warranty); *Poli v. DaimlerChrysler Corp.*, 349 N.J.Super. 169, 793 A.2d 104, 110-11 (Law Div.2002) (buyer's breach of warranty claims did not accrue until manufacturer failed to perform repair within reasonable time)). Finally, KMA argues that Bassett failed to prove that each absent class member sustained damages caused by the defect, or any damages at all. *Id.* at 22-23 (citing *Price v. Chevrolet Motor Div.*, 765 A.2d 800 (Pa.Super.2000) (buyer must prove that alleged defect is proximate cause of damages)). According to

KMA, Bassett's damages were unique and she did not attempt to extrapolate her experience to the entire class or to prove individual damages. KMA insists that Bassett's evidence on damages was theoretical and focused on the cost of retrofitting all vehicles in the class. KMA concludes that Bassett failed to establish "the critical elements of any breach of express warranty claim" and, therefore, that the class was improperly certified "in the first instance."

Bassett responds first with a waiver argument. Bassett claims that KMA waived all certification issues by failing to object on the trial court record and distinguish express warranty issues from implied warranty issues for certification purposes. According to Bassett, KMA contested certification as to all claims, "hoping as a matter of strategy to obtain the same *res judicata* benefit it now claims for the implied warranty claim." Our review, however, reveals that KMA raised and preserved issues related to certification of the class with respect to all of Bassett's claims on behalf of the class. Therefore, KMA's claims related to the express warranty were not waived, even if they were not addressed separately from implied warranty claims, and regardless of KMA's strategy.[11]

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[11] We also reject Bassett's additional arguments in the same vein. Thus, in her "Counter-statement of the case," Bassett asserts three claims that KMA either waived or is judicially estopped from challenging class certification on the merits because: (1) KMA implemented a free brake repair program limited to a subset of the class members and, therefore, admitted the existence of the class; (2) KMA admitted that certification was proper by filing a motion for "temporary" certification of a class in *Leger v. Kia Motors America, Inc.*, No. CV-04-80522, a case pending in the District Court for the Middle District of Florida; and (3) KMA stipulated to class certification in

On the merits, Bassett argues that consumer product warranty claims are recognized as "particularly suitable" for class litigation. Bassett's Brief at 14 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (predominance is "readily met" in certain cases alleging consumer fraud) and 15 U.S.C. § 2310(e) (establishing separate notice and opportunity to cure procedures for class actions)). According to Bassett, warranty data showing high percentage rates of covered brake repairs was *prima facie* proof that all 1997-2000 Sephias experienced a premature wear defect. Further, deposition testimony from KMA executives, KMA internal documents, and a "coupon" program, through which KMA offered free brake repairs to members of the class, showed that KMA recognized the 1997-2000 Sephias as suffering from a model-wide defect. Bassett states that KMA did not require individual inspections of each Sephia, nor inquiry into individual drivers' habits, as a prerequisite to qualify for its coupon program, proof that KMA discounted their role in revealing the causes of customer complaints. Bassett claims that KMA also did not limit the program to select iterations of the 1997-2000 Sephia models, in recognition that any modifications or "tweaks" of the brake system did not alter the basic defective design.

Santiago v. Kia Motors America, Inc., No. 01 CC 01438, 2004 WL 5521781 (Cal.Super. Ct. May 24, 2004), a 47-state class that did not include Pennsylvania. But, Bassett does not address or develop these assertions in the body of the brief. As a result, Bassett waived these claims. *Purple Orchid, Inc. v. Pa. State Police*, 572 Pa. 171, 813 A.2d 801, 804 (2002) (issue included in "statement of questions" was waived by failure to address and develop in appellate brief).

Bassett argues that she proved that each class vehicle manifested the defect by showing that the abnormal degradation of the brake pads and rotors was measurable. KMA's business records, *i.e.*, warranty data and internal memoranda, showed that the defect was measured, tested, and ultimately recognized internally by KMA. Thus, Bassett asserts, warranty data supported the commonality and predominance allegations, regardless of whether the same data also showed that KMA complied with its warranty promises, a fact relevant to KMA's liability but not a factor for the court to consider for certification purposes.

According to Bassett, KMA did not object to or introduce evidence to rebut Bassett's commonality evidence. Bassett notes that KMA's appeal strategy is different from its trial argument: at trial, KMA sought to prove that a common defect did not exist but, on appeal, KMA is claiming that existence of a defect is irrelevant. Bassett emphasizes that, at trial, KMA "recognized" that it was replacing one set of defective brakes with another and, therefore, that warranty repairs did not restore the Sephias to a defect-free condition. But, Bassett adds, on appeal, implicit in the jury's verdict is a finding that commonality existed so there is no basis to overturn the certification decision.

Bassett also argues that common issues predominated over any individual issues. Common issues included whether KMA met its express promise to deliver vehicles free from defect; whether the Sephias had a braking system design defect; and whether the design defect manifested as abnormal or premature wear of the brakes. According to Bassett, these issues

were essential to proving the warranty claims and were properly supported with generalized proof.

Next, Bassett responds to KMA's assertion that evidence of individual reliance is necessary to prove breach of warranty and is not amenable to generalized proof. According to Bassett, reliance is not an element of proof in a warranty action because the written warranty is an affirmation of fact and part of the basis of the bargain. Bassett's Brief at 29 (citing *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 171 F.3d 818, 825 & n. 7 (3d Cir.1999) (not all promises are warranties; to be a warranty, promise must be part of basis of bargain and reliance may become factor in determining whether promise is part of basis of bargain)). Bassett states that the burden was, therefore, on KMA to prove that the written warranty was not part of the bargain and did not cover the defective condition of which class members complained. *Id.* (citing 13 Pa.C.S. § 2313 cmt. 3 (seller's affirmations of fact about goods during bargain become part of description, hence no particular reliance need be shown to weave them into agreement; rather, fact which takes affirmations out of agreement requires clear affirmative proof)). Here, according to Bassett, KMA did not offer any proof that class members disregarded the warranty and reliance was not an issue. Bassett states that the cases cited by KMA in support of a contrary legal conclusion are inapposite because they do not address the issue of reliance but merely whether express warranties existed in fact-specific circumstances. *Id.* at 30 (citing *Goodman, supra*).

Bassett also rejects KMA's arguments that each class member was required to provide individual notice of the common defect, opportunity to cure, and

to establish failure to repair in order for the class to maintain suit. According to Bassett, KMA "received ample notice" that the Sephias' brakes were defective from consumer complaints, warranty claims, and internal records; thus, individual notice prior to suit was not required. *Id.* at 31-32 (citing *In re Latex Gloves*, 134 F.Supp.2d 415, 422 (E.D.Pa.2001), *vacated in part on diff. grounds, Whitson v. Safeskin Corp.*, 2001 WL 34649695 (E.D.Pa. Apr. 6, 2001) (whether buyer provided notice within reasonable time to seller via complaint, which was filed two years after discovery of injury, is issue for finder of fact)). Indeed, Bassett argues that the MMWA did not require notice to KMA on behalf of the class and an opportunity to cure until after certification of the class. *Id.* at 32 (citing 15 U.S.C. § 2310(e) (class of consumers may not proceed on breach of warranty claim except to establish representative capacity of named plaintiffs, unless warrantor "is afforded a reasonable opportunity to cure" failure to comply with warranty; named plaintiffs shall notify defendant that they are acting on behalf of class at that time)). Additionally, Bassett claims that she notified KMA of the class's claim in timely fashion, which led KMA's counsel to withdraw a motion for directed verdict after trial. *See* N.T., 5/25/05, Vol. 7, at 26-27.

Finally, Bassett responds to KMA's argument that her evidence of damages at trial was inadequate because individual out-of-pocket costs of repair were not demonstrated. Bassett states that KMA's current argument on this issue highlights the difference in posture at the time of class certification, when Bassett was asserting that the class action mechanism was appropriate, versus on appeal, when KMA is attacking a completed trial as improper. Bassett emphasizes that her expert's testimony at trial, and

KMA's records, substantiated the request for per person damages, to which KMA had a full opportunity to object but did not. Furthermore, according to Bassett, the jury's award was supported by the evidence at trial.

In its reply brief, KMA reemphasizes that the existence of a common defect "is not the answer to the question of whether the class was properly certified" but merely a threshold fact. KMA also states that Bassett's arguments ignore evidence that among the 1997-2000 Sephias, KMA introduced thirteen separate design changes to the brakes and that not simply one automobile model was at issue.

Preliminarily, to better focus the dispute, we address the proper scope of our review of the trial court's decision to certify the class. "Scope of review refers to the confines within which an appellate court must conduct its examination . . . [or] to the matters (or "what") the appellate court is permitted to examine." *Morrison v. Commonwealth*, 538 Pa. 122, 646 A.2d 565, 570 (1994); *see generally* Jeffrey P. Bauman, *Standards of Review and Scopes of Review in Pennsylvania—Primer and Proposal*, 39 DUQ. L.Rev. 513 (2001). Both parties here offer extensive argument about whether the trial court's decision to certify was proper in view of evidence offered during the liability phase of trial. But, as stated, a certification proceeding is a preliminary inquiry whose purpose is to establish who the parties to the class action are "and nothing more." Pa.R.C.P. No. 1707 cmt. Bassett was not required to prove KMA's liability at the certification stage and the trial court was prohibited from factoring the perceived adequacy of the underlying merits of the class's claims into the

certification decision. *Debbs*, 810 A.2d at 154; *see Hohider*, 574 F.3d at 175-76.

An appellate court does not second-guess a trial court's discretionary "preliminary" decision to certify the class by considering subsequent case developments of which the trial court could not have been aware at the time of its decision. Thus, arguments regarding subsequent case developments, such as evidence revealed at the liability phase of trial or the jury's verdict, cannot prove an abuse of discretion at the certification stage.[12] By the same token, pre-trial class certification proceedings do not require a mini-trial; the class is not obligated to establish liability during the class certification phase. Pa.R.C.P. No. 1707 cmt.; *Debbs*, 810 A.2d at 154. *See Hohider*, 574 F.3d at 175-76. The practical consequence here is that we address the first and second questions on appeal, class certification and sufficiency, separately. But, because the parties have unhelpfully addressed the issues together, we have parsed the briefs to separate the arguments relevant to each issue.

For ease of discussion, we will address commonality and predominance together as the parties do, but we emphasize that the Rule 1702(2) commonality

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[12] Of course, the rules of civil procedure anticipate that evidence available after certification but before a decision on the merits may be considered by the trial court, and consequently by the appellate courts, in deciding whether revocation of the class certification is proper. Pa.R.C.P. No. 1710(d); *see Basile v. H & R Block, Inc.*, 601 Pa. 392, 973 A.2d 417, 423 (2009) (filing of decertification motion appropriate before decision on merits, if circumstances change following certification decision); *Clark v. Pfizer Inc.*, 990 A.2d 17, 29 (Pa.Super.2010) (same). But, here, KMA's issues on appeal do not concern decertification and consideration of post-certification evidence is inappropriate.

requirement and the Rule 1708(a)(1) predominance requirement are distinct prerequisites for class certification, both of which must be established by the class proponent.

To establish the commonality requirement, Bassett had to identify common questions of law and fact—"a common source of liability." *Weismer*, 615 A.2d at 431. Simply contending that all putative members of a class have a complaint is not sufficient if the complaints are disparate personal allegations arising from different circumstances and requiring different evidence, *i.e.,* "one requiring less, the other requiring more, the one not indicative of the merits, the other appearing to approach the merits of individual cases." *Allegheny County Hous. Auth. v. Berry*, 338 Pa.Super. 338, 487 A.2d 995, 996-98 (1985) (commonality requirement not met with bare allegation that a number of plaintiffs had different verifiable complaints against same defendant); *see Eisen v. Indep. Blue Cross*, 839 A.2d 369, 372 (Pa.Super.2003) (same). Commonality may not be established if "various intervening and possibly superseding causes of damage" exist. *Weismer*, 615 A.2d at 431. The critical inquiry for the certifying court is whether the material facts and issues of law are substantially the same for all class members. *Liss*, 983 A.2d at 663. The court should be able to envision that the common issues could be tried such that "proof as to one claimant would be proof as to all" members of the class. *Id.*

Bassett was not required to prove that the claims of all class members were identical; the existence of distinguishing individual facts is not "fatal" to certification. *Buynak v. Dep't of Transp.*, 833 A.2d 1159, 1163 (Pa.Cmwlth.2003). The common questions

of fact and law merely must predominate over individual questions. Pa.R.C.P. No. 1708(a)(1). The standard for showing predominance is more demanding than that for showing commonality, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 311, but is not so strict as to vitiate Pennsylvania's policy favoring certification of class actions. *Eisen*, 839 A.2d at 371.

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623, 117 S.Ct. 2231; *see In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 310-11. Thus, a class consisting of members for whom *most* essential elements of its cause or causes of action may be proven through simultaneous class-wide evidence is better suited for class treatment than one consisting of individuals for whom resolution of such elements does not advance the interests of the entire class. *See Liss*, 983 A.2d at 666 ("[c]lass members may assert a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice"); *Delaware County v. Mellon Fin. Corp.*, 914 A.2d 469, 475 (Pa.Cmwlth.2007) (existence of separate questions "essential" to individual claims does not foreclose class certification) (quoting *Weismer*, 615 A.2d at 431); *Cook v. Highland Water & Sewer Auth.*, 108 Pa.Cmwlth. 222, 530 A.2d 499, 505 (1987) (internal citations omitted) ("Where a common source of liability can be clearly identified, varying amounts of damage among the plaintiffs will not preclude class certification. However, where there exist [ ] various intervening and possibly superseding causes of the damage, liability cannot be determined on a class-wide basis.")

Here, we do not discern any abuse of discretion in the pre-trial certification decision. The evidence available to the court at the time of certification supported the following findings of fact by the trial court. KMA sold the Sephia to U.S. consumers between 1997 and 2000. N.T., 7/15/04, at 10, 19. Although KMA made several changes to the design of the Sephia's brake system during those years, the modifications did not significantly alter the basic defective design. N.T., 7/15/04, at 86-87, 129; 7/16/04, Vol. 1, at 79-81. According to Bassett's expert, the brake systems of all 1997-2000 Sephias had a common design defect related to heat dissipation in the front brakes, which caused premature wear of the brake pads and rotors. N.T., 7/15/04, at 93, 100-01.[13] Bassett showed U.S. consumer expectations and the KMA owner's manual to set the reasonable life expectancy of Sephia brake pads at 20,000 to 30,000 miles. *Id.* at 94-97. But, the Sephias' brake pads (and, subsequently, rotors) wore prematurely. *See* Motion for Class Certification, Exh. 2-D-I, K (KMA Technical Service Bulletins dated 1997-1999; Sephia Repair Tips (from Kia Technician Times, Apr. 1998)). Warranty data showed high claim rates related to the premature wear of brake pads and rotors for 1997-2000 Sephias, which indicated, according to Bassett's expert, "extra" or "abnormal" wear independent of factors like driver habits and the environment that

[13] The expert stated: "I don't believe that I have been provided with enough . . . material to ultimately put my finger on the exact reason why we can't or they can't evacuate the heat. What I am confident in saying is that, and within a reasonable degree of engineering certainty, is that this front brake system cannot evacuate the heat properly." N.T., 7/15/04, at 100.

normally contribute to brake component wear.[14] N.T., 7/15/04, at 98-99, 102, 104. Bassett also offered KMA internal memoranda and evidence of a free brake pad coupon program to confirm the existence of a system-wide brake defect and KMA's knowledge of the defect since 1998. *Id.* at 132; N.T., 07/16/04, Vol. 1, at 48-49 (quoting quality assurance report of June 8, 1999, in reference to premature brake wear and warping of rotors on the Sephia: "This is a well-known condition and needs to be corrected ASAP."); *see also* Motion for Class Certification, Exh. 2-D-I, K (KMA Technical Service Bulletins dated 1997-1999; Sephia Repair Tips (from Kia Technician Times, Apr. 1998)). Finally, warranty data, internal memoranda, and KMA's repeated attempts to make minor brake system modifications, as explained by expert testimony, supported the trial court's finding that KMA was unable to effectively repair the defect in the brake system. N.T., 7/15/04, at 88 (brake system defect was "chronic"). Thus, the trial court's findings of fact for the purposes of Bassett's class certification motion are supported by the record.

The findings of fact by the certifying court formed a sufficient basis to conclude that commonality was met, as the class's claims were based on "a common

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[14] Neil Barbalato, a KMA warranty department representative, reported in an affidavit that of 1997 Sephias, 55% had one or more warranty repairs, of 1998 Sephias, 83% had one or more warranty repairs, of 1999 Sephias, 70-71% had one or more warranty repairs, and of 2000 Sephias, 36% had one or more warranty repairs. Bassett's expert testified that the average claim rate of 61% was ten times higher than that of the Kia Sportage, another KMA vehicle. Notably, the claim rate did not include instances of brake repairs done by Sephia owners or for which Sephia owners paid out of pocket to Kia dealers or to private mechanics. N.T., 7/15/04, at 91-92, 97-98.

source of liability" and were susceptible to common proof. *Liss*, 983 A.2d at 663; *Weismer*, 615 A.2d at 431. KMA warranted Sephias to be "free from defects in material and workmanship." Bassett and the class asserted several causes of action on the basis of the common source of liability (*i.e.*, the defective design of the brake system), including breach of express and implied warranties, and violation of the MMWA. The trial court did not abuse its discretion in concluding that common questions of law and fact existed, such as whether the 1997-2000 Sephias had the common defect alleged, whether KMA had the ability to repair the defect, whether KMA breached the express and implied warranties, and whether KMA violated the MMWA. Based on the same evidence, the certifying court also did not abuse its discretion in concluding that common issues predominated over individual issues of liability.

KMA's arguments on appeal do not prove an abuse of discretion by the trial court. First, the class here was not required to prove "reliance" in order to recover for breach of the express warranty[15] KMA now argues that, to recover, each class member had to prove individually that s/he read the warranty—a clause of the purchase contract—and relied on it in seeking brake repairs and, consequently, in bringing an action for failure to repair. But, it is undisputed that the express and implied warranties at issue existed and were terms in each class member's sales contract. *See* KMA's Warranty ("[KMA] warrants

[15] Notably, during certification proceedings, KMA never argued that certification was inappropriate because Bassett and the class had to show "reliance." Nevertheless, because the class fails to assert waiver on this ground, and the issue is one of law easily resolvable on the existing record, we will pass upon it.

that your new [Sephia] is free from defects in material and workmanship . . . all components of your new [Sephia] are covered for 36 months or 36,000 miles, whichever comes first"); *see Keller v. Volkswagen of America, Inc.*, 733 A.2d 642, 644-45 (Pa.Super.1999) (breach of warranty is an action for breach of contract). A written express warranty that is part of the sales contract is the seller's promise which relates to goods, and it is part of the basis of the bargain. 13 Pa.C.S. § 2313(a)(1). This statement of law is not qualified by whether the buyer has read the warranty clause and relied on it in seeking its application. *See id.* General contract law supports this interpretation. "Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood." *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162, 165 (1990); *see Erie Ins. Exchange v. Baker*, 601 Pa. 355, 972 A.2d 507, 511 (2008) (plurality) (plaintiff's failure to read contract not ground to nullify contract terms); *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 503 Pa. 300, 469 A.2d 563, 566 (1983) (same). To adopt KMA's position would essentially require us to abandon this rule with respect to warranties. We decline to do so. Here, KMA cannot avoid its contractual responsibilities pursuant to the class member warranties, regardless of whether individual members read and fully understood the warranty provisions; therefore, to require class members to prove individual reliance on the written warranties is unnecessary. Accordingly, at the class certification stage, Bassett was not required to show that reliance lent itself to class-wide proof. *See Liss*,

983 A.2d at 665 (reliance is not element of cause of action for breach of contract).[16]

Second, the trial court did not abuse its discretion in concluding that the issue of proximate cause could be proven by common evidence. The court considered KMA's internal memoranda and expert testimony regarding the brake design defect, in conjunction with warranty claims data, which tended to prove that the brake design defect was the proximate cause of premature wear of brake pads and rotors with respect to the class claims. N.T., 7/15/04, at 88-91, 99-102. On appeal, KMA argues that commonality was not established because evidence of record proved that premature wear could also have other causes, such as environmental conditions, driver habits, or

[16] In arguing that "reliance" is an element of proof in a warranty action, KMA relies primarily on the Superior Court's decision in *Goodman*, 849 A.2d at 1245-46. In *Goodman*, consumers who purchased windows and doors from a manufacturer sued the manufacturer's supplier of wood preservative for breach of express warranty. The written warranty was part of the contract between the manufacturer and the wood preservative supplier, and extended only to the manufacturer and not to the consumers/plaintiffs. The court dismissed the consumers' breach of warranty claim on the ground that the wood preservative supplier had not warranted the product to the consumers; consumers had not relied on any of the supplier's representations in purchasing the windows from the manufacturer. *Id.* at 1246. *Accord Dormont Mfg. Co. v. ITT Grinnell Corp.*, 323 Pa.Super. 17, 469 A.2d 1138, 1140 (1983) (express warranty not created by buyer's reliance on past sales). The question of whether reliance is required to create a warranty in the first place (the *Goodman* scenario) is distinct from the question of whether a warrantor may be liable for breach to a consumer who did not read the express warranty that is indisputably part of the written contract (present scenario). Therefore, *Goodman* is inapposite.

separate defects, *id.* at 120-23, 148. We reject KMA's implicit invitation to reweigh the evidence on appeal. *Commonwealth v. Treiber*, 582 Pa. 646, 874 A.2d 26, 30 (2005). Whether causation could be established on a class-wise basis was an issue for the finder of fact—the certifying court, in this case—and contrary testimony in the record is insufficient for reversal on appeal. *See Summers v. Certainteed Corp.*, 606 Pa. 294, 997 A.2d 1152, 1163-64 (2010) (causation is question for finder of fact; plaintiff need not exclude every possible explanation so long as reasonable minds can conclude that defendant's conduct was proximate cause of harm by preponderance of evidence); *Popowsky v. Pa. Pub. Utility Comm'n*, 594 Pa. 583, 937 A.2d 1040, 1055 n. 18 (2007) (preponderance of evidence is akin to "more likely than not" inquiry); RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY § 3 cmt. d (1998) (if plaintiff can prove that most likely explanation of harm involves causal contribution of a product defect, fact that there may be other concurrent causes of harm does not preclude liability).

Third, we also reject KMA's claims that certification was an abuse of discretion because the record was devoid of evidence that class members provided notice of the defect and an opportunity to cure.[17]

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[17] Pursuant to the Pennsylvania Commercial Code, notice of breach is required within "a reasonable time." 13 Pa.C.S. § 2607(c)(1). The purpose of providing notice is to defeat commercial bad faith and not to deprive the consumer of her remedy. 13 Pa.C.S. § 2607 cmt. 4. The statute, however, does not provide direction as to what constitutes reasonable notice in the context of a class action. Nor does the statute explicitly require the consumer to provide an opportunity to cure before filing suit for breach of warranty. In spite of KMA's allegations to the contrary, and evident from the caselaw on which KMA

Indeed, the record shows that KMA was on notice since late 1998 (more than two years before this action was filed) that Sephias, beginning with the 1997 model, had defective front brakes. *See, e.g.*, KMA's Opposition to Class Certification, Exh. D2-32 (Tim McCurdy Inter-Office Memorandum to James Lee, 2/03/99; KMC Brake Quality Team Meeting Summary, 2/15/99). KMA had the opportunity (and sought) to repair the defect repeatedly but unsuccessfully during the 1997-2000 production years. On this record, we hold that the trial court did not abuse its discretion by concluding that the class would be able to prove notice and opportunity to cure through common evidence at trial.

As a final matter, KMA argues that common proof for individual class members of the related issues of defect manifestation and amount of damages, *see Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 627-28 (8th Cir.1999), was not available and that the trial court's decision to certify the class was erroneous on

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relies, the law of this Commonwealth is neither "well-settled" nor self-evident on these issues. KMA's Brief at 17-18, 21 (citing *Beneficial Commercial Corp. v. Brueck*, 23 Pa. D. & C.3d 34, 37 (Pa.Com.Pl.1982) ("*Brueck*"): *Perona v. Volkswagen of Am., Inc.*, 292 Ill.App.3d 59, 225 Ill.Dec. 868, 684 N.E.2d 859 (1997); *Zwiercan v. Gen. Motors Corp.*, 2002 WL 1472335 at *3-4 (Pa.Com.Pl.2002); *Grant v. Bridgestone/Firestone, Inc.*, 57 Pa. D. & C.4th 72, *4-5 (Pa.Com.Pl.2001)). But, without any development of the law it wishes us to follow or adopt, KMA insists that the record is void of any proof of notice and opportunity to cure. Bassett denies the allegation. Implicit in both parties' arguments is a presumption that some proof of these issues is necessary to establish a claim for breach of warranty. For the purposes of decision, we accept that presumption and reject KMA's contention that no evidence was present in the record. We offer no opinion as to whether KMA's iteration of the law is in fact correct.

this ground. According to KMA, testimony related to Bassett's repair history was insufficient to prove the damages of the other class members and the trial court should have found commonality lacking on this ground. KMA argues that Bassett "made no attempt to extrapolate her experience to those absent class members and offered no documentary or testimonial evidence to establish that any plaintiff class member other than she [sic] sustained *any* economic harm." KMA's Brief at 23.

At issue are two different considerations: whether the class could demonstrate the impact of the defective brakes on each member and whether the amount of damages for each class member was provable with common evidence. *See Behrend v. Comcast Corp.*, 655 F.3d 182, 204-06 (3d Cir.2011) ("At the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 188 (3d Cir.2001) (ability to calculate amount of damages "does not absolve plaintiffs from the duty to prove each investor was harmed by the defendants' practice"); *accord Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565, 51 S.Ct. 248, 75 L.Ed. 544 (1931) ("rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount"). The impact of the defect on each class member implicates concepts of manifestation and causation. Impact may be proven with common evi-

dence "so long as the common proof adequately demonstrates some damage to each individual." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir.1977), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The question regarding the impact on each class member turns on the individual facts of a case "rather than upon a rule of law precluding common proof of fact of damage." *Id.* at 454-55; *accord Summers, supra.*

The design defect of which the class complained was susceptible to proof on a class-wide basis, and testimony showed that the inability of the Sephia brake system to exhaust heat manifested as premature wear of brake pads and rotors, accompanied by noise and inability to brake, symptoms of which Sephia owners complained. High warranty claims confirmed the impact of the defect on individual members of the class. The fact that the claims rates were not one hundred percent across all models was not dispositive of the issue of manifestation because, as KMA's representative testified, only covered claims were included in the calculations of the warranty rate. Uncompensated claims were not. *See* N.T., 7/15/04, at 91-92, 97-98. KMA offered testimony that the decision whether to replace brake pads and rotors, wear-and-tear items generally not covered under the warranty, was at the discretion of KMA. Moreover, Bassett's evidence supported the conclusion that, even where KMA replaced brake system components free of charge, the replacement parts were equally defective and required additional repairs, whose replacement at no cost to the Sephia owners would again be subject to KMA's discretion. Notably, at the preliminary stage of trial, the class was pursuing several types of compensation, includ-

ing out-of-pocket costs, diminished re-sale value of the vehicle, and retrofit costs. The record following the certification hearing contained sufficient evidence to support the trial court's decision that all class members were affected by the defect and sustained some form of damages.

Regarding damage amounts or scope of individual relief, it has been well established that if a "common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." *Weismer*, 615 A.2d at 431; *accord* 6 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 18:27 (4th ed.2002) (part of federal approach to class actions is "recognition that individual damages questions do not preclude [certification] when the issue of liability is common to the class."). Indeed, as we have recently held, "demonstrating that all class members are subject to the same harm will suffice" for certification purposes. *Liss*, 983 A.2d at 666 (quoting *Baldassari*, 808 A.2d at 191 n. 6); *accord Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 361, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ("*Teamsters*") (authorizing "additional proceedings after the liability phase of the trial to determine the scope of individual relief"); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir.2003) (if "common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain"). The class here did not offer testimony of identical damages among members during certification proceedings and, in fact, acknowledged that individual class members paid varying out-of-pocket costs for brake repairs. N.T., 7/15/04, at 22-23.

KMA argued in opposition to certification—and renews the argument now, on appeal—that the individual nature of damages proves that the trial court abused its discretion in its finding of commonality and predominance. We disagree. As our previous analysis shows, Bassett and the class adduced sufficient evidence during certification proceedings to show a common source of liability. Any question regarding individual expenditures resulting from varying attempts to repair the defect was not a ground to reject the commonality found on other issues, to defeat the predominance of common issues and, ultimately, to deny certification of the class at the preliminary stages of trial.[18] For these reasons, we discern no abuse of discretion by the trial court in concluding that Bassett met the prerequisites of commonality and predominance.

In his dissent, Mr. Justice Saylor addresses damages and observes that class members had "plainly individualized experience[s] with out-of-pocket expenditures," which the trial court "glossed over" both at certification proceedings and at trial. Dissenting Op., at 63-64. Justice Saylor criticizes the trial court for failing to manage the class action proceedings fairly and efficiently to account for differences in out-of-pocket damages incurred by the individual class members. *Id.* at 62. "The looseness of the certification decision yielded ongoing controversy about how the

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[18] Because Bassett and the class did not offer testimony regarding common damages during the class certification proceedings, any references to expert testimony on this topic in KMA's appellate brief (*see* KMA's Brief at 23) necessarily address the expert's testimony at trial, which, as discussed *supra*, is irrelevant to prove an abuse of discretion in pre-trial class certification.

certification was to operate and its impact on required substantive proofs" at trial. *Id.* at 60.

We do not discount the concern of our esteemed colleague. Respectfully, however, in our view, the concern has less power in the context of assessing the trial court's ruling on the commonality and predominance prerequisites for class certification (especially since claims proceedings that account for different damages among class members are not uncommon in class actions), and more power in the overall context of ensuring that the "class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708." Pa.R.C.P. No. 1702(5). Rule 1708 requires a certifying court to consider, among other factors, whether "the size of the class and the difficulties likely to be encountered in the management of the action as a class action." Pa.R.C.P. No. 1708(a)(2). We agree with Justice Saylor that the approach to the management of individualized damages matters was not addressed by the trial court properly at the outset, following certification of the class. This management misstep developed into an issue raised by KMA regarding the molding of the verdict, which will be discussed further *infra.*

But, we do not view the trial court's failure to devise a proper damages management plan during class certification proceedings—a failure that itself invited a distinct objection—as sufficient to render an abuse of discretion its determination that "potential differences in individual damage claims based upon individual experiences and costs associated with attempts to repair the vehicle" do not "pose any serious management difficulty." Tr. Ct. Op., 9/21/04, at 18. The question is rather whether the individual dam-

ages issues were especially difficult and burdensome on the trial court so as to factor against class certification. *See* Pa.R.C.P. No. 1708(a): *accord Smilow*, 323 F.3d at 40 n. 8 (citing 5 J.W. Moore, Moore's Federal Practice, § 23.46[.2][b], at 23-209 & n. 17) (3d ed.1997 & Supp.2002). KMA argued at the certification proceedings that the class should not be certified because individual claims proceedings on the issues of causation, manifestation, and damages would require the trial court "to preside over thousands of mini hearings, which would take years," and the class was therefore unmanageable. KMA's Supp. Memo. of Law in Opposition to Class Certification, 7/8/04, at 11. On appeal to this Court, KMA states that "the necessity for 9,401 [sic] individual post-verdict class proceedings in and of itself would have overwhelmingly established that class certification was improper in the first instance." KMA's Brief, at 30.

Setting aside KMA's failure to develop the claim in any meaningful fashion in its brief so as to allow for appellate review—a sufficient basis in itself to reject the argument, *Commonwealth v. Walter*, 600 Pa. 392, 966 A.2d 560, 566 (2009)—KMA's claim also fails on the merits. First, contrary to KMA's arguments, only the issue of individual damages would have been subject to individualized proceedings. *See also Teamsters*, 431 U.S. at 361-62, 97 S.Ct. 1843 (question of individual relief does not arise until defendant's liability has been proved and "force of that proof does not dissipate at the remedial stage of the trial"). Second, "[w]here damages issues are likely to require more individualized treatment, a judge has available a number of creative methods of managing questions of remedy in a manner that protects the defendant's rights while redressing harms to individual plaintiffs." *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337,

893 N.E.2d 1187, 1212 (2008) (citing 2 A. Conte & H.B. Newberg, Class Actions § 4.32, at 287-88 (4th ed.2002) ("Newberg") (listing class action management techniques)). Among these are bifurcated trials for liability and damages and the use of special masters. *Id.* We are not persuaded that it is appropriate to adopt what amounts to a *per se* rule that the prospect of individualized variations in damages alone required ruling against certification. On the issue of damages, for purposes of certification, there is no compelling reason to believe that the damages could not have been calculated based on information received from class members regarding their individual experiences with their Sephias, *e.g.*, at further class proceedings or by a special master. KMA does not offer any persuasive argument that management of the damages issue alone in this fashion, for the less than 10,000 class members, would be so unduly burdensome as to prevent class certification.

B. Typicality

Concerning typicality, Pa.R.C.P. No. 1702(3), KMA claims that Bassett's experience was "vastly different" from that of the other class members and required different treatment from other class members at trial. According to KMA, "unrebutted" evidence established that the Sephia's front brake system underwent continuous redesign between 1997 and 2000, that Bassett's vehicle was only one of "over thirteen" designs, and, as a result, that her experience was unrepresentative of the class. KMA emphasizes that the model of Bassett's car, her repair history, and interaction with KMA were unique to her so that any claim of typicality should have been fruitless.

KMA argues that, as with the commonality and predominance prongs, the trial court considered evidence irrelevant to an express warranty claim like Bassett's, which evidence would have supported "at best" an uncertifiable Lemon Law violation. But, KMA states, Bassett failed to pursue her Lemon Law claim and her individual experience and individual proof were not probative of class-wide claims of express warranty. According to KMA, the class in this case lacked a representative whose experience was typical and should not have been certified.

Bassett responds that typicality was established. According to Bassett, her position on common issues of law and fact is sufficiently aligned with that of absent class members so that pursuit of her own interests would also advance those of the class. Bassett reiterates that she purchased a model year 2000 Sephia with the same warranty and same front brake defect as the absent class members. She states that the brake components were interchangeable between 1997-2000 Sephias and that she was "ideally suited" to present the class claims regarding the ineffectiveness of the design changes, because her vehicle was the latest model in the class. Bassett emphasizes that proof of her claims necessarily proved each class member's claims as well.[19]

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[19] Bassett also asserts that KMA admitted that Bassett's claims are typical of the class by not challenging the class verdict with respect to the implied warranty claims. But, Bassett cites no legal authority—for there is none—in support of this position. *See Basile*, 973 A.2d at 421-22 ("party adversely affected by earlier rulings in a case is not required to file a protective cross-appeal if that same party ultimately wins a judgment in its favor") (emphasis omitted).

Rule 1702(3) states that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all members in a class action only if [, *inter alia*,] the claims . . . of the representative parties are typical of the claims or defenses of the class." Pa.R.C.P. No. 1702(3). A challenge to the typicality requirement presumes that commonality has been established. The purpose of the typicality requirement is to ensure that "the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members." *D'Amelio*, 500 A.2d at 1146; *Baldassari*, 808 A.2d at 193. Typicality exists if the class representative's claims arise out of the same course of conduct and involve the same legal theories as those of other members of the putative class. *Dunn v. Allegheny County Prop. Assessment Appeals & Review*, 794 A.2d 416, 425 (Pa.Cmwlth.2002). The requirement ensures that the legal theories of the representative and the class do not conflict, and that the interests of the absentee class members will be fairly represented. *See id.; Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir.1996). But, typicality does not require that the claims of the representative and the class be identical, and the requirement "may be met despite the existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class." *Keppley v. Sch. Dist. of Twin Valley*, 866 A.2d 1165, 1174 (Pa.Cmwlth.2005); *Hassine v. Jeffes*, 846 F.2d 169, 176-77 (3d Cir.1988); *Klusman v. Bucks County Court of Common Pleas*, 128 Pa.Cmwlth. 616, 564 A.2d 526, 531 (Pa.Cmwlth.1989). *aff'd per curiam*, 524 Pa. 593, 574 A.2d 604 (1990) (atypicality "must be clear and must be such that the

interests of the class are placed in significant jeopardy").

Here, the trial court did not abuse its discretion in deciding that Bassett was a typical class member. Bassett and the class asserted the same claims for breach of express warranty, premised on similar facts and KMA conduct. During class certification proceedings, Bassett adduced evidence to support her averments that, like the other class members, she purchased a Sephia vehicle model year 1997-2000 and received the standard purchase contract and written warranty. Because of a design defect that affected the ability of the Sephias' front braking system to dissipate heat, Bassett's vehicle, like the other vehicles in the class, experienced premature wear of the brake pads and warping of the rotors. As with the other members of the class, KMA failed to effectively repair Bassett's vehicle free of charge in accordance with the written express warranty. Bassett's Complaint, at ¶¶ 15-21; N.T., 7/15/04, at 84-89, 99-106.

During certification proceedings, KMA emphasized testimony that not all 1997-2000 Sephias utilized the same brake pads or rotors because the brake system was constantly redesigned and Bassett's vehicle had one of thirteen designs available on 1997-2000 Sephias. N.T., 7/16/04, Vol. 1, at 8-23. Bassett's expert acknowledged the design changes, but testified that these changes were minor and that they did not eliminate the design defect which affected all Sephias in the class, including Bassett's vehicle. N.T., 7/15/04, at 102, 105. KMA also suggested that driver habits or environmental conditions were likely to cause premature brake wear and that, therefore, Bassett's experience could only be atypical of the class and insufficient to prove the brake defect allega-

tions of the class. N.T., 7/15/04, at 120-23, 148. But, Bassett rebutted the suggestion by referring to KMA internal documents and her own expert's testimony, which traced the cause of premature wear of the Sephias' brakes to a design defect rather than to other factors. N.T., 7/16/04, Vol. 1, at 52-53 (referring to McCurdy documents). Bassett's expert also testified that wear rates on the 1997-2000 Sephias were abnormal even when accounting for factors such as driver habits and environmental conditions highlighted by KMA. N.T., 7/15/04, at 131. On this disputed evidence, the trial court was persuaded that Bassett's experience was typical of the class.

KMA's central position that the trial court's decision on this point "was contrary to the evidence," *see* KMA's Brief at 25, n. 13, is not borne out by the record. Rather, as we have detailed, the evidence was disputed, creating an issue for the trial court to resolve. Where, as here, the evidentiary record supports the trial court's credibility determinations, we are bound to accept them. *See In re R.J.T.*, 608 Pa. 9, 9 A.3d 1179, 1190 (2010). The existence of facts in the record that would support a result contrary to that reached by the certifying court does not demonstrate an abuse of discretion by that court. *See In re E.F.*, 995 A.2d at 329.

C. Adequacy of Representation

Finally, KMA states that it is also challenging the adequacy of Bassett's representation of the class. Pa.R.C.P. No. 1702(4). Rule 1702(4) states that a representative party may sue on behalf of a class if, *inter alia*, the representative party "will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709." *Id.* Rule 1709 states that fairness and adequacy of rep-

resentation is an inquiry into the adequacy of class counsel, into any conflict of interest that Bassett, as the representative party, may have in the maintenance of the class action, and into the financial resources secured by Bassett and intended "to assure that the interests of the class will not be harmed." Pa.R.C.P. No. 1709; *Klusman*, 564 A.2d at 531.

Here, KMA develops its adequacy of representation argument only as a subset of and in reference to whether Bassett's interests are typical or aligned with those of the class, and fails to develop any arguments that address the Rule 1709 criteria. *See* KMA's Brief at 25. This argument thus sounds more as a challenge to typicality rather than to the adequacy of representation prerequisite for certification. Therefore, any claim of trial court error or abuse of discretion regarding the adequacy of representation prerequisite is waived for failure to develop "in any meaningful fashion capable of review." *Commonwealth v. Walter*, 600 Pa. 392, 966 A.2d 560, 566 (2009); *see Purple Orchid, Inc. v. Pa. State Police*, 572 Pa. 171, 813 A.2d 801, 804 (2002) (issue waived by failure to address and develop in appellate brief).

D. Conclusion

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in certifying the class. *Kelly*, 546 A.2d at 610. The case properly proceeded to trial as a class action.

II. Sufficiency and Weight of Evidence

Intermingled with its issues of class certification, KMA raises questions of whether the evidence was sufficient to support the jury's finding of liability for breach of express warranty, and of whether the jury's verdict was against the weight of the evidence. KMA

asks that we reverse the Superior Court's decision and vacate the judgment in favor of the class.

KMA maintains that Bassett's proof in support of her own claim against KMA was not probative of the other class members' claims and the trial court erroneously allowed the jury to extrapolate from evidence of Bassett's claim proof respecting the entire class. KMA again rests its argument on the premise that Bassett did not establish the commonality, typicality, adequacy of representation, and predominance prerequisites for class certification. According to KMA, the class also failed to prove all the elements of a breach of the express warranty claim and the Superior Court "improperly used [evidence of] the [jury-]rejected implied warranty claims to justify a class-wide breach of express warranty cause of action." KMA's Brief at 28.

Bassett responds that, at trial, she introduced class-wide common evidence which established that KMA breached its express warranty. According to Bassett, KMA did not object to the admission of the "common" evidence at trial and failed to argue against her offer of generalized proof. Bassett argues that, irrespective of KMA's argument on appeal, the jury credited her evidence and found KMA liable to the entire class. Bassett also recounts the evidence introduced at trial, specifically addressing the following elements of a breach of warranty: KMA's warranty or promise, KMA's failure to meet its promise, causation, notice to KMA and opportunity to cure, and the class members' damages. Although Bassett articulates her arguments with parallel references to the record from the trial and to the record created during class certification proceedings, she observes that there is "a material difference between pre-trial

certification and post-trial reexamination" of a trial and argues that "the question after trial is whether generalized proof was fairly presented and confronted by the parties at trial." Bassett's Brief at 33.

In its Rule 1925(a) opinion, the trial court described the evidence introduced at trial and decided that it was sufficient to support the jury's verdict on Bassett's breach of express warranty claim. The court recounted that the of-record deposition of Tim McCurdy, KMA's Director of Technical Operations, and the testimony of Donald Pearce, KMA's Vice President of Parts and Service, and Bassett's expert indicated that all 1997-2000 Sephias had similarly designed brake systems with interchangeable components and all were equally affected by a systemic design problem. The court also noted internal documents which demonstrated that KMA was aware of the brake system problems as early as 1995 and tried unsuccessfully to convince parent-company KMC to remedy the problem. One document prepared for KMA vendors, for example, related the discrepancy between the high warranty claims rate for the Sephia (41.8%) versus the relatively low rate for KMA's Sportage (6.3%) during the 1997-1999 period. In addition, a field report from a Kia Parts Service Manager in May 1999 described the Sephias' defect as "a well [-]known condition [that] needs to be corrected ASAP," and a record of calls to KMA's technical assistance hotline documented complaints that "systemic design problems existed causing unreasonably early wear-out of brakes and rotors." The court also described evidence of KMA attempting to identify the brake problem with the aid of an independent engineering firm, and to remedy the defect by developing and introducing improved pads and rotors from different manufacturers. But, testing of the

Sephias after KMC's brake pad and rotor improvements showed that the vehicles' brake system components continued to underperform. Subsequently, KMA offered a "Brake Coupon Program" to provide unconditional free repairs to Sephia owners who had had three or more brake repairs. Tr. Ct. Op., 12/29/06, at 10-22.

Finally, the court described KMA's sale of 1997-2000 Sephias to consumers with identical written warranties, which provided that KMA promised the "new Kia Vehicle [to be] free from defects in material and workmanship." KMA's warranty manual also included a maintenance schedule which recommended a first inspection of the brake system at 30,000 miles or 30 months for ordinary driving use, or 15,000 miles or 15 months for instances of severe driving conditions. Witnesses testified that, under ordinary use conditions, the Sephias did not meet consumer expectations for brake component life under either KMA or American consumer standards. The American consumer expectation was of a 20,000 miles effective life for brake pads but the Sephias were severely underperforming at 3,000 miles on the earlier models and 9,400 for later models. According to the trial court, evidence showed that KMA paid for some repairs and covered others as part of its coupon program. Tr. Ct. Op., 12/29/06, at 22-32. In the trial court's view, the evidence was sufficient to support the liability judgment in favor of the class; additionally, "the verdict was fully supported by the weight of the evidence." *Id.* at 39. The Superior Court affirmed on the basis of the trial court's opinion. Super. Ct. Op., 10/24/07, at 2.

Initially, we agree with Bassett that our examination of the trial court's pre-trial certification decision

is materially different from our examination of issues raised post-trial following the judgment in favor of the class, including issues of evidentiary sufficiency and weight. *Accord Behrend*, 655 F.3d at 194-95 (court determined relevant geographic market solely for purposes of class certification and not binding on merits). The action proceeded at trial on behalf of the entire class. The class action mechanism is designed to permit a named individual to proceed to trial on behalf of the class, including herself, and to try all of the class members' claims together to judgment. *See Bell, supra*; Pa.R.C.P. No. 1715(c) ("judgment entered in an action certified as a class action shall be binding on all members of the class except as otherwise directed by the court"). *Accord* Joel H. Bernstein & Ronna Kublanow, *Securities Arbitration 1993: Products, Procedures, and Causes of Action*, 819 PLI/Corp 689, 703-05 (1993) (comparing discovery and trial procedure in class action versus multi-plaintiff proceedings). The record reflects that, at trial, the parties proceeded on the premise that Bassett was introducing evidence in support of all the class members' claims. Indeed, at no time did KMA file a motion to decertify the class pursuant to Rule 1710. Pa.R.C.P. No. 1710(d) (order certifying class may be revoked, altered, or amended "before a decision on the merits").

Once the jury rendered its decision, the trial court's certification of the class was no longer revocable. *Id.* The only available avenue for KMA to obtain relief from the judgment based on post-verdict arguments that evidence personal to Bassett was not probative of the class claims was to challenge the sufficiency or weight of the evidence. And, indeed, KMA essentially appears to be challenging the sufficiency and weight

of the evidence, even if its claims are not so precisely articulated.[20] We address each claim.

A. Sufficiency of the Evidence

When reviewing a sufficiency of the evidence claim in a civil case (here, a breach of express warranty action), an appellate court, viewing all the evidence and reasonable inferences therefrom in the light most favorable to the verdict winner, must determine whether the evidence was sufficient to enable the factfinder to find that all the elements of the causes of action were established by a preponderance of the evidence. *Elliott-Lewis Corp. v. York-Shipley, Inc.*, 372 Pa. 346, 94 A.2d 47, 50 (1953); *Mescanti v. Mescanti*, 956 A.2d 1017, 1020 (Pa.Super.2008). *See McElwee v. Southeastern Pa. Transp. Auth.*, 596 Pa. 654, 948 A.2d 762, 774 (2008); *Commonwealth v. Hawkins*, 549 Pa. 352, 701 A.2d 492, 499 (1997). Whether a claim was established under a preponderance of the evidence standard is "tantamount to a 'more likely than not' inquiry." *Popowsky*, 937 A.2d at 1055 n. 18; *Commonwealth v. D'Amato*, 579 Pa. 490, 856 A.2d 806, 818-19 (2004).

To prevail on her breach of express warranty claim in this class action, Bassett had to establish that KMA breached or failed to meet its warranty promise with respect to the members of the class, that the breach was the proximate cause of the harm to the class members, and the amount of the ensuing damages. *Price v. Chevrolet Motor Div.*, 765 A.2d 800,

[20] The record shows that KMA raised sufficiency and weight of the evidence issues in both its post-trial motion and in its Rule 1925(b) statement. *See* KMA's Supplemental Motion for Post-Trial Relief, 7/15/05, at ¶¶ 5; 2-3; KMA's Concise Statement of Matters Complained of on Appeal, 12/28/05, at ¶ 2.

809 (Pa.Super.2000).[21] Additionally, because the class members had already accepted tender, Bassett had to show that the class notified KMA of the breach within a reasonable time. 13 Pa.C.S. § 2607(c)(1).

KMA's warranty, provided to all the members of the class, states that:

> [KMA] warrants that [the] new Kia Vehicle is free from defects in material or workmanship, subject to the following terms and conditions. An Authorized Kia Dealer will make the necessary repairs, using new or remanufactured parts, to correct any problem covered by this limited warranty without charge to you.
>
> * * *
>
> The liability of [KMA] under this warranty is limited solely to the repair or replacement of parts defective in Kia-supplied material or workmanship by an Authorized Kia Dealer at its place of business. . . .

E.g., KMA's 1999 Warranty and Consumer Information Manual at 4, 6; N.T., 5/24/05, Vol. 1, at 67 (warranty manual same for 1997-2000 Sephias).[22]

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[21] As discussed *supra*, a plaintiff in a breach of warranty claim is required to prove "reliance" only if there is a disputed issue regarding whether the promise allegedly breached was part of the basis of the bargain or a term of the contract. *See, e.g., Goodman*, 849 A.2d at 1246. Here, there is no question that KMA's written express warranty was a part of the standard sale contract that all class members received and, therefore, an inquiry into whether each class member relied on KMA's promise to deliver a defect-free vehicle and to repair or replace items covered by the warranty is unnecessary. *See* 13 Pa.C.S. § 2313(a)(1); *Simeone*, 581 A.2d at 165.

[22] In its "Statement of the case," KMA states that its liability was limited to the repair or replacement of defective parts and

At trial, the record shows that Bassett offered evidence (in the form of expert testimony from R. Scott King, testimony from KMA executives and other corporate designees, Tim McCurdy, Lee Sawyer, Donald Pearce, and Y.S. Sohn,[23] and internal KMA memoranda) that the 1997-2000 Sephias were manufactured and sold with defective front brake

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characterizes claims of the class members as claims for breach of express warranty "by refusing to replace parts during the warranty period." KMA's Brief at 6. In response, Bassett disputes at length KMA's description of the warranty and of the class claims, asserting that KMA's warranty was not merely a "repair or replace warranty" but a "classic warranty." Bassett's Brief at 14-21 (citing *Nationwide Ins. Co. v. Gen. Motors Corp.*, 533 Pa. 423, 625 A.2d 1172 (1993)). In *Nationwide*, the Court addressed the distinction between a "repair or replace" and a "classic" warranty in deciding when the applicable statute of limitations for a breach of warranty claim began to run. This issue is not before us and the distinction between the two types of warranties is irrelevant. Rather, pursuant to well-established contract interpretation principles, we look to the plain language of the warranty, which is clear and unambiguous, to identify KMA's promise and any breach of that promise. *See Greer v. City of Philadelphia*, 568 Pa. 244, 795 A.2d 376, 380 (2002).

[23] McCurdy was KMA's Director of Technical Operations, in charge of managing technical concerns and investigations, communicating with field technicians and dealers, and reporting to KMC. Sawyer was KMA's Senior Vice-President of Fixed Operations, responsible for all aspects of parts and service, such as consumer affairs, warranty coverage, quality assurance, and service training. Pearce was KMA's Vice-President of Service, and was responsible for product quality and technical operation support for the field and retail organizations, warranty claim administration, and training activities. Finally, Sohn was KMC's Manager of Chassis Division from 1996 to 2001, when he was promoted to deputy general manager at KMC. In his role as Manager of the Chassis Division, Sohn was responsible for vehicle parts design, review of parts testing, and design enhancements (including for brakes).

systems. The brake systems were defective because the rotors' placement on the vehicles—or the design of the brake system—did not permit sufficient dispersal of heat generated during normal operation of the brakes, which caused premature wear of the brake pads and warping of the rotors. Once the lining on the brake pads wore down to the indicators and the rotors warped, the members of the class experienced noise and vibration when applying the brakes. KMA's corporate designee Tim McCurdy and Bassett's expert agreed that brake system components had to be replaced significantly in advance of when anticipated by KMA and by consumers. It was only in 2001, when a significant modification for that year's model involving a re-design of the front brake rotor, a larger brake pad, and a repositioning of the axle, that the performance of the brake system improved to KMA and American market expectations. According to Bassett's expert, high warranty claim rates for the 1997-2000 Sephias confirmed the existence of a common defect. *See* N.T., 5/19/05, Vol. 1, at 55, 60, 68-70, 95-116 (King testimony); N.T., 5/18/05, Vol. 1, at 80-81; 5/18/05, Vol. 2, at 15-16; 34-35, 41-42, 72-78 (McCurdy deposition); N.T., 5/23/05, Vol. 1, at 17, 20 (Sawyer deposition); N.T., 5/23/05, Vol. 1, at 42-43 (Pearce deposition); N.T., 5/23/05, Vol. 5. at 19-23 (Sohn deposition); Tim McCurdy Inter-Office Memorandum to James Lee, 2/03/99.

Further, KMA did not make effective necessary repairs free of charge. KMA's warranty data, internal KMA documents, and King's testimony regarding the nature of the brake system defect allowed the jury to conclude that simply replacing the pads and rotors on the 1997-2000 model year Sephias was an ineffective repair, which did not resolve the defective design problem that affected the vehicles. Indeed, only a

"field fix" for vehicles already on the market, announced via a January 2002 Technical Service Bulletin, and a redesign of the brake system for new models (re-named the Spectra), successfully offered the necessary repair in late 2001. *See* KMA Technical Service Bulletin (chassis division), 1/02, Vol. 3 # 8. Testimony from KMA's corporate designees Donald Pearce and Michelle Cameron[24] also established that Sephia owners were responsible to pay for repairs out of pocket following the premature wear of brake system components, because brake pads and rotors were generally not covered under the warranty. N.T., 5/23/05, Vol. 1, at 30-33, 42-43, 54-55, 58-62 (Pearce deposition); N.T., 5/24/05, Vol. 1, at 39 (Cameron cross-examination), 64-77 (Pearce cross-examination).

Both Bassett's expert and KMA executives attributed consumer complaints of noise, vibration, and early brake component wear to the brake system design. Bassett's expert testified that none of the materials that he reviewed from KMA suggested that the widespread problem with the brakes on the Sephias was caused by individual driver habits such as "a heavy foot on the brake," or road conditions, dirt, and dust. *See* N.T., 5/18/05, Vol. 2, at 41-43 (McCurdy deposition); N.T., 5/19/05, Vol. 1, at 107-10 (King testimony); N.T., 5/20/05, Vol. 1, at 46-52 (King re-direct), N.T., 5/23/05, Vol. 1, at 42-43 (Pearce deposition).

The record also contained evidence that, at least since late 1998 (more than two years before the class

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[24] Cameron was a regional, and then national, Manager of KMA's Consumer Affairs Department. She was responsible for developing and implementing policies and procedures for handling customer complaints.

action was filed), KMA had notice that the brake system on the Sephias, beginning with the 1997 model, was performing under market expectations in terms of wear and required frequent repair and replacement. According to KMA executives, they became aware of the problem because of an increase in the sale of brake parts and warranty claim activity. KMA sought repeatedly to increase the performance of the brake system but failed until 2001, when a field fix was developed for in-use models concurrently with the re-design of front brake system on the new model in the Sephia line. In the meantime, class members experienced varying treatment in seeking replacement of brake pads and rotors under the warranty. *See* Tim McCurdy Inter-Office Memorandum to James Lee, 2/03/99; KMC Brake Quality Team Meeting Summary, 2/15/99; N.T., 5/23/05, Vol. 1, at 16-18, 23-24 (Sawyer deposition); N.T., 5/18/05, Vol. 2, at 35 (McCurdy deposition). Finally, Bassett adduced sufficient evidence to prove that the members of the class suffered damages. Donald Pearce and Michelle Cameron testified that KMA dealerships offered some free repairs to promote good will for Sephia owners, as well as the brake coupon program in late 2001. But, according to the KMA witnesses, in general, the replacement of brake pads and rotors was not covered by the written warranty. As a result, KMA owners sustained out-of-pocket repair costs estimated by Bassett's expert at approximately $1,005 over the life of their Kia Sephia. On cross-examination, the expert stated that he derived the number not from Bassett's repair history data but by relying on data from KMA, and in particular on the Field Assurance and the Technical Assistance Center Incident reports, regarding the frequency of repairs over the life time of a Sephia. N.T., 5/19/05,

Vol. 3, at 19-26 (King testimony); N.T., 5/20/05, Vol. 1, at 23 (King cross-examination); N.T., 5/23/05, Vol. 1, at 23-24 (Sawyer deposition); N.T., 5/23/05, Vol. 5, at 103; N.T., 5/24/05, Vol. 1, at 39 (Cameron cross-examination), 64-77 (Pearce cross-examination).[25]

KMA's primary defense strategy at trial was to undermine the class assertions that the Sephia brake system was defective and that any defect affected all the members of the class, by referencing the design changes and the fact that it is common to hear complaints regarding noise, vibration, and brake component wear. KMA executive Y.S. Sohn explained that the primary goal of designing brakes was safety and that brake component longevity was simply an issue of merchantability or competitiveness in the automobile market. According to Sohn, there was no stated or established target for brake pad longevity by which to measure a premature wear defect. N.T., 5/24/05, Vol. 6, at 17-34, 45-48 (Bowman testimony); N.T., 5/25/05, Vol. 2, at 10-29 (Sohn deposition).

KMA elicited testimony from Bassett's expert which confirmed that the rotors on Bassett's vehicle did not present a safety concern. The expert also agreed that other vehicle or driver-specific causes were possible for the symptoms exhibited by vehicles in the class;

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[25] KMA alleges that Bassett's expert's testimony was not probative of the damages of each class member because it did "not reflect the proper measure of damages for breach of an express warranty, but, at best, addresses the measure of damages in an implied warranty claim," which the jury rejected. KMA's Brief at 23. But, KMA does not develop any law to support this argument and the Pennsylvania Commercial Code draws no distinction between damages for breach of express versus implied warranty. *See* 13 Pa.C.S. § 2714. KMA's claim, therefore, fails as stated.

but, on re-direct, he concluded that KMA internal memoranda and warranty data persuaded him that they were not the proximate cause of the premature wear of brake system components experienced by the class members. Finally, although KMA asked the expert about whether he based his calculation of out-of-pocket repair costs for the class on Bassett's experience and challenged the expert's qualifications in providing an opinion on damages, KMA did not object to the introduction of aggregate damages evidence on due process or other grounds, and did not introduce any evidence to rebut the class expert's damages testimony. N.T., 5/16/05, Vol. 1, at 44-50 (motions); N.T., 5/19/05, Vol. 3, at 49, 52-61 (King cross-examination); N.T., 5/20/05, Vol. 1, at 5-9, 23 (King cross-examination), 46-51 (King re-direct).

On appeal, KMA no longer presses the "no defect" theory it pursued at trial, and challenges instead whether sufficient evidence was introduced at trial to prove all the elements of a breach of warranty claim with respect to all the class members on the basis that the evidence described only Bassett's individual experience. Essentially, KMA questions whether Bassett established a breach of express warranty with respect to the entire class. *See McElwee*, 948 A.2d at 773.

Contrary to KMA's claims, the evidence of record was sufficient to establish all the elements of a breach of warranty claim by a preponderance of the evidence. *See Mescanti*, 956 A.2d at 1020. The evidence established that KMA made the same promise to all class members, 1997-2000 Sephia owners, to deliver a vehicle free of manufacturing defects and to correct free of cost any problem covered by the warranty. All vehicles in the class were sold with a

defectively designed brake system causing premature wear of brake components that necessitated frequent replacement. KMA knew that the 1997-2000 Sephias were not performing up to the expectations of KMA and the American market, and that the transactions were troublesome well before this lawsuit was filed. Although KMA sometimes covered the repairs under the warranty or offered free repairs under other consumer satisfaction programs, members of the class also paid for repairs out-of-pocket. Testimony supported a verdict of up to $1,005 per class member for out-of-pocket costs over the life of a Kia Sephia. This evidence was sufficient to establish the breach of warranty claim with respect to the entire class. *Price*, 765 A.2d at 809. The trial court did not commit an error of law in sustaining the verdict and rejecting KMA's application for a judgment notwithstanding the verdict or for a new trial.

B. Weight of the Evidence

Next, KMA essentially contends that the jury's verdict in favor of the class was against the weight of the evidence because the record contained "nothing more than anecdotal testimony regarding [Bassett]'s *personal* experience, expert testimony regarding alleged 'defects' generally present in class vehicles and irrelevant KMA statistics. . . ." KMA's Brief at 18 (emphasis in original, footnote omitted). KMA insists that the individual experiences and circumstances of the class members differed and were unsuitable for class-wide treatment, citing selected evidence. Moreover, KMA states the "only" class-wide evidence was "that KMA actually had performed under the warranty," and this proves that the class failed to establish a breach

of express warranty. *Id.* at 27 (emphasis omitted).[26] The class responds that Bassett introduced evidence on behalf of herself and the class regarding all the necessary proof for a breach of express warranty.

Allegations that a motion for judgment notwithstanding the verdict or a new trial should have been granted because the verdict was against the weight of the evidence are addressed to the discretion of the trial court. *Commonwealth v. Cousar*, 593 Pa. 204, 928 A.2d 1025, 1035-36 (2007). "An appellate court, therefore, reviews the exercise of discretion, not the underlying question whether the verdict is against the weight of the evidence. The factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." *Id.* The trial court awards a judgment notwithstanding the verdict or a new trial "only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion." *Id.* at 1036. Thus, the trial court's decision based on a weight of the evidence claim is among "the least assailable of its rulings." *Id.*

After examining the evidence in this case, we find meritless KMA's assertion that the jury improperly extrapolated to the class evidence personal to Bassett, and that this process resulted in a verdict that shocks

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[26] In its post-trial motion and Rule 1925(b) statement, KMA acknowledged that similar arguments went to the weight of the evidence. KMA's Supplemental Motion for Post-Trial Relief, 7/15/05, at ¶¶ 5; 2-3; KMA's Concise Statement of Matters Complained of on Appeal, 12/28/05, at ¶ 2.

one's sense of justice. Bassett, as the representative of the class, introduced evidence that addressed and tended to prove KMA's liability to each of the class members. KMA's assertion to the contrary is based on selected witness testimony and rests on claims of erroneous credibility determinations.

Witness credibility is an issue "solely for the jury to determine." *Commonwealth v. Hawkins*, 549 Pa. 352, 701 A.2d 492, 501 (1997). The jury in this case had an opportunity to hear conflicting evidence regarding the existence of a common brake system design defect affecting the 1997-2000 model Sephias, of KMA's knowledge of the defect, of KMA's unsuccessful efforts to repair the defect, and of its policy to consider brake component repairs non-warranty items, only sometimes covering replacements and, consequently, causing Sephia owners out-of-pocket costs. Bassett presented evidence in support of claims for the entire class. *Cf. Behrend*, 655 F.3d at 203-04 (court's inquiry is whether class claims may be proven on class-wide basis using common proof). Based on this evidence, the jury found in favor of Bassett and the class on the breach of express warranty claim and awarded damages. We see no abuse of discretion in the trial court concluding that the verdict is not so contrary to the evidence as to shock one's sense of justice.

Whether the amount of damages awarded to each class member is against the weight of the evidence is a narrower and potentially more difficult question. Bassett's expert testified that each class member incurred identical costs of approximately $1,005. He calculated these costs based on: (1) a life expectancy for each Kia of 100,000 miles, (2) during which time, brake system components would be replaced approximately every 10,000 miles, half the distance that

would have met KMA and industry standards, (3) at the average cost of replacing brake components in Pennsylvania ($175 for replacing brake pads and resurfacing rotors, and $240 for replacing brake pads and replacing rotors). Bassett's expert estimated that each vehicle underwent five extra repairs in addition to wear-and-tear replacements of brake pads and rotors. This calculation, of course, does not account for factors such as: whether class members owned their vehicles for 100,000 miles, whether each class member experienced exactly five additional repairs, and whether any additional repairs were covered under the warranty. Indeed, warranty data introduced at trial reflected that KMA covered some of the brake component replacements under good will and brake coupon programs, which suggested that a number of the estimated repairs for the class did not in fact cause class members out-of-pocket expenses.

As Mr. Justice Saylor explains in his dissent, the class never attempted to account for variables in damages resulting from "markedly different experiences of personal expenditure to address Sephia brake problems." Dissenting Op., at 59, 60-61 & n. 7. The class expert testified to aggregate damages representing out-of-pocket costs that likely did not reflect the actual expenses of each or even most members of the class. As Justice Saylor points out, this evidentiary approach "blur[s] the substantive requirements of the law of damages." *Id.* at 64. The dissent emphasizes that court sanctioning of agreements to calculate damages in the aggregate as part of class action settlements involves different considerations from court approval of aggregate damages evidence proffered in the adversarial trial setting. *See id.* at 63-64 n. 14 (citing *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1385 (S.D.N.Y.1972)). As

Justice Saylor notes, the parties' consensual acceptance of rough justice does not distort the expectations, predictability, and fundamental fairness of our judicial system. *See id.* at 64.

On the other hand, we note that some jurisdictions have permitted the use of aggregate damages calculations in class actions. *See, e.g., Scottsdale Mem'l Health Sys., Inc. v. Maricopa County*, 224 Ariz. 125, 228 P.3d 117, 133 (App.2010) (rejecting claim that calculating damages based on statistical sampling is *per se* violation of due process); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-99 (1st Cir.2009) ("*In re Pharm.*") (rejecting due process challenge to aggregate damages and to expert's method of calculating those damages); *Hilao v. Estate of Marcos*, 103 F.3d 767, 784-86 (9th Cir.1996) (rejecting due process challenge to aggregate damages calculation based on sample claims); *but see, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-33 (2d Cir.2008) (aggregate recovery for class followed by individualized distribution violates due process); *In re Fibreboard Corp.*, 893 F.2d 706, 711-12 (5th Cir.1990) (aggregate damages extrapolated from damages of sample plaintiffs violated Texas law requiring proof of causation and damages). In *In re Pharm.*, the U.S. Court of Appeals for the First Circuit concluded that: "Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages." 582 F.3d at 197 (quoting 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10.5, at 483-86 (4th ed.2002) ("Newberg")). *Accord Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564, 51 S.Ct. 248, 75 L.Ed. 544 (1931))

("[a]lthough the factfinder is not entitled to base a judgment on speculation or guesswork, the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly"). With specific respect to a due process challenge to such a computational model, the First Circuit stated: "Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis. . . . Just as an adverse decision against the class in the defendant's favor will be binding against the entire class in the aggregate without any rights of individual class members to litigate the common issues individually, so, too, an aggregate monetary liability award for the class will be binding on the defendant without offending due process." *In re Pharm.*, 582 F.3d at 197-98 (quoting *Newberg, supra*). Furthermore, as Justice Saylor notes, "some jurisdictions have accepted the use of statistical, surveying, and sampling techniques" in class actions to prove damages in the aggregate, while others have rejected the approach. *See* Dissenting Op. at 62 n. 10 (citing Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 Va. L.Rev. 405, 415-20 (2002); 2 MCLAUGHLIN ON CLASS ACTIONS § 8:7 (6th ed.2010)).

The question of whether testimony regarding aggregate damages is probative to calculate the amount of damages in a class action would be an issue of first impression for this Court. In this instance, Bassett's expert offered such testimony. Once the evidence was offered, KMA had the opportunity to object that it was incompetent to the task or violated KMA's right to due process (or other rights), to cross-examine the witness on the weakness of his methodology, or rebut

the argument with evidence of its own; yet, the testimony of Bassett's expert went unchallenged in these respects.

Instead, as we read the record and KMA's brief, KMA proceeded both at trial and on appeal on the theory that Bassett introduced only evidence of her own damages and no evidence of damages to any other member of the class. But, this position misapprehends the record. As described, Bassett's expert specifically testified to his calculation of estimated damages for each member of the class, which in the aggregate produced the molded verdict.

Justice Saylor has well demonstrated that this testimony was subject to a colorable objection on the ground that it inaccurately or imprecisely captured the amount of damages for individual members of the class. But, at the appropriate time at trial, when any error in this regard could have been addressed or avoided, KMA did not challenge the expert's method of calculating damages in the aggregate on due process or any other grounds, and thus waived the argument. The dissent articulates a problematic issue regarding the proof and determination of individual damages differently, and certainly more cogently, than KMA did either at trial or on appeal. In light of existing jurisprudence that articulates a reasonable ground upon which to permit certain forms of aggregate damages evidence in class action litigation, and in light of the narrower nature of KMA's preserved challenge to the damages calculation here, we find no abuse of discretion in the rejection of this aspect of KMA's weight claim.[27]

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[27] We emphasize the narrow nature of our holding in this regard. Given the limited nature of KMA's preserved challenge,

III. Molding of the Verdict

Next, KMA claims that the Superior Court erred in affirming the trial court's judgment of a molded verdict of $5,641,200. KMA makes two related but nonetheless distinct arguments. First, KMA contends that molding of the verdict was improper or in violation of its due process rights because it allowed each member of the class to recover $600, although no evidence of liability and amount of out-of-pocket costs was of record for any member of the class except Bassett. Essentially, the manufacturer re-asserts its prior arguments regarding the certification of the class and the sufficiency of evidence to prove a breach of the express warranty. *See Jackson v. Virginia*, 443 U.S. 307, 313-14, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (constitutional predicate of sufficiency claim is due process clause). Second, KMA states that molding of the verdict was improper because the trial court did not conduct claims proceedings per its pretrial order of May 16, 2005 ("May 16th Order"), which disposed of KMA's motion to bifurcate the trial into proceedings on what KMA perceived as "common" versus "individual" issues. The May 16th Order stated:

> AND NOW, this 16th day of May, 2005, upon consideration of the Motion to bifurcate of Defendant, Kia Motor [sic] America, Inc., it is hereby ORDERED that Defendant's Motion is DENIED. Each class member's entitlement to

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we need not, and therefore do not, express a definitive view on the questions of whether proving damages in the aggregate in a class action is "lawful and proper" in Pennsylvania, and of whether the methodology of Bassett's expert in estimating individual damages here was sound.

> recover if plaintiff class prevails, shall be determined at claims proceedings.

Tr. Ct. Order, 5/16/05. According to KMA, in light of the May 16th Order, the trial court molded the verdict "without forewarning" and in violation of KMA's constitutional due process rights. Regarding its due process claim, KMA also insists that the improper certification of the class denied KMA the opportunity to present a defense as to each member of the class and have its merits fairly judged. KMA claims that the trial of the case as a class action improperly expanded the substantive rights of class members other than Bassett, who "were awarded damages for a harm they did not prove." KMA's Brief at 28-32.

Bassett and the class respond that KMA distorts the record. According to Bassett, the evidence was "crystal clear that this case was tried on a class basis and defended on a class basis." Bassett's Brief at 39. She states that the jury entered a verdict for the class and not for Bassett alone, as the jury questionnaire reflected. Question 5 on the jury questionnaire stated:

> State the amount of damages if any, sustained by each [c]lass member:
>
> * * *
>
> b) For repair expenses, reasonably incurred, as a result of defendant's breach of warranty.

Jury Verdict Special Interrogatories, 5/27/05. After the jury awarded $600 per class member, the trial court merely realized the plain intent of the jury by multiplying the per person award by the stipulated number of class members, and arrived at the molded

verdict. The trial court then entered judgment pursuant to Rule 1715(d), which required the court to specify who was bound by the judgment.

Bassett emphasizes that KMA waived any claim of error regarding the molding of the verdict by failing to raise a timely objection at trial. According to Bassett, the trial court's May 16th Order did not relieve KMA of the obligation to object when the trial court molded the verdict.[28] Bassett regards as "dubious" KMA's position that it detrimentally relied on the May 16th Order to reserve its defenses until an evidentiary claims proceedings phase. Bassett points out that KMA failed to identify any defenses that it was allegedly prevented from asserting at trial. Bassett also reemphasizes that the nature of her proof and of the class proceedings was known or should have been known to KMA and its attorneys, who failed to object at any time to class-wide proof of damages, or to the jury questionnaire, or to the molding of the verdict. Thus, Bassett says, KMA's assignment of error via post-verdict motions and on appeal is untimely. Finally, Bassett offers her own due process and fairness arguments in support of maintaining the class and sustaining the verdict.[29]

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[28] Bassett postulates that, in addressing claims proceedings in the May 16th Order, the trial court anticipated proceedings related to individual UTPCPL claims, election of remedies, or required affirmations of fact, which were then rendered moot by the evidence introduced at trial. But, the record contains no specific support for Bassett's assertions and we express no opinion regarding the trial court's purpose for referring to claims proceedings in its May 16th Order.

[29] As a separate issue, Bassett also argues in a footnote that KMA waived all of its appellate arguments by failing to move for decertification before or after trial. Bassett's Brief at 48-49 n. 27. In its reply brief, KMA responds that, pursuant to Rule

In its reply brief, KMA asserts that its objection to the molded verdict was timely, because the first appropriate opportunity to object was in its motion for post-trial relief; the post-trial motion gave the trial court "every opportunity to correct its error." KMA's Reply Brief at 12 n. 12. According to KMA, the jury questionnaire, which referenced damages of each class member, was consistent with the May 16th Order, which, according to KMA, required that "there *would be* claims proceedings in which each class member *would have to prove* entitlement to a recovery." *Id.* (emphasis in the original). Thus, the molding

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1710, a party may seek decertification at any stage, including on appeal, "before the final appeal is exhausted." According to KMA, a party is not required to file for decertification in order to preserve its arguments regarding class certification on appeal. KMA's Reply Brief at 10-11 & n. 10. Both parties conflate two separate concepts: decertification by the trial court and appellate review of a trial court certification decision. Thus, only the trial court may decertify a class pursuant to Rule 1710(d), which, as a Rule of Civil Procedure, governs practice and procedure in the courts of common pleas. Practice and procedure in the appellate courts is governed by the Rules of Appellate Procedure. Pa.R.A.P. 103. Rule 1710(d) plainly states that a decertification decision is proper only "before a decision on the merits." Pa.R.C.P. No. 1710(d). But, filing a motion to decertify is optional and failure to move for decertification does not waive a party's claims of error on appeal regarding the trial court's initial certification decision. Appellate courts review a trial court decision under an abuse of discretion standard and may order the judgment vacated or reversed, on the basis that certification was erroneous, with the ultimate result that the class is decertified. *See, e.g., Debbs*, 810 A.2d at 164 (judgment vacated with direction for trial court to decertify the class). Here, KMA's decision to forego filing a motion to decertify did not waive its claims of error regarding the initial certification of the class, the sufficiency and weight of the evidence to support the judgment, or the molding of the verdict.

of the verdict created the inconsistency to which, KMA states, its timely objection was raised. *Id.*

In its Rule 1925(b) statement, KMA raised the molding of the verdict issue in terms similar to those in its appellate brief to this Court. Unfortunately, the trial court addressed the narrower (and somewhat different) issue of whether there was error in its denial of the motion to bifurcate the damages and liability phases of trial. The court concluded that bifurcation was not necessary because the risk of prejudice against the defendant, common, for example, in catastrophic personal injury cases, was not present here. Tr. Ct. Op., 12/29/06, at 39. The Superior Court agreed and affirmed the judgment on the molded verdict. The panel also added that the record contained sufficient evidence to support a verdict of $600 per class member (and indeed of up to $1,005). According to the court, "all class members were entitled to have good brakes on their cars that did not require repeated trips to the dealership for replacement to avoid brake failure." Super. Ct. Op., 10/24/07, at 3-4. We address each of KMA's related claims separately.

A. Class Certification Decision and Sufficiency of the Evidence

KMA argues that the molding of the verdict was improper because evidence as to Bassett's claim was not probative of the claims of other class members and, as a result, the class failed to carry its burden of proof at trial. The car manufacturer essentially incorporates and re-asserts its prior claims of trial court error regarding the sufficiency and weight of the evidence to justify the jury's verdict as the basis for its due process argument. We have already discussed at length and dismissed KMA's prior claims.

Accordingly, we also reject this repetitive claim. *Jackson, supra.*

B. Effect of May 16th Order

KMA argues that the molding of the verdict was erroneous in light of the May 16th Order. In April 2005, KMA filed a motion to bifurcate, seeking separate trials on common issues from issues that it identified as individual, *i.e.*, defect manifestation, notice and opportunity to cure, causation, and damages. According to KMA, its request was for a court order "confirming that issues of fact and law identified by KMA [t]herein [would] be adjudicated in future, class-member-specific proceedings, in the event that [Bassett] prevail [ed] in the . . . common issue trial." *See* KMA's Motion to Bifurcate, 4/25/05, at 14, 19. The trial court denied the motion and stated that "class members' entitlement to recover[,] if plaintiff class prevails, shall be determined at class proceedings." Tr. Ct. Order, 5/16/05. Thereafter, the parties proceeded to trial and Bassett introduced evidence to prove the claims of all the members of the class.

On May 25 and 26, 2005, the trial court conferred in chambers with both parties regarding their requested jury instructions and the jury verdict sheet, and sought to provide prompt resolution to the parties' objections. The court described its jury instructions and jury questions in terms of amount "sustained by each class member," *inter alia*, "for repair expenses as a result of defendant's breach of warranty." The trial court asked if there were any objections to the questions on the jury verdict form as explained and KMA's counsel responded "No, Your Honor." N.T., 5/25/05, Vol. 7, at 70-73. Both the jury instructions and the verdict form reflected the dis-

cussion in chambers. Indeed, after providing a description of the damages requested by the class in its charge to the jury, the court explained: "[b]ecause you're rendering a verdict for each class member, I will take care of making sure that the Class members recover." At sidebar, immediately after the damages instruction, the court again asked attorneys for both parties if there were any objections to the charge and the attorneys responded in the negative. N.T., 5/26/05, Vol. 3, at 50-53. The court then released the jury for deliberations.

The questions on the verdict sheet, in relevant part and with the jury's answers, read:

> Question No. 1:
>
> Did [KMA] breach its express warranty on the cars purchased by the class?
>
> X Yes ___ No
>
> * * *
>
> Question No. 5:
>
> State the amount of damages if any, sustained by each Class member:
>
> b) For repair expenses, reasonably incurred, as a result of [KMA]'s breach of warranty.
>
> $ 600.00

Jury Verdict Special Interrogatories, 5/27/05; *accord* N.T., 5/27/05, Verdict, at 3-8.

After the trial court recorded the jury's answers to the questions on the verdict slip, the court multiplied the $600 damages award by the agreed-upon number of class members—9,402—and recorded a verdict of $5,641,200 on behalf of the class. After dismissing the

jury, the court asked the parties if there was anything further they wished to address at that time. Counsel for KMA answered "No, Your Honor. Thanks to the Court." The court concluded proceedings. N.T., 5/27/05, Verdict, at 4-8.

On appeal, KMA concedes that it raised an objection to the molding of the verdict premised on the May 16th Order for the first time in its post-trial motion, re-asserted it in its Rule 1925(b) statement, and argues that such an objection afforded the trial court sufficient opportunity to correct its error. In the Rule 1925(b) statement, KMA asserted that Bassett had consented to undertake post-verdict claims proceedings to determine each class member's entitlement to recover, yet the trial court "*sua sponte* and in derogation of its own order on bifurcation, transformed this bifurcated class action trial into a unitary verdict in favor of the class." The manufacturer also raised an alternate, facially contradictory, argument that "[t]he time for determining whether class members have claims against KMA is at trial, not 'at claims proceedings' following trial and verdict." KMA's Concise Statement of Matters Complained of on Appeal, ¶ 3. KMA had initially asserted the latter, but not the former, argument in its post-trial motion for a judgment notwithstanding the verdict. KMA's Motion for Post-Trial Relief, ¶ 9. On appeal, KMA insists that absent reversal and decertification of the class, KMA's due process rights will have been violated. KMA's Brief at 30-32; KMA's Reply Brief at 12 n. 12.[30]

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[30] In a brief footnote, KMA also states that "claims proceedings" referenced in the May 16th Order amounted to a concession by the trial court that the class was improperly certified. KMA's Brief at 30 n. 18. KMA cites no legal support for its

We disagree with KMA that its objection, which it concedes was offered for the first time in a post-trial motion, was timely under the circumstances. Under prevailing Pennsylvania law, a timely objection is required to preserve an issue for appeal. Pa.R.C.P. No. 227.1(b)(1) & n.; Pa.R.A.P. 302; *Straub v. Cherne Indus.*, 583 Pa. 608, 880 A.2d 561, 567 (2005); *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114, 116-17 (1974). Here, KMA failed to object to the verdict sheets when composed and offered to the jury, to the related jury charge, or, at the latest, contemporaneous with the actual molding of the verdict. As a result, the issue of whether the May 16th Order precluded the trial court from molding the verdict was waived.

The substance of the trial court's May 16th Order does not affect this conclusion. This Court's *Straub* decision is particularly instructive. In *Straub*, after the parties rested, the trial court discussed the verdict sheets with the parties and stated that it aimed to explain to the jury that the plaintiffs were forwarding two independent claims, and that the plaintiffs could win on one claim but lose on the other or vice versa. The parties agreed and the trial court issued its instruction. The jury returned a verdict in favor of the plaintiffs on one claim but not on the second. The defendant did not object to the jury questionnaire, the trial court's instructions, or the jury's verdict. Then, in post-trial motions, the defendant sought a judgment notwithstanding the verdict on

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argument. Indeed, claims proceedings are a recognized, albeit not required, feature of determining damages post-verdict in class actions. *See generally* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L.Rev. 995 (2005).

the ground that once the jury found that the product was not defective respecting the first claim, it should have found in its favor on all counts. The trial court did not rule on the post-verdict motions and entered judgment on the verdict; the Superior Court reversed and remanded. This Court, however, held that the Superior Court erred in rejecting the plaintiffs' waiver argument and reversed. We concluded that the defendant premised its claim of error "on the argument that the jury's verdict was incompatible with a principle of law." But, this alleged error should have been evident when the verdict sheets and the trial instructions were agreed upon and formulated. Yet, the defendant did not object to the verdict sheets, to the trial court's related instructions, or "to the verdict itself when it was rendered." By failing to object, the defendant had waived its claim. 880 A.2d at 567.

Here, we have a similar scenario. KMA argues that the molded verdict was incompatible with the May 16th Order, which it poses as the law of the case, and upon which it claims it relied to allegedly forego pursuit of undisclosed defenses to the class claims.[31] Pursuant to *Straub*, however, this so-called reliance was not sufficient to excuse KMA's obligation to raise

[31] KMA's description of the claims proceedings mentioned in the May 16th Order is nebulous and, at times, suggests proceedings very expansive in scope, which would encompass individual trials of each class member's claims with respect to reliance, manifestation, notice and opportunity to cure, causation, and damages. But, the trial court denied KMA's motion to bifurcate, which had expressly requested separate trials on these "individual" issues. To interpret the May 16th Order as nonetheless permitting what it expressly denied and to credit KMA's purported reliance on it in either not asserting defenses or objecting is not tenable.

a timely objection when, in its view (as alleged now), the court acted contrary to the prior order. KMA should have objected contemporaneously to the jury questionnaire or, at the latest, contemporaneously to the actual molding of the verdict in order to give the trial court a contemporaneous opportunity to address the alleged error and to preserve the present issue for appeal. Indeed, the object of contemporaneous objection requirements respecting trial-related issues is to allow the court to take corrective measures and thereby to avert the time and expense of appeals or new trials. *See Criswell v. King*, 575 Pa. 34, 834 A.2d 505, 509-10 (2003) (listing policy considerations behind contemporaneous objection requirement). KMA simply did not do that here. As a result, the manufacturer's claim of error in the molding of the verdict, premised upon a supposed inconsistency with the May 16th order, is waived for failure to record a contemporaneous objection.

IV. Authority of Trial Court to Enter Counsel Fee Order

Next, KMA argues that the counsel fee award should be vacated because, when the award was issued, the trial court had been deprived of jurisdiction by KMA's appeal from the judgment on the verdict. According to KMA, Bassett entered judgment pursuant to Rule 227.4(1)(b) on October 25, 2005, while the attorney's fee petition of June 6, 2005, was still pending. *See* Pa.R.C.P. No. 227.4(1)(b) (upon party's praecipe, prothonotary to enter final judgment on jury's verdict if court does not dispose of all post-trial motions within one hundred twenty days after filing of first post-trial motion). The manufacturer appealed the judgment on October 28, 2005, and the trial court decided the fee petition on Janu-

ary 23, 2006, nearly three months later. According to KMA, the MMWA requires that the counsel "fee award be entered 'as part of' the underlying judgment." But, here, the trial court issued the fee award months after and, thus, it was not part of the final judgment entered. The manufacturer argues that, pursuant to Rule of Appellate Procedure 1701(a), the trial court no longer had jurisdiction to act on the petition for counsel fees once Bassett entered voluntary judgment on the verdict. Pa.R.A.P. 1701(a) ("Except as otherwise prescribed by these rules, after an appeal is taken . . . the trial court . . . may no longer proceed further in the matter."). Thus, KMA asserts that the trial court's award of counsel fees should be vacated. *See* KMA's Brief at 34.[32]

Bassett answers that the award of costs was proper. She recognizes that the MMWA is the statute authorizing legal fees here, but argues that matters of trial court jurisdiction and procedure related to the award of attorneys' fees are governed by Pennsylvania law and rules. According to Bassett, petitions for attorneys' fees are ancillary to the judgment on the

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[32] KMA cites two cases from our sister states in support of its claim. *See* KMA's Brief at 35 (*Stenger v. LLC Corp.*, 819 N.E.2d 480 (Ind.App.2004); *Glandon v. Daimler Chrysler Corp.*, 142 S.W.3d 174 (Mo.App.2004)). Notably, both cases are distinguishable. In *Stenger*, the parties settled the case and the court held that, as a result, plaintiff was not a "prevailing party" entitled to attorneys' fees under the MMWA unless the settlement agreement provided for fees. 819 N.E.2d at 484. In *Glandon*, the court of appeals quashed the plaintiff's appeal from the trial court's order denying a motion for attorneys' fees on the ground that such an application was not a cognizable after-trial motion following entry of a consent judgment. 142 S.W.3d at 178. Neither decision is persuasive nor do the cases inform our decision on the issue before us.

merits and the trial court does not lose jurisdiction to decide them separately after an appeal on the merits is filed. Bassett's Brief at 49-50 (citing *Old Forge Sch. Dist. v. Highmark Inc.*, 592 Pa. 307, 924 A.2d 1205 (2007); *Miller Elec. Co. v. DeWeese*, 589 Pa. 167, 907 A.2d 1051 (2006) ("*Miller*")). Bassett notes that the MMWA does not control trial and appellate jurisdiction in Pennsylvania. Indeed, Bassett claims that the U.S. Supreme Court has recognized that counsel fees may be awarded separately from the judgment on the verdict and later incorporated into the judgment. *Id.* at 51 (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988)).

The trial court agreed with Bassett that the fee petition and award were timely. According to the court, issues regarding attorneys' fees and costs are collateral or ancillary to the merits and may be addressed by the trial court after an appeal has been filed. Entry of judgment and the appeal therefore did not divest the court of jurisdiction to decide Bassett's pending fee petition. Tr. Ct. Supp. Op.—Findings of Facts & Conclusions of Law, 11/14/07, ¶ 122 (citing *Budinich, supra; Miller, supra; Rosen v. Rosen*, 520 Pa. 19, 549 A.2d 561 (1988)). The Superior Court affirmed without further addressing this issue.

Rule 1701 provides that "[e]xcept as otherwise prescribed by these rules, after an appeal is taken . . . the trial court . . . may no longer proceed further in the matter." Pa.R.A.P. 1701(a). But, after an appeal is taken, the trial court may take other action "ancillary to the appeal." Pa.R.A.P. 1701(b)(1). In Pennsylvania, the trial court's action on a petition for counsel fees has been deemed to be ancillary to the appeal from the judgment on the merits. *Miller*, 907

A.2d at 1057. Therefore, if the petition for counsel fees is timely filed, the trial court is empowered to act on it after an appeal was taken.

Pursuant to the MMWA, a consumer who prevails on a claim under that statute or on a claim for breach of warranty may recover "as part of the judgment" the reasonably incurred "amount of cost and expenses (including attorneys' fees based on actual time expended)." 15 U.S.C. § 2310(d)(2).[33] In *Budinich*, the U.S. Supreme Court recognized that statutes and decisional law authorizing counsel fees are inconsistent in characterizing the fees as either costs or part of the merits judgment. 486 U.S. at 201, 108 S.Ct. 1717. But, the Court noted that, as a general matter, "a claim for attorney's fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending the action." *Id.* at 200, 108 S.Ct. 1717. The Court also stated that "[a]t common law, attorney's fees were regarded as an element of 'costs' awarded to the prevailing party, which are not generally treated as part of the merits judgment. Many federal statutes providing for attorney's fees continue to specify that they are to be taxed and collected as 'costs.' " *Id.* at 200-01, 108 S.Ct. 1717 (citations omitted).

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[33] Section 2310 conditions the award of costs on a consumer's success on the merits and places the task of awarding costs within the bailiwick of the court. Thus, as a practical matter, where the case is tried to a jury, the proceedings on attorneys' fees (with the court acting as factfinder) necessarily take place after and separately from the trial on the merits to a verdict.

As here, the statute at issue in *Budinich* provided that the "judgment" would "include a reasonable attorney fee in favor of the winning party, to be taxed as part of the costs of the action." *Id.* at 197, 108 S.Ct. 1717 (citing Colo.Rev.Stat. 8-4-114 (1986)). The prevailing plaintiff took judgment on the jury's verdict on March 26, 1984, and the defendant filed post-trial motions, which were denied May 14, 1984. The district court issued its final order concerning attorneys' fees on August 1, 1984. The defendant took its only appeal on August 19, 1984, as to all issues. The U.S. Supreme Court held that the appeal was untimely as to all issues except the attorneys' fees. According to the Court, the judgment on the merits was final and appealable on May 14, 1984, and its finality did "not turn upon the characterization of [attorneys'] fees by the statute or decisional law that authorizes them." *Id.* at 201, 108 S.Ct. 1717. The High Court explained that the important value at stake in adopting this uniform interpretation of finality was the "preservation of operational consistency and predictability" with respect to jurisdictional and procedural rules governing the time to appeal. *Id.* at 202, 108 S.Ct. 1717.

Like the Colorado statute at issue in *Budinich*, the MMWA describes the same paradoxical characterization of attorneys' fees as both a "cost" of litigation and "as part of the judgment." 15 U.S.C. § 2310(d)(2). In the interpretation of the U.S. Supreme Court, similar statutory language conveyed no legislative intent to modify jurisdictional and procedural rules applicable to determine the finality of an order for purposes of appeal. Following the High Court's lead, we hold that the trial court's authority to proceed on the petition for attorneys' fees "does not turn" on the MMWA's characterization of those fees. We have no reason to

believe that, if faced with this question, the High Court would decide otherwise. *Council 13, Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Rendell*, 604 Pa. 352, 986 A.2d 63, 77 (2009) ("*Council 13*") ("It is fundamental that by virtue of the Supremacy Clause, the State courts are bound by the decisions of the Supreme Court with respect to . . . federal law, and must adhere to extant Supreme Court jurisprudence.").

Similar to the U.S. Supreme Court, we have a strong interest in the preservation of consistency and predictability in the operation of our appellate process. Pennsylvania law is well established that a petition for attorneys' fees is an ancillary matter, which the trial court retains authority to decide after entry of judgment on the verdict. Here, there is no dispute that the application for attorneys' fees was timely when filed on June 6, 2005. Accordingly, the trial court was authorized to decide Bassett's application for attorneys' fees in January 2006, irrespective of KMA's appeal on October 28, 2005, from the judgment on the verdict dated October 25, 2005. We must reject KMA's request for relief from the fee award on this ground.[34]

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[34] In reality, even if we were to adopt KMA's interpretation of the MMWA, we would still reject the manufacturer's prayer for relief. If attorneys' fees had to be awarded as part of the judgment, then the October 2005 judgment would have been interlocutory given that the counsel fees matter was still pending. This would require us to vacate the Superior Court's decision of October 2007 with directions to quash KMA's appeal. Moreover, because in its second appeal KMA challenged only the attorneys' fees, any other issues would have been waived. *See Budinich, supra.*

V. Counsel Fee Enhancement

Finally, KMA argues that the Superior Court erred in affirming the trial court's application of a "risk multiplier" to the attorneys' fees award under the MMWA. According to KMA, the U.S. Supreme Court "prohibited" risk multipliers in federal fee shifting cases and, because fees were awarded here pursuant to a federal statute—the MMWA—state courts are bound by that interpretation. KMA's Brief at 35-36 (citing *City of Burlington v. Dague*, 505 U.S. 557, 559, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); U.S. CONST., Art. VI, Cl. 2). KMA states that the lower courts ignored *Dague* to rely on a distinguishable Pennsylvania Superior Court case, *Signora v. Liberty Travel, Inc.*, 886 A.2d 284 (Pa.Super.2005), in awarding the enhanced fee. KMA notes that in *Signora*, attorneys' fees were awarded pursuant to a Pennsylvania statute rather than a federal statute. And, citing the U.S. Supreme Court's opinion in *Dague*, the *Signora* panel observed that federal statutes do not permit enhancement for risk. *Id.* at 293 n. 14. KMA posits that this Court is bound by U.S. Supreme Court precedent in this matter and should vacate the award of the enhanced fee as contravening that precedent.

Bassett responds that Pennsylvania law, not federal law, controls the award of the fee enhancement in this case for several reasons. First, she claims that the *Dague* decision was limited to the environmental statutes addressed by the High Court. Second, according to Bassett, calculation of attorneys' fees is a matter of exclusive state procedure, not of substantive law. Bassett's Brief at 52 (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982);

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58 (3d Cir.1988)). Consequently, in Bassett's view, federal fee-shifting provisions cannot override or displace state rules governing the award of attorneys' fees. *Id.* at 54 (citing *Chin v. Chrysler LLC*, 538 F.3d 272, 279-80 & n. 5 (3d Cir.2008)). She also insists that the MMWA does not preempt Pennsylvania law with regard to attorneys' fees and the application of the risk multiplier. *Id.* at 55 (citing 15 U.S.C. § 2311(b)(1)).

Finally, Bassett emphasizes that Pennsylvania has a strong public policy to fully compensate parties that incur attorneys' fees where a statute permits fee-shifting. *Id.* (quoting *Solebury Twp. v. Dep't of Envtl. Prot.*, 593 Pa. 146, 928 A.2d 990, 1004 (2007) ("federal standards that have not been incorporated into state statutes can only be supported to the extent that those standards are consistent with Pennsylvania public policy")). According to Bassett, the discretion of state courts to award attorneys' fees is broader than that of federal courts in purely federal cases and, as a result, state courts may adjust the lodestar. *Id.* at 55-56 (citing *Signora*, 886 A.2d at 293 & n. 14; *Skelton v. Gen. Motors Corp.*, 860 F.2d 250 (7th Cir.1988); *Krebs v. United Ref. Co. of Pennsylvania*, 893 A.2d 776 (Pa.Super.2006); *Croft v. P & W Foreign Car Serv., Inc.*, 383 Pa.Super. 435, 557 A.2d 18 (1989)). Bassett claims that to fulfill the consumer-friendly purposes of the MMWA's fee-shifting provision, accounting for the nature of the services, amount of time expended, results obtained, amounts recovered, and for the contingent nature of the fee arrangement, via the application of a risk multiplier, is integral. *Id.* at 58-61. Bassett asserts that Pennsylvania Rule of Civil Procedure 1716 reflects these

considerations and controls the "discretionary determination of a 'reasonable' class fee by the Commonwealth's courts."[35] *Id.* at 57 (citing Pa.R.C.P. No. 1716). Also, Bassett avers, the performance of class counsel in this class action met the "exceptional case" standard and an award of a fee enhancement therefore was appropriate. *Id.* at 62 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 728, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) ("*Delaware Valley*")).

In its reply brief, KMA briefly reiterates the arguments in its main appellate brief and adds that application of a risk multiplier is in plain conflict with the language of Section 2310 of the MMWA. According to KMA, the *Dague* decision applies to all federal fee-shifting statutes, including the MMWA.

The trial court agreed with Bassett that class counsel was entitled to an attorneys' fee award equal to a risk multiplier of 1.375 times the $3 million lodestar, for a total of $4.125 million.[36] The court stated that it had discretion to adjust the lodestar upwards by applying a risk multiplier where class counsel had taken the case for a contingent fee. Tr. Ct. Op., 11/14/07, at 11 (citing *Signora, supra*). According to the court, whether a fee enhancement is appropriate requires consideration of several factors: that a contingent fee case is significantly riskier than an hourly

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[35] Bassett adds that the attorneys' fee question before us is also controlled by 41 P.S. § 503. But, Title 41 relates to maximum interest rates in mortgage transactions and Section 503 is the attorneys' fees provision applicable in disputes between mortgage debtors and lenders. Section 503 is, therefore, inapplicable here.

[36] The court also included an award of $267,513.00 for costs and expenses of litigation. Tr. Ct. Op., 11/14/07, at 2.

fee case, what fee would attract competent counsel, and whether the prevailing class would have obtained representation absent the potential for a fee adjustment. The court emphasized that the *Signora* court approved the exercise of discretion to adjust the lodestar by reference to Rule 1716 but noted that other Superior Court panels used additional criteria. *Id.* at 11-12 (citing *Logan v. Marks*, 704 A.2d 671 (Pa.Super.1997)). Against this legal background, the trial court concluded that a 1.375 risk multiplier was appropriate in view of the "extensive work, time, and effort devoted by both sides and specifically [Bassett's] lawyers. . . ." *Id.* at 12. The Superior Court affirmed, quoting at length and without adding to the trial court's analysis of the risk multiplier issue.

Generally, where the award of attorneys' fees is authorized by statute, an appellate court reviews the propriety of the amount awarded by the trial court under an abuse of discretion standard. *Solebury Twp.*, 928 A.2d at 997 n. 8. We will not find an abuse of discretion in the award of counsel fees "merely because [we] might have reached a different conclusion." *Hoy v. Angelone*, 554 Pa. 134, 720 A.2d 745, 752 (1998). Rather, we require a showing of manifest unreasonableness, partiality, prejudice, bias, ill-will, or such lack of support in the law or record for the award to be clearly erroneous. *Id.* To the extent that the issue before us is a question of statutory interpretation, however, our scope of review is plenary and the standard of review is *de novo. Solebury Twp.*, 928 A.2d at 997 n. 8.

The authorizing statute here—the MMWA—is a federal statute. "The construction of a federal statute is a matter of federal law." *Council 13*, 986 A.2d at 80. Pursuant to federal rules of statutory construc-

tion, the courts consider the particular statutory language, as well as the design of the statute and its purposes in determining the meaning of a federal statute. *Id.* (citing *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990)). But, if the MMWA's language is clear, we should refrain from searching other sources in support of a contrary result. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."); *Carter v. United States*, 530 U.S. 255, 271, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (statutory interpretation "begins by examining the text . . . not by psychoanalyzing those who enacted it"); *United States v. Gonzales*, 520 U.S. 1, 6, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (where "[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history"); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "). *Accord Dooner v. DiDonato*, 601 Pa. 209, 971 A.2d 1187, 1195 (2009) ("The language used by [Congress] is the best indication of its intent.").

In relevant part, Section 2310 of the MMWA provides that:

> If a consumer finally prevails . . . he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount

> of cost and expenses (including *attorneys' fees based on actual time expended*) determined by the court to have been *reasonably incurred by the plaintiff* for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2) (emphasis added). Here, there is no dispute that the MMWA authorizes an award of attorneys' fees to prevailing consumers such as Bassett and the class. 15 U.S.C. § 2310(d)(2). The salient question is whether, in view of the authorizing statute, the trial court abused its discretion in factoring the class counsel's risk into its calculation of the final award of attorneys' fees.

On its face, Section 2310(d)(2) contains no language authorizing a mandatory contingency multiplier nor does it give the courts discretion to apply such a multiplier to supplement the actual fee. The provision explicitly states that attorneys' fees are to be "based on actual time expended," and does not provide for a discretionary fee enhancement. In practical terms, this means that the amount of attorneys' fees authorized by the MMWA is a factor of the actual hours expended and billed by the attorneys in the case—that is, the lodestar. *See Dague*, 505 U.S. at 559, 112 S.Ct. 2638 ("product of reasonable hours times a reasonable rate" is lodestar); *Stair v. Turtzo, Spry, Sbrocchi, Faul & Labarre*, 564 Pa. 305, 768 A.2d 299, 308 n. 8 (2001) (same). Thus, Section 2310(d)(2) specifically addresses fee awards and permits only fee awards equal to the lodestar, with no mention, much less approval, of a contrary scheme of fee enhancement such as a contingency multiplier.

The plain language of Section 2310(d)(2) is clear and unambiguous regarding attorneys' fees equaling the lodestar.[37]

Moreover, even assuming *arguendo* that Section 2310(d)(2) is subject to a construction contrary to its plain terms, U.S. Supreme Court precedent provides additional strong legal support for KMA's position that the statute does not allow for a contingency multiplier in the present circumstances. Congress qualified the right of consumer-plaintiffs to recover costs and expenses, limiting recovery to those costs and expenses "reasonably incurred." *See* 15 U.S.C. § 2310(d)(2). Controlling case law from the U.S. Supreme Court directs that the "reasonable hours times reasonable rate" lodestar is strongly presumed

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[37] We are aware that in *Skelton*, 860 F.2d 250, the Seventh Circuit Court of Appeals rejected this plain language reading. The *Skelton* court held that contingency multipliers are available in cases where the parties settle a MMWA claim and create a class settlement/common fund from which the plaintiff-class has to pay its attorneys. The court also noted material differences in the policies that support applying contingency multipliers to an attorney fee awarded under the common fund/ settlement agreement and to a fee awarded under a statutory fee-shifting provision. Then, in *dicta*, the court opined that contingency multipliers would be available in MMWA statutory fee cases in light of the U.S. Supreme Court's plurality decision and Justice O'Connor's concurrence in *Delaware Valley*, 483 U.S. 711, 107 S.Ct. 3078. The court also suggested that the plain language of the MMWA does not preclude application of a contingency multiplier which "multiplies the lodestar by a number representing the probability of loss [as the fee awarded would continue to be] based on the number of hours the attorneys worked." *Skelton*, 860 F.2d at 257. Notably, in *Dague*, the U.S. Supreme Court specifically discussed *Delaware Valley* and rejected contingency multipliers. In addition, the Seventh Circuit's analysis was in *dicta* and is neither binding on this Court nor persuasive, as explained further *infra*.

to be a "reasonable" attorney fee. *Dague*, 505 U.S. at 562, 112 S.Ct. 2638; *see also Perdue v. Kenny A.,* 559 U.S. —, 130 S.Ct. 1662, 1669, 176 L.Ed.2d 494 (2010). The *Dague* Court further held that a contingency multiplier is generally incompatible with Congressional intent that only "reasonable" attorneys' fees could be recovered under federal fee-shifting statutes. *Dague*, 505 U.S. at 562-67, 112 S.Ct. 2638.[38] The High Court made plain that its consideration extended to federal fee-shifting statutes in general and that the Court intended to speak broadly to provide general guidance. *Dague* clearly indicated that it intended its analysis of the contingency multiplier to extend to "all" federal fee-shifting statutes, as follows:

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[38] Unlike the MMWA, which provides for calculation of reasonable attorney's fees "based on actual time expended," the statutes pursuant to which attorneys' fees were awarded in *Dague* and *Perdue* provided simply for the award of a "reasonable" attorney's fee as part of the costs. In *Perdue*, the Court clarified its *Dague* holding and explained that a fee determined by the lodestar method is strongly presumed reasonable but may be enhanced in very "rare" and "exceptional" circumstances, *i.e.*, (1) "when the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value, as demonstrated in part during litigation;" (2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" and (3) in "extraordinary circumstances in which an attorney's performance involves exceptional delay in the payment of fees." *Perdue*, 559 U.S. at —, 130 S.Ct. at 1674-75. Foremost, however, the High Court rejected the claim that "either the quality of an attorney's performance or the results obtained are [different] factors that may properly provide a basis for an enhancement," as these were already subsumed in the lodestar calculation. *Id.* at 1673-74. Moreover, we note, there has been no suggestion in this case that rare and exceptional circumstances justify application of a contingency multiplier.

> [The Clean Water Act and the Solid Waste Disposal Act] authorize a court to "award costs of litigation (including *reasonable attorney . . . fees*)" to a "prevailing or substantially prevailing party." This language is similar to that of many other federal fee-shifting statutes, *see, e.g.*, 42 U.S.C. §§ 1988, 2000e-5(k), 7604(d); our case law construing what is a reasonable fee applies uniformly to all of them.

505 U.S. at 561-62, 112 S.Ct. 2638 (emphasis in original; internal citations omitted). The Supreme Court, of course, is the final word on federal statutory interpretation and our decisional mandate is to follow its teachings. *See Council 13*, 986 A.2d at 77 ("It is fundamental that by virtue of the Supremacy Clause, the State courts are bound by the decisions of the Supreme Court with respect to . . . federal law, and must adhere to extant Supreme Court jurisprudence.").[39] Here, the lower courts failed to consider or apply the strong presumption in favor of equating the counsel fee with the lodestar; rather, the courts considered impermissible factors in enhancing the attorneys' fee award.

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[39] In light of the Supremacy Clause, any reliance by the class on cases that allowed a contingency multiplier based on Pennsylvania law or decisions pre-dating *Dague* is unavailing. *See Solebury Twp.*, 928 A.2d 990 (attorney fee award under Pennsylvania's Clean Streams Law, 35 P.S. § 691.307(b)); *Krebs*, 893 A.2d 776 (attorney fee award under Pennsylvania's Storage Tank and Spill Prevention Act, 35 P.S. § 6021.1305(f)); *Signora*, 886 A.2d 284 (attorney fee award under Pennsylvania's Wage Payment and Collection Law, 43 P.S. § 260.9a(f)). *See Croft*, 557 A.2d 18 (pre-dates *Dague* and does not address contingency multiplier but whether jury award in MMWA case acts as cap on attorney fee awards); *Skelton, supra* (pre-dates *Dague* and relies on a High Court opinion specifically rejected in *Dague*).

Bassett insists that the MMWA allows for enhancement of the attorneys' fee award beyond the lodestar by application of a risk multiplier. She claims essentially: (1) that *Dague*'s holding was limited to the environmental statutes at issue in that case; (2) that the MMWA gives state courts discretion to award contingency multipliers available through state procedural rules; and (3) that Pennsylvania public policy supports the exercise of discretion in the application of a contingency multiplier to promote the pro-consumer purposes of the MMWA.[40] We must reject Bassett's arguments.

Bassett's argument that *Dague's* holding must be deemed limited to the environmental statutes "at issue" there, the Solid Waste Disposal Act and the Clean Water Act, proceeds as follows. Section 2310(d)(2) of the MMWA is different from the fee-shifting provisions in *Dague*, Bassett argues, because it awards an "aggregate amount" of "expenses" in addition to costs as incurred by the consumer/plaintiff, which necessarily should include "contingent fees." Bassett's Brief at 54, 59-60. We recognize that the High Court concluded *Dague* by saying "we hold that enhancement for contingency is not permitted under the fee-shifting statutes *at issue*" and, of course, the MMWA was not specifically at issue. *Dague*, 505 U.S. at 567, 112 S.Ct. 2638 (emphasis added). Nevertheless, the Court's analysis made plain that its approach to reasonable fees under all such fee-shifting provisions was uniform. *Id.* at 561-62, 112 S.Ct. 2638 (caselaw construing what is a reasonable fee "applies uniformly to all" federal fee-shifting statutes); *accord Signora*, 886 A.2d at 293 n.

[40] Bassett's arguments were reordered for clarity and ease of discussion.

14 ("Enhancement for contingency is not permitted under federal fee shifting statutes.").

Writing for the *Dague* Court, Justice Antonin Scalia focused on whether a "reasonable" attorneys' fee award may include a contingency enhancement of the lodestar. The High Court concluded that the lodestar benefits from a "strong presumption" of reasonableness because it generally reflects the merits and difficulties of a case, *i.e.*, the risk of loss. For an attorney who expected a premium over his hourly rates when he or she accepted a contingency fee case, the "lodestar enhancement [would] amount[ ] to double counting" the risk of loss and is unreasonable. 505 U.S. at 562-63, 112 S.Ct. 2638. The Court also discussed various approaches to lodestar enhancement and decided that all the approaches suffered from similar infirmities: undesirable social costs (such as creating incentives to bring nonmeritorious claims and overcompensating cases with above-average chances of success), added incentives for burdensome satellite litigation over attorneys' fees, and inconsistency with the Court's general rejection of contingent fees. *Id.* at 563-66, 112 S.Ct. 2638 (rejecting, *inter alia*, the *Delaware Valley* approach, *see supra* at n. 2). Importantly, "reasonableness" of the attorneys' fees is the linchpin under the MMWA just as it was under the statutes analyzed in *Dague*. *Compare* 15 U.S.C. § 2310(d)(2) (courts may award expenses, including attorneys' fees "reasonably incurred by the plaintiff") *with* 42 U.S.C. § 6972(e) (courts may award costs of litigation that include "reasonable attorney . . . fees") *and* 33 U.S.C. § 1365(d) (same). Bassett's argument regarding the limiting language notwithstanding, *Dague* plainly requires rejection of the nontextual contingency multiplier that the lower courts engrafted here onto the MMWA.

Bassett also insists that we limit the application of *Dague* to "federal-question [sic] cases pending only before the federal courts under exclusively federal statutes." Bassett's Brief at 54. According to Bassett, because the MMWA incorporates state law, it is "subject to state procedural rules and interpretations" and its variations regarding contract laws and counsel fee decisions. But, Bassett's description of the MMWA is inapt and her attempt to divorce the trial court's award of attorneys' fees here from the plain language of Section 2310 and controlling precedent is unavailing.

The MMWA is an act that provides, *inter alia*, federal standards governing contents of warranties and minimum standards for warranties. *See, e.g.*, 15 U.S.C. §§ 2302, 2304, 2311(c). Failure to comply with the MMWA's requirements or prohibitions constitutes an unfair method of competition, in violation of 15 U.S.C. § 45. *See* 15 U.S.C. § 2310(b). The MMWA does not create a cause of action for breach of warranty, but it also does not preempt a breach of warranty claim or, generally, "any right or remedy of any consumer under State law." *See* 15 U.S.C. § 2311(b)(1). According to Section 2310(d)(1) of the MMWA, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, *or* under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief" in federal or state court, pursuant to appropriate jurisdictional requirements. 15 U.S.C. § 2310(d)(1) (emphasis added); *see* 15 U.S.C. § 2310(a)(3), (d)(3), (e). Thus, claims for violation of the MMWA and breach of warranty are separate causes of action that may be joined when filing suit in state or federal court. If the consumer prevails on

either cause of action, she is entitled to recover costs and expenses, as described in Section 2310(d)(2). Contrary to Bassett's assertions, we perceive no clear Congressional intent from the plain language or the statutory scheme of the MMWA that attorneys' fees would be calculated "subject to state procedural rules and interpretations." *Accord Chin*, 538 F.3d at 279-80 & n. 5 (holding that for New Jersey procedural rule permitting counsel fees to apply, consumers must have asserted New Jersey cause of action authorizing fees). Indeed, because Section 2310(d)(2) of the MMWA is a provision of a federal statute, we are bound in our interpretation of that provision by decisions of the U.S. Supreme Court by virtue of the Supremacy Clause. *Council 13, supra.*

In the same vein, Bassett argues that the award of attorneys' fees is traditionally a matter of procedure "exclusively" governed by state law and procedure, specifically Pennsylvania Rule of Civil Procedure 1716.[41] We recognize that the question of what in

[41] Bassett cites three cases in which federal courts yielded to the authority of state courts to regulate the practice of law in those states. *See Middlesex County Ethics Comm.*, 457 U.S. at 432-35, 102 S.Ct. 2515 (New Jersey state bar disciplinary proceedings warranted federal court deference); *Goldfarb*, 421 U.S. at 782-83, 95 S.Ct. 2004 (minimum fee schedule published by county bar and enforced through prospect of professional discipline constituted "price-fixing" within meaning of federal act); *Arons*, 842 F.2d at 63 (New Jersey rule prohibiting non-attorney from receiving compensation for legal representation from client not preempted by federal act permitting lay representation in administrative hearing). Bassett perceives no distinction between the power to regulate the practice of law as a profession and the power to adopt rules of civil procedure, *e.g.*, with regard to attorneys' fees. But, these two powers, in Pennsylvania at least, are separate and distinguishable. *See* PA. CONST. Art. 5, § 10(c) ("The Supreme Court shall have the power to prescribe

particular is substantive and what is procedural is not always clear. *See Laudenberger*, 436 A.2d at 155 (noting substantive effect of new procedural rule permitting pre-judgment interest). But that is not so in this instance where, given the interplay between the MMWA and Rule 1716, the effect of accepting Bassett's argument would be to import the rule for substantive purposes so as to undo the express terms of the federal statute.

Bassett also looks to the MMWA's savings clause and concludes that Congress intended to preserve a consumer/plaintiff's right under state law, which in Pennsylvania—as Bassett would have it—permits a contingency multiplier. Bassett's Brief at 55, 60-61 (citing 15 U.S.C. § 2311(b)(1) ("Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.")). According to Bassett, the right to a contingency multiplier is vested and embodied in Pennsylvania procedural Rule 1716(5), which states, *inter alia*, that "[i]n all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things . . . whether the receipt of a fee was contingent on success." Even aside from *Dague*, we hold that the MMWA's savings clause is not applicable here and that no general "right" to a contingency multiplier exists in Pennsylvania.

Rule 1716 is a rule of procedure prescribed by this Court that does not purport to create any substantive

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general rules governing practice, procedure and the conduct of all courts" and "for admission to the bar and to practice law"). The cases cited by Bassett provide no support for the proposition for which they are cited, *i.e.*, that attorneys' fees are "exclusively" governed by state law.

right to a contingency multiplier in all cases. *See* PA. CONST. Art. V § 10(c) ("The Supreme Court shall have the power to prescribe general rules . . . if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant."). Under Pennsylvania law, the contingency multiplier of Rule 1716 cannot be fairly construed as a "right or remedy" that was intended to be preserved under the MMWA's savings clause so as to undo the express substantive terms of the federal statute.

Finally, we must reject Bassett's claim that Pennsylvania's "strong public policy to justly compensate parties who incur attorney fees" and are entitled to attorneys' fees under fee-shifting provisions justifies an application of the contingency multiplier here. Bassett's Brief at 55 (citing *Solebury Twp.*, 928 A.2d at 1004) (awarding attorney fee under Pennsylvania's Clean Streams Law, 35 P.S. § 691.307(b)).[42] Pennsylvania generally adheres to the

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[42] Bassett also cites *Solebury Township* for the proposition that "federal standards that have not been incorporated into state statutes can only be supported to the extent that those standards are consistent with Pennsylvania public policy." Bassett's Brief at 55. But, in *Solebury Township*, this Court addressed the question of whether townships in whose favor formal judgment had not been entered were entitled to counsel fees pursuant to Pennsylvania's Clean Streams Law, which provided that the Environmental Hearing Board "may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act." 35 P.S. § 691.307(b). The Board had relied on federal law awarding counsel fees to deny the townships' application for counsel fees, holding that the townships were not prevailing parties. We vacated the decision and held that the Board's restrictive application of the narrow federal criteria was not supported by the plain language of the

"American Rule," under which "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." *Trizechahn Gateway LLC v. Titus*, 601 Pa. 637, 976 A.2d 474, 482-83 (2009); *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-70, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (providing exhaustive discussion of American Rule and concluding that Congress and not courts may dispense with it and devise new rules to reallocate costs between litigants). According to this standard, what Bassett identifies as a "strong public policy" is not sufficient to overcome the presumption that the American Rule applies. There is nothing inherently unjust about limiting this form of compensation to *actual* costs.[43] Moreover, like Congress, our General Assembly has created several exceptions to the American Rule extant in Pennsylvania—via fee-shifting provisions—

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fee-shifting provision of the Pennsylvania statute. *Solebury Township* is distinguishable because, at issue here is the interpretation of a federal, not a Pennsylvania statute, on which the High Court has final say pursuant to the Supremacy Clause.

[43] Additionally, any easy dismissal of *Dague* on the ground that the MMWA operates to protect consumers cannot withstand scrutiny. The dual concerns regarding the economic feasibility of access to courts and attracting adequate representation existed and were addressed by the Supreme Court. The High Court rejected the contingency multiplier as a means to unduly reward attorneys. *Dague*, 505 U.S. at 563, 112 S.Ct. 2638 (fee-shifting "statutes were not designed as a form of economic relief to improve the financial lot of lawyers"); *see Stair*, 768 A.2d at 306-07 (attorneys do not have an "exclusive interest" in statutory fee award). The purpose of the MMWA is fully served by applying the statute according to its plain terms and does not open the door to importing non-textual additional incentives and rewards.

that allow courts to award attorneys' fees as a remedy to well-defined parties. *See* 42 Pa.C.S. § 2503 (listing categories of litigants who may receive attorney fee awards); *Lucchino v. Commonwealth*, 570 Pa. 277, 809 A.2d 264, 267-68 (2002) (listing Pennsylvania statutes with fee-shifting provisions). We cannot torture our procedural rule to supplant the legislative prerogative.

Rule 1716's actual procedural purpose is as follows. With respect to authorized counsel fee awards under legislation, courts must weigh the considerations of Rule 1716 as a matter of procedure. *See, e.g., Signora, supra.* But, the procedural vehicle does not create the underlying entitlement. Here, the class requested attorneys' fees under a federal statute—the MMWA. The plain language of the MMWA and the High Court's clear precedent provide no basis to trigger our procedural rule. Applying *Dague* to the *federal* statute at issue here by no means interferes with Congressional intent to preserve distinct state rights or remedies. Accordingly, we reverse the order below to the extent it provides for enhancement of the attorneys' fee award beyond the amount of the lodestar.

VI. Conclusion

For the foregoing reasons, we affirm in part and reverse in part the decisions of the Superior Court dated October 24, 2007, and February 8, 2008. Our reversal is limited to the lower courts' decision to permit application of a risk of loss multiplier to enhance the attorneys' fee award beyond the amount of the lodestar. We remand to the trial court for adjustment of the attorneys' fees in accordance with this Opinion. Jurisdiction is relinquished.

Justice GREENSPAN did not participate in the decision of this case.

Justices EAKIN, BAER, TODD and McCAFFERY join the opinion.

Justice SAYLOR files a dissenting opinion.

Justice SAYLOR, dissenting.

I agree with the majority's rationale as it concerns the attorney-fee matters but dissent relative to the class treatment as it was administered by the trial court.

I. Preface

Initially, the majority's overarching approach to this appeal appears to suggest liberality in favor of class certification. I have no objection, to the degree that this does—as the majority indicates and our rules prescribe—nothing more than indicate who the parties to the action will be. *See* Majority Opinion, at 15-16 (quoting Pa.R.C.P. No. 1707, cmt.).

The difficulty we are seeing in the cases, however, is that many proponents of class treatment believe the judiciary concomitantly should bring about substantive changes in the law favorable to consumer classes. It seems, more often than not, that such innovations are not being presented to our courts as the matters of substantive law they truly represent. Rather, they are being passed off as if they were merely part and parcel of the procedural aspects of class treatment.

My intention is not to advance or criticize any particular position advanced in the legitimate, ongoing policy debate concerning what the substantive law should be in the class setting. It may be that changes are desirable. My point is that substantive modifications require choices among competing social policies, can have deep and wide-reaching social impact, and may implicate defendants' constitutional

rights and entitlements.[1] Furthermore, substantive changes in the law generally are most appropriate to legislative consideration. *See Program Admin. Servs., Inc. v. Dauphin County Gen. Auth.*, 593 Pa. 184, 192, 928 A.2d 1013, 1017-18 (2007) (explaining that "it is the Legislature's chief function to set public policy and the courts' role to enforce that policy, subject to constitutional limitations").

Accordingly, and in the first instance, it is essential to recognize substantive accretions for what they are. Moreover, even assuming judicial lawmaking is appropriate to facilitate collectivized litigation, there can be no legitimate dispute that substantive changes are well beyond the contemplation of the class action provisions presently reposited in our Civil Procedural Rules. *See* Pa.R.C.P. Class Actions, Explanatory Comment 1977 ("Many desirable approaches to class action problems involve substantive rather than procedural solutions. . . . These are beyond the power of the Procedural Rules."). Therefore, if such alterations of law are to occur, they must be overtly presented, considered, and sanctioned as matters of substance.

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[1] One commentator summarized one facet of the tremendous controversy which has arisen over the employment of the class action device as follows:

> The academic literature examining this form of litigation has portrayed the class action at times as a savior, bringing about justice in an otherwise flawed system of individual adjudication, and other times as a villain, serving to artificially expand defendant liability and create a specialty practice for entrepreneurial plaintiffs' lawyers.

Martin H. Redish & Clifford W. Berlow, *The Class Action As Political Theory*, 85 WASH. U.L.REV. 753, 754 (2007) (footnotes omitted).

In the present case, the phenomenon of substantive inroads riding the coattails of class action procedure is most vividly illustrated with regard to the damages question. To develop this, in light of the breadth and complexity of the underlying litigation, it is necessary first to lay some supporting groundwork. Upon review of this background, I will discuss how class members were relieved of the obligation to present necessary, fair, and sufficient proofs concerning an unarguably individualized form of damages they sought—and the only form of damages they were awarded—namely, "out of pocket paid repair costs." N.T., May 26, 2005, Vol. 4, at 51 (jury charge).

II. Background

In assessing the damages question, it is important to understand that there simply was no evidence of class-wide commonality relative to numerous factors affecting out-of-pocket costs, including the mileage of affected Sephias or the length of actual ownership by class members. Moreover, Appellees' own proofs established that many remedial measures were undertaken by KMA as warranty brake repairs at *no cost* to individual class members. *See, e.g.*, N.T., May 19, 2005, Vol. 1, at 92, 96-97 (testimony of Appellees' automotive expert). Given such substantial variables,[2] it seems plain that individual class members

[2] For the sake of readability, in the text above, I have identified only a few of the many, readily-discernible variables differentiating out-of-pocket expenditures by class members. Here, I note only that there are many others. *See, e.g.*, N.T., May 19, 2005, Vol. 3, at 18 (reflecting the testimony of Appellees' automotive expert that a "field fix" utilized by KMA had redressed the brake issue relative to some Sephia vehicles); *compare* N.T., May 19, 2005, Vol. 1, at 88 (containing the explanation of Appellees' expert that the named plaintiff's brake pads wore out at between 3,000 and 5,000 miles), *with* N.T., May 19, 2005, Vol. 3,

had markedly different experiences of personal expenditure to address Sephia brake problems. Certainly, Appellees never attempted to prove differently by accounting for the variables. Indeed, at various junctures throughout the pretrial and trial proceedings, class counsel conceded their presence and impact.[3]

Rather than addressing individualized damages on conventional terms, as required under ordinary substantive law, class counsel repeatedly argued to the judge and the jury that—on account of the small amounts involved and the nature of a class action—there simply was no need for any sort of individualized assessments. *See, e.g.*, N.T., May 26, 2005, Vol.

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at 22 (reflecting the same expert's testimony that other class members experienced brake pad life in the range of 10,000 miles).

[3] For example, at the certification hearings, counsel for the named plaintiff (later class counsel) explained that, at times, "[t]he individuals had to pay for the repair. In other instances maybe [KMA] did cover it or did under goodwill." N.T., July 15, 2004, at 22-23; *accord* N.T., May 26, 2005, Vol. 4, at 57 (reflecting class counsel's comment in his closing remarks that "KMA did replace many, many defective pads and rotors for some people who owned Kia Sephias").

There is nothing unusual about the phenomenon that class actions encompass both common and individual questions. *See generally* Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L.REV. 995, 998-99 (2005) ("Factual distinctions at various levels of subtlety and materiality usually permeate the legal claims of putative class members, such that their collective claims raise both 'common' and 'individual' questions relevant to proving liability and damages." (footnote omitted)). As further developed below, the irregularities in this case pertain to the absence of a management approach which would fairly account for such material differences.

4, at 113-14. For its part, the trial court, at the certification stage, did not concretely address how individualized damages matters would be managed. Instead, the court rested its approval of class treatment entirely on conclusory pronouncements indicating that damages issues simply were not a problem. *See Samuel-Bassett v. Kia Motors Am., Inc.*, No. 2199, Jan. Term 2001, *slip op.* at 18, 2004 WL 2173324 (C.P. Phila., Civ. Trial Div. Sep. 21, 2004) ("Neither do potential differences in individual damage claims based upon individual experiences and costs associated with attempts to repair the vehicle pose any serious management difficulty."); *id.* at 21 ("The damages herein are ascertainable, not de minimus and quite capable of determination. No problems exist herein for certification.").[4]

The looseness of the certification decision yielded ongoing controversy about how the certification was to operate and its impact on required substantive proofs.[5] At the pretrial stage, the uncertainties culminated in a surprising turn taken shortly before trial, during a discussion of KMA's motion to bifurcate. At this juncture, after consistently rejecting the notion that individualized treatment of *any* issues was necessary, both class counsel and the trial court

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[4] Notably, from the outset, KMA argued to the court that individualized assessments were required. *See, e.g.*, N.T., July 15, 2004, at 50-51 ("What happened with Ms. Bassett doesn't provide any information or proof for the remainder of the class. It must be done individually.").

[5] It is perhaps in light of the potential for misunderstandings of this kind ensuing from insufficiently reasoned class certification decisions that the federal appellate courts require of the district courts a "rigorous analysis" of the certification criteria. *See Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, —, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011) (citations omitted).

cryptically agreed that some sort of undefined claims process would be necessary. This dialogue proceeded as follows:

> THE COURT: And [the] verdict will then set the upper limit of what [KMA] has to pay and then people will have to prove that they fit within whatever requirements qualify them to receive that upper limit, and if they had to pay twice or three times as much, it's because of the defect, they're out of luck, right?
>
> [CLASS COUNSEL]: That's correct.
>
> THE COURT: Okay.

N.T., May 16, 2005, Vol. 1, at 60. Such consensus was then memorialized in the pretrial order, referenced by the majority, specifying that "[e]ach class member's entitlement to recover if plaintiff class prevails, shall be determined at claims proceedings." Majority Opinion, at 42 (quoting *Samuel-Bassett v. KMA Motors of Am., Inc.*, No. 2199 Jan. Term 2001 (Order of May 16, 2005)).[6]

Despite this prescription for claims proceedings (which, conceptually, should have worked a major alteration in the path of the litigation), Appellees attempted at trial to quantify the out-of-pocket ex-

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[6] This order appeared to embody a variant of the traditional strategy for addressing individual issues in class actions, *i.e.*, bifurcation of the damages question. *See* 3 NEWBERG ON CLASS ACTIONS § 9:59 (4th ed.2002) ("After identifying common issues that would support class certification, and recognizing generally or specifically that individual issues would remain after common questions have been litigated, the chief judicial management tool for handling individual issues is to sever them for subsequent trial[.]"). Nevertheless, as further developed below, the order did not alleviate the burgeoning incongruities and misunderstandings.

penses incurred by absent class members via grossly generalized, hypothetical proof. In this regard, Appellees presented an "automotive expert" who indicated—based on assumptions that each class member paid for all relevant brake repairs and drove his vehicle 100,000 miles—all plaintiffs incurred $1,005 in damages. *See* N.T., May 19, 2005, Vol. 3, at 23-26. Two obvious deficiencies in the testimony were that: the first of the underlying assumptions was directly contrary to the record (not the least because it was well established that KMA already had paid for many of the repairs as warranty items, *see supra* note 3); and the second was in strong tension with common experience (since it seems highly unlikely that all of a class of 9,400 automobile owners would retain their vehicles for 100,000 miles).[7]

In response to defense criticisms of this evidence, class counsel, for his part, maintained before the jury that the class action procedural device alleviated his problems of substantive proof:

> [Defense counsel] is a good guy, a good lawyer but this is a Class action and I think you have heard comments that distort Pennsylvania law with respect to how Class actions are handled. *This is not a case of 10,000 individual claimants in which case we would have the burden of bringing in everybody including everybody's individual damages.*
>
> The whole notion of a Class action, why they exit [sic], is because if you can satisfy the court before

[7] Both the hypothetical and the responsive testimony also simply ignore many other readily discernable variables impacting out-of-pocket expenditures by individual class members, which Appellees never attempted to discount. *See supra* note 2.

> it gets to the jury trial stage that the issues are common and the complaints of Ms. Samuel-Bassett are shared by all other members of the Class, then the court will certify by a judicial Order the action as a Class action and it may proceed to this trial.
>
> Ladies and Gentlemen, this case was certified by the Philadelphia Court of Common Pleas as a Class action. This court was satisfied after a hearing that the complaints that [sic] Ms. Samuel-Bassett were the complaints of the 10,000 members of the Class. But I don't ask any of you to accept what I tell you; I ask that you listen to the instruction of the court on this issue. Listen to Judge Bernstein's instruction. I believe he will tell you that *proof and evidence that we present as to Ms. Samuel-Bassett should be considered by you as evidence for the entire Class.* That's important. That's how Class actions work.

N.T., May 26, 2005, Vol. 4, at 113-14 (emphasis added).[8]

Finally, contradicting its pretrial order providing for claims proceedings, the trial court instructed the jurors that there would be no subsequent proceedings to decide anything.[9]

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[8] Certainly, counsel's comments in this regard were apt as to *common* issues. However, the remarks were not so qualified, and, as developed above, out-of-pocket damages cannot fairly be regarded as a common question.

[9] The court stated:

> The amount that you award today must compensate the Class completely for all damage that you find has been proven, let me put it that way.

III. Discussion

In my view, the irregularities discussed above are manifestations of a core analytical problem, *i.e.*, the failure to distinguish between the procedural class action device and substantive legal innovations being employed to facilitate them, including adjustments to the plaintiffs' burden of proof. It could not be argued seriously that hypothetical testimony from an automotive expert—based upon underlying assumptions that are unsupported by the record, false, counter-intuitive, and/or substantially under-representative of the range of actual variables affecting plaintiff costs—could support an out-of-pocket damages verdict in any individual case. Plainly, therefore, the trial court's decision to permit Appellees to use just this sort of testimony to justify such a verdict for 9,400 people was incongruous with Pennsylvania substantive law governing damages.[10]

> Because *there's no second day in court.* Just like I said, we can't handle 10,000 individual cases and just like I said maybe the amount in question is too small to warrant a whole blown trial for every individual claim; well, just like we in court want only one case if we can reasonably and justly do it; likewise, the defendant only wants one case against them [sic]. So you [sic] damages, *your verdict is the only verdict in this claim for both sides. There's no second day in court.* Nobody can come back and say we forgot to bring this up or we discovered something tomorrow. Can't be done. You the jury are the only judges of the facts. *After you decide this case, this case is decided.*

N.T., May 26, 2005, Vol. 3, at 49-50 (emphasis added).

[10] Throughout this litigation, Appellees have repeatedly relied upon the federal district court's decision to certify a class action in their favor against KMA. *See, e.g.*, Brief for Appellees at 3-4. Significantly, however, the district court's supporting opinion actually recognized the necessity of individualized damages

The complexity of class action litigation, and the concomitant need for probing consideration of foundational questions concerning the appropriateness of full or partial class treatment, is apparent both from the many closely reasoned judicial opinions and the broad range of commentary on the subject. *See, e.g., Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319-21 (5th Cir.1998). A judicious class certification decision requires the trial court to distinguish between common questions and individual ones, and to approve a litigation plan for fair and efficient administration which will provide appropriate treatment for both

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assessments relative out-of-pocket expenditures from the outset. *See Samuel-Bassett v. Kia Motors Am., Inc.*, 212 F.R.D. 271, 281 (E.D.Pa.2002) (explaining that elements of damages, other than diminution in value, are "reliant upon 'the intangible, subjective differences of each class member's circumstances,' and would likely require additional hearings to determine given that some individuals have undoubtedly expended more monies and incurred higher parts and labor costs to repair their vehicles than others."), *vacated and remanded by* 357 F.3d 392 (3d Cir.2004); *id.* at 282 n. 2 (indicating that "the individual questions at issue here largely concern the element of damages").

I note that, in some circumstances, some jurisdictions have accepted the use of statistical, surveying, and sampling techniques to fill this sort of evidentiary void. *See generally* Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases By Jury Trial*, 88 VA. L.REV. 405, 415-20 (2002). Such techniques are not universally and uncritically accepted, however. *See generally* 2 MCLAUGHLIN ON CLASS ACTIONS § 8:7 (6th ed.2010) (collecting cases). Moreover, whatever the merits of these sorts statistical and/or scientific techniques for approximating individualized damages in a class action, nothing of the sort was attempted here. Rather, and again, Appellees' "automotive expert" offered an opinion based on a hypothetical entailing unproven, demonstrably erroneous, and under-inclusive assumptions.

issue categories.[11] Where the proponent of class certification fails to lay the necessary groundwork, the correct judicial response is to deny the certification. *See generally* 2 MCLAUGHLIN ON CLASS ACTIONS § 8:16 ("[C]ertification is not permissible where it relies on a damages model under which gross or aggregate damages would be calculated and awarded without considering whether each class member had a valid claim, thereby risking that the

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[11] This point is made by one commentator as follows:

> when a plaintiff asks a court to certify her as a representative of absent class members seeking damages, the court may do so only if it has a feasible plan for resolving factual and legal disputes regarding each element and defense applicable to each class member's claim and for eventually entering judgment for or against each class member. There must either be an opportunity for the parties to litigate individual claims or defenses, or a reason to believe that such an opportunity is not necessary to reach a judgment that accurately values class members' claims. The existence of individualized issues of fact and law unique to the circumstances of particular class members thus does not necessarily preclude certification if the court has a plan for coping with individual factual and legal inquiries. In practice, however, certification will not be possible when there is no manageable way of reaching a final judgment that resolves all factual and legal disputes relevant to each class member's entitlement to relief under applicable substantive law, and when one or more parties is unwilling to settle voluntarily.

Erbsen, *From "Predominance" to "Resolvability"*, 58 VAND. L.REV. at 1049.

Parenthetically, the majority cites Professor Erbsen's substantial work for the proposition that claims proceedings are not required in class actions. *See* Majority Opinion, at 45 n. 30. While this may be true, the majority does not capture the author's overarching point that *some* fair mechanism for individualized treatment of individualized issues is required.

defendant would be liable for damages that it was not proved to have caused, or that some class members would recover damages that do not correspond to the true value of their claims."). As fundamentally, where class treatment is appropriate, the trial court must tailor class procedure to accommodate the governing substantive law, not the opposite.[12]

In the present case, certification of a 9,400-person class action occurred without the predicate, closely-reasoned justification or any rational plan for the handling of individualized issues.[13] Rather than redressing this fundamental misstep at any of several benchmark opportunities, Appellees continued to invite the trial court and the jurors to treat the substantive law as if were shaped by the certification

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[12] Professor Erbsen's article provides the following explanation for why particular care in class action certification and management is required to protect all parties' rights and interests:

> The practical problems with certifying class actions despite dissimilarity among claims arise from the natural human instinct to simplify the inherently complex and to create order out of what appears chaotic. These instincts manifest in class actions in the form of procedural shortcuts to squeeze heterogeneous claims into a homogenous mold and thereby avoid the procedural difficulties that dissimilarity would create. . . . Likewise, aggregating distinct individual claims into a class obscures differences among class members in ways that engender substantive consequences.

Erbsen, *From "Predominance" to "Resolvability"*, 58 VAND. L.REV. at 1009-10.

[13] Indeed, this baseline reality of this case was reflected in the following impromptu comment by class counsel during the trial proceedings: "I don't know how, in the context of this Class Action, or in any Class Action, at a trial you could prove the amount of damages actually incurred by everyone." N.T., May 26, 2005, Vol. 3, at 19.

of a class. Unfortunately, to a large degree, the trial court accommodated Appellees' vision of aggregate litigation. Thus, for example, Appellees' expert was permitted to testify to fictionalized class-wide out-of-pocket expenses, which became the sole basis for the only damages awarded by the jury (other than to the named plaintiff).[14]

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[14] Approximations and extrapolations are frequently the basis for class action *settlements. See, e.g., City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1385 (S.D.N.Y.1972) (explaining that an "evaluation of the proposed settlement . . . requires an amalgam of delicate balancing, gross approximations, and rough justice"), *rev'd in part on other grounds*, 495 F.2d 448 (2d Cir.1974). However, the settlement context, involving a consensual resolution of affairs, is far different from the adversarial trial setting. Indeed, it is the difficulties of proof facing plaintiffs, and the scale of potential liabilities faced by defendants should they go to trial, which often provide the incentives for consummation of settlements.

Again, it may well be that, as a matter of social policy, some or all of the techniques and philosophies pertaining to class action *settlements* should be transported into the *trial* context. My main point here is that, undisputably, the approval of the class action device as acceptable procedure did not accomplish such a substantive change in Pennsylvania. *See supra* Part I. Moreover, and again, in any such substantive decision making, separation of powers considerations and the constitutional interests of affected defendants obviously merit careful consideration. *See id.*

Professor's Erbsen's overview perspective is again illuminating:

> "Ad hoc lawmaking" occurs in class actions when courts attempt to devise substantive and evidentiary shortcuts around management problems that dissimilarity imposes on the resolution of otherwise similar claims. For example, courts will . . . bend the rules of evidence and alter burdens of proof so that contested facts can be resolved on a common rather than individualized basis[.] . . . Nothing

At one point, during the transient agreement of class counsel and the trial court to subsequent claims proceedings, they appear to have come to some realization of the scale of the distortion created by conflating the common and individualized issues. In the end, however, the latter were unceremoniously blended back into the collectivized treatment, apparently under the force of the driving class-action rubric. The result was a trial at which class members' plainly individualized experience with out-of-pocket expenditures was simply glossed over. As developed above, however, such blurring of the substantive requirements of the law of damages is plainly outside the contemplation of our civil procedural rules. *See supra* Part I. Furthermore, I agree with KMA that the perversion of expressly limited procedural rules to accomplish unauthorized substantive objectives impacts upon a defendant's due process rights. *See* Brief for KMA at 28-32. *See generally* Erbsen, *From "Predominance" to "Resolvability"*, 58 VAND. L.REV. at 1024 ("Class certification is . . . proper only if the court has a plan for eventually reaching an adjudicated or negotiated judgment that reflects the parties' rights under controlling law.").

I recognize that the record of this case creates the impression that purchasers of Sephias in the relevant time period sustained injury on account of a poor brake design and that the amount of the damages awarded to each individual class member appears to

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> inherent in the class action device distorts substantive or evidentiary rules in this manner, but certification has that practical effect when judges try to manage the dissimilar aspects of class members' claims.

Erbsen, *From "Predominance" to "Resolvability"*, 58 VAND. L.REV. at 1012-13.

be modest. Thus, there may be a sense that the jury verdict in this case serves a "rough justice" and, as such, should not be disturbed. Result orientation in the law, however, yields its own set of perverse consequences, not the least of which is the silent dilution of the consistency, predictability, and fundamental fairness which are aspirations of the American judicial system. *Cf.* Erbsen, *From "Predominance" to "Resolvability"*, 58 VAND. L.REV. at 1037-39 (discussing the deleterious impact of ad hoc lawmaking in class action proceedings on democratic legitimacy and concluding that "[a]llowing courts to bend substantive rules to the procedural needs of particular cases is . . . inconsistent with the normal process of rulemaking and prone to prioritize the welfare of litigants over broader social welfare with undesirable distributive consequences").

Finally, Appellees forcefully contend that KMA's attorneys did not do enough to bring their criticisms to the attention of the trial court, and the majority credits such argument. *See* Majority Opinion, at 41-42. My response is twofold. First, I do not believe the majority opinion in this case will be read as an error-review, issue-preservation decision.[15] Rather, it will

[15] Responsively, the majority does say that its opinion is so confined, in relevant part. *See* Majority Opinion, at 42 n. 27. Nevertheless, the majority decision sanctions the certification of a broad-scale class in circumstances in which there was no ostensible plan for appropriate treatment of individualized issues, while at the same time cataloguing the incongruities, missteps, and (in my view) unfairness which resulted. While the majority places the onus upon defendants to provide some greater critique of class certification efforts, in my view, the need for individualized treatment of some elements of the plaintiffs' claims was obvious from the outset of this case (and KIA's objections were sufficient to identify the problem, in any

likely be advanced as supporting the proposition that Pennsylvania takes an unconventionally liberal approach to class certification and collectivized treatment of individualized issues in aggregate litigation. Second, the record is replete with objections on KMA's part to: the class certification decision; the expert testimony upon which the hypothesized class-wide out-of-pocket expenses was based; and the trial court's failure to require individualized proof for individualized claims. To me, this case should not turn on waiver.

In summary, left to my own devices, I would vacate the verdict and overturn the class certification order on its terms. I would also highlight the evaluative process which I believe should be required from the outset to shape the course of broad-scale, aggregate litigation likely to span the better part of a decade. I do not believe justice is served by insulating this verdict in reliance on the discretionary aspect of certification decisions, thus extending a liberality which yields trials where substantive requirements are subject to dilution and non-enforcement without substantive justification.

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event). Moreover, to prevent similar disorder in future class action cases, I believe the Court should take this opportunity to place the burden upon proponents of class treatment to advance an appropriate management plan.

APPENDIX B

NON-PRECEDENTIAL DECISION -
SEE SUPERIOR COURT I.O.P. 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

———

No. 3048 EDA 2005

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SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED

v.

KIA MOTORS AMERICA, INC.,
Appellant

———

Appeal from the Judgment entered
October 25, 2005 in the Court of Common Pleas
of Philadelphia County, Civil, No. 2199
January Term, 2001

———

No. 3068 EDA 2005

———

SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED
Appellant

v.

KIA MOTORS AMERICA, INC.,

———

Appeal from the Judgment entered
October 25, 2005 in the Court of Common Pleas of
Philadelphia County, Civil, No. 2199
January Term, 2001

———

No. 537 EDA 2006

SHAMELL SAMUEL-BASSETT ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED

v.

KIA MOTORS AMERICA, INC.,
Appellant

Appeal from the Order entered
January 23, 2006 in the Court of Common Pleas of
Philadelphia County, Civil, No. 2199
January Term, 2001

Filed October 24, 2007

MEMORANDUM

BEFORE: KLEIN, BENDER and GANTMAN, JJ.

Kia Motors America, Inc. appeals from a class action verdict awarding $600.00 to each of 9,402 class members, for a total of $5,641,200.00, based on a finding that Kia Sephias on the market between model years 1995 and 2001 had brakes that needed replacement approximately every 5,000 miles, when the standard in America is much higher than that and the express warranty was for 36 months or 36,000 miles. Plaintiff, in a cross-appeal, appeals from the order denying class certification under the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §§ 201-1 *et seq*. The trial judge also awarded plaintiff counsel fees in the amount of $4,125,000.00 and expenses of $267,513.00, which

Kia appeals. All three appeals have been consolidated herein.

With regard to the appeal of the class action verdict and related cross-appeal, we affirm on the thorough and cogent Pa.R.A.P. 1925(a) opinion of the distinguished trial judge, the Honorable Mark I. Bernstein. With regard to the appeal of the counsel fee award, we remand for the filing of a supplemental Rule 1925(a) opinion and further briefing by the parties.

Kia's Appeal of Class Action Verdict

Kia classifies its questions involved into four separate categories. We will address each briefly.

First, Kia claims that that it was improper to certify a class because it was not certain that each member relied on the warranty or that Kia refused to make repairs. The evidence demonstrated that: (1) there was a common defective design of the brake systems in all 1995-2001 Kia Sephias; (2) the repair cost for each vehicle was only $600; (3) expert testimony would be needed in each individual case; and (4) there were 9,402 consumers who bought the Sephias with bad brakes. We agree with the following observation by Judge Bernstein:

> It strains credibility that a party could sincerely suggest that more than 9,402 product defect design warranty cases claiming damages in the amount of only $600.00 each could be individually tried. If not tried as class litigation, individual claims would place an absurd burden on [both the] Courts, and on each of the 9,402 plaintiffs.
>
> . . .

> . . . Clearly requiring each of the 9,402 class members to individually litigate damages in the amount of $600.00 amounts to sealing shut our Courtroom doors in violation of the Pennsylvania Constitution.

(Trial Court Opinion, 12/28/06, at 34-35 (footnote omitted).)

Second, Kia claims that the trial court erred in assessing Kia $600.00 for each class member, since there might be no individual entitlement by various class members. Based on the evidence, it is clear that the brakes on all 1995-2001 Kia Sephias were defective. Regardless of whether an individual class member had his or her brakes repaired under warranty by Kia, all class members were entitled to have good brakes on their cars that did not require repeated trips to the dealership for replacement in order to avoid brake failure. Plaintiff's engineering expert testified that the out-of-pocket expenses for additional repair costs beyond the costs associated with a non-defective brake system was $1,005.00 per consumer. Plaintiff's total cost for brake repairs during the warranty period was $596.16. We conclude that the jury's assessment of class damages at $600.00 was reasonable and supported by the evidence. Thus, the trial court did not err in multiplying the 9,402 class members (which was stipulated) by $600.00 to reach a total verdict of $5,641,200.00.

Moreover, the jury found a breach of the *express* warranty in that the brakes did not last 36,000 miles. The jury did not reach the issue of *implied* warranty. While Kia claims that the brake *linings* were exempt from the warranty, the linings themselves were fine; it was the *design* that was flawed, which caused the linings to fail.

Third, Kia claims that it is entitled to a new trial because the trial court erred in admitting evidence of complaints made to the National Highway Transportation and Safety Administration (NHTSA) and excluding evidence that the NHTSA did not institute an investigation. This claim was not addressed in Judge Bernstein's opinion, nor was it raised in Kia's Pa.R.A.P. 1925(b) statement. Therefore, it is waived. *See Commonwealth v. Castillo*, 888 A.2d 775 (Pa. 2005); *Commonwealth v. Lord*, 719 A.2d 306 (Pa. 1998).

Fourth, Kia claims that that trial court erred in "multiple respects" in its jury charge and in submitting the special interrogatories and verdict slip to the jury. With respect to the alleged errors in the jury charge, either Kia *won* on the issue or failed to object to the charge. After a lengthy conference, Kia basically approved the charge, and any variations were within the trial judge's discretion and do not warrant a new trial. There is no requirement that the trial judge use the language suggested by either party.

Plaintiff's Cross-Appeal

Plaintiff asserts that proof of individual reliance was not required for class certification under the UTPCPL. However, this same argument was considered and rejected in *Debbs v. Chrysler Corp*., 810 A.2d 137 (Pa. Super. 2002). In *Debbs*, this Court held that because reliance must be proven on an individualized basis, the critical inquiry under the UTPCPL was not amenable to class treatment. *Id*. at 156. Therefore, plaintiff's claim lacks merit.

Accordingly, as to the appeal and cross-appeal of the class action verdict, we affirm on the basis of Judge Bernstein's Rule 1925(a) opinion. We incorpo-

rate that opinion herein and instruct counsel to attach a copy in the event of further proceedings in this matter.

Kia's Appeal of Counsel Fee Award

Kia also appeals from the January 23, 2006 order awarding plaintiff counsel fees in the amount of $4,125,000.00 and costs and expenses of $267,513.00. Kia asserts, *inter alia*, that the fees awarded were not based on actual time expended, nor were they proven to be necessary and reasonable. Plaintiff, on the other hand, asserts that the trial court properly exercised its discretion in awarding counsel fees and expenses. The issues Kia raises with respect to this matter are complex and fact-specific. Although the trial court held a lengthy hearing on the counsel fee petition, it did not prepare a Rule 1925(a) opinion explaining the basis for its multi-million-dollar fee award. We agree with Kia that our review of such an award is hampered without the benefit of a trial court opinion.[1]

Accordingly, we remand this case to the trial court for the filing of a supplemental Rule 1925(a) opinion on the counsel fee matter within 60 days of this decision. The parties then shall have 30 days after the

[1] On February 23, 2007, this Court denied Kia's request to suspend the briefing schedule pending the filing of a Rule 1925(a) opinion on counsel fees. In that order, we also stated that we would accept a supplemental Rule 1925(a) opinion on counsel fees should Judge Bernstein deem one necessary. To date, Judge Bernstein has not filed a supplemental opinion. However, after reviewing the parties' briefs and hearing argument on the counsel fee matter, we decline to consider this particular appeal without the benefit of a trial court opinion.

filing of that opinion to file supplemental briefs with this Court, if they so desire.

Judgment of October 25, 2005 affirmed. All outstanding motions are denied. Counsel fee matter remanded for further proceedings consistent with this memorandum. Panel jurisdiction retained.

Judgment Entered.

[Illegible]
Prothonotary

Date:_____

APPENDIX C

COURT OF COMMON PLEAS
OF PENNSYLVANIA,
CIVIL TRIAL DIVISION.
Philadelphia County

No. 2199

SHAMELL SAMUEL-BASSETT on behalf of herself and all others similarly situated,
Plaintiff,

v.

KIA MOTORS AMERICA, INC.
Defendant.

December 28, 2006

OPINION

Mark I. Bernstein, J.
JANUARY TERM, 2001

> "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law. . . ."

Constitution of Pennsylvania at Article 1 Section 11.

INTRODUCTION

After eight days of trial, a jury found that there was a common defective design of the brake system of the 1995 to 2001 Kia Sephia. Because of the design

defect, even new Sephias required brake repair every 5,000 miles. Kia warranted to all new purchasers of the Sephia that their vehicle would be free from defect in material and workmanship for 36 months or 36,000 miles:

> "Kia Motors America, Inc. warrants that your new Kia Vehicle is free from defects in material or workmanship, subject to the following terms and conditions . . .
>
> Except as limited or excluded below, all components of your new Kia Vehicle are covered for 36 months or 36,000 miles, whichever comes first. . . ."

The jury found that the common defective design, coupled with Kia's erratic and individualized responses to the brake problems forced owners to unnecessarily expend $600 for repairs. The defense stipulated that there were 9,402 class members, so after the jury verdict was received, the verdict was molded, and without objection, judgment was entered in the amount of $5,641,200.00.

PROCEDURAL HISTORY:

Plaintiff Shamell Samuel-Bassett, individually and on behalf of all other similarly situated Kia Sephia owners, filed this case on January 17, 2001 as a class action against Defendant Kia Motors America, Inc. Plaintiffs claimed damages arising from Defendant's violation of the Pennsylvania Unfair Trade practices and Consumer Protection Law,[1] ("UTPCPL"), breaches of implied and express warranties, and violations of the Magnuson-Moss Warranty Improve-

[1] 73 P.S. § 201-1 *et seq*.

ment Act.[2] On February 12, 2001, this case was removed to the District Court for the Eastern District of Pennsylvania. It was remanded to the Court of Common Pleas on April 7, 2004.

On May 21, 2004, Plaintiffs filed a motion for class certification. A class certification hearing occurred on July 15th and 16th, 2004. On September 21, 2004, the Court issued an opinion granting class certification on Plaintiffs' claims of breach of implied and express warranty, and violations of the Magnuson-Moss Warranty Improvement Act. The class was defined as "[a]ll residents of the Commonwealth of Pennsylvania who purchased and/or leased model year 1995 - 2001 Kia Sephia automobiles for personal, family or household purposes for a period of six years preceding the filing of the complaint in this action." The Court denied certification of Plaintiffs' UTPCPL claim because individual questions of fact made class certification inappropriate on this count. A copy of the Court's class action certification opinion is attached hereto and-made[sic] part hereof. This opinion addresses all issues concerning certification raised on this appeal.

Prior to trial, the Court ruled on motions *in limine* and a defense motion to bifurcate. On May 18, 2005, the motion to bifurcate was denied. That same day the Court denied Defendant's motions to preclude the expert testimony of R. Scott King as to liability and Dr. John Matthews as to a specific measure of damages.

Shortly before the start of trial Defendant settled a similar class action which had been filed in the state of California. That California settlement resolved all

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[2] 15 U.S.C. § 2301 *et seq*.

similar class claims in 47 states. Excluded from the reach of that settlement were class members in Pennsylvania, New Jersey, and Florida. Despite that settlement, defendant proposed to the Pennsylvania plaintiffs a settlement of all 50 state class action claims conditioned upon (1) voiding the California settlement, (2) amending the class definition, (3) resolving all issues concerning the "stipulation and agreement of settlement" (4) resolving all issues concerning the "form of mailed notice" to class members (5) resolving all issues concerning the "form of claim form" for class members to make any recovery and (6) resolving any issues arising during negotiations about alternative proofs required of class members for recovery, including form of proof, documentation required, recovery without documentation, and further conditioned upon (7) trial in Pennsylvania being stayed, and (8) a Florida Federal Court Judge agreeing to certification of the national class for settlement, and (9) approval of a national settlement by a Federal District Court Judge for the Southern District of Florida. The parties agreed upon the total amount of settlement,[3] the total bonus amount for representative Plaintiff, the total amount of attorneys fees and the fact that allocation of attorney fees to all attorneys including those who controlled the distribution pursuant to the California settlement would be controlled by Pennsylvania counsel.[4]

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[3] An amount which in retrospect is grossly inadequate for a national settlement since it was only three times the value of the Pennsylvania verdict alone.

[4] One wonders whether the California attorneys would have meekly accepted this complete loss of control over their already earned fees.

On the morning of trial, May 17, 2005, the parties announced they had reached a memorandum of understanding which, when all details were resolved, they would submit to a Federal Judge in the Southern District of Florida for approval. Because the memorandum of understanding was conditional and no petition for approval of settlement had been filed in Pennsylvania, the Court denied the request for continuance and proceeded to trial. The Court advised counsel that until such time as a Federal Court enjoined the trial, the Pennsylvania class action would proceed to verdict.

Although Defendant Kia requested such an injunction, the Federal Court declined to intervene. Federal Judge Zloch agreed with the Pennsylvania Court's course of action, noting that "the agreement articulated in the MOU [Memorandum of Understanding] could not, by its terms, be either "accepted" or "rejected" by Judge Bernstein in any manner that passed on the inherent legitimacy of the same. Judge Bernstein was simply able to decide whether the MOU presented him with an occasion to stop the proceedings before him."

As Federal Judge Zloch said in his final opinion denying the request to stay this Pennsylvania proceeding:[5] ". . . there is, therefore, no owner of a Sephia in the United States without a remedy currently being pursued." Judge Zloch continued, ". . . there is no basis for enjoining the various state court actions currently pending throughout the nation involving the same subject matter . . ." In

[5] Judge Zloch declined to enter any order affecting this proceeding, and after briefs and argument, affirmed the propriety of the verdict in this case.

ruling that Federal abstention was proper, Judge Zloch noted that the Florida action had been filed three years after the Pennsylvania complaint. He thought it significant that the other actions had made substantially more progress than the Florida action. "[T]he Court finds that 'wise judicial administration' dictates against exercising jurisdiction over an action which is largely duplicative in nature, and which would provide no plaintiff a remedy not already pursued in another more advanced action." The Federal District Court in Florida rejected the proposed settlement.

Rule 1714 of the Pennsylvania Rules of Civil procedure provides that "[n]o class action shall be compromised, settled or discontinued without the approval of the court after hearing." This Court was never asked to approve any settlement. No petition for settlement was ever filed. No settlement was ever completed.[6]

Trial began on May 17, 2005. Plaintiffs presented class claims for breaches of implied and express warranties, and violations of the Magnuson-Moss Warranty Improvement Act. Plaintiff Shamell Samuel-Bassett's UTPCPL claim was tried simultaneously as an individual claim. Plaintiffs' evidence for class jury determination was deemed incorporated into named plaintiff's UTPCPL individual claim and the class claim for injunctive relief. The parties agreed that any additional testimony needed for

[6] The proposed amount of settlement of $16 million for all 50 states was grossly inadequate. This jury rendered a verdict for the Pennsylvania class members alone in the amount of 5.6 million dollars. Translated into a national class this Pennsylvania verdict is the equivalent of $120 million nationwide, $134 million above the proposed settlement.

Plaintiffs' claim for injunctive relief would be presented to the Court after the close of evidence before the jury. Evidence was presented for eight days before the jury. Neither party added any evidence to the record for the non-jury determinations but the parties did stipulate that whatever jury verdict was rendered for each individual class member would be trebled to become the named representative Plaintiff's own verdict under the UTPCPL.

After the conclusion of evidence, a jury charge conference on both May 25th and May 26th, 2005. On May 26, 2005, plaintiff and defense counsel agreed that the number of class members was 9,402. During the jury charge conference counsel also agreed upon the form of jury verdict interrogatories and most of the jury instructions.

On May 27, 2005, the jury returned a verdict for Plaintiff class. By special verdict interrogatories the jury found that the Defendant had breached its express warranty and had failed to remedy a common defect after being given an opportunity to do so. The jury found in favor of the Defendant on Plaintiffs' claim for breach of an implied warranty. The jury further found that Plaintiffs had not proven a decrease in the value of the Sephia, each of which at time of trial was at least four years old. The jury found that each class member had sustained $600.00 in repair expenses reasonably incurred. Class representative Plaintiff Shamell Samuel-Bassett was awarded $1,800.00 by the Court for her UTPCPL claim. Based upon the parties' stipulation as to the actual number of class members, the Court molded the jury's verdict of $600 per individual class members to a class-wide verdict of $5,641,200.00. No objection to molding the verdict was raised by defense

counsel despite specifically being given an opportunity to do so. Immediately following the reading of the verdict by the foreperson and before the jury had been discharged, the following occurred:

> THE COURT: Now, everybody has agreed that there are 9,402 Class members so multiplying the number of Class members by the amount of your verdict, the Court is recording a verdict of $5,641,200 on behalf of the Class.[7]

No objection was lodged.

After the jurors left the courtroom the Court again made sure there were no objections:

> THE COURT: Anything further at this time?
>
> MR FELDMAN (for Plaintiff): No, Your Honor.
>
> MR. MCCLURE (for Defense): No, Your Honor. Thanks to the Court.[8]

Defendant filed a motion for post-trial relief on June 10, 2005. Defendant included a motion to decertify the class in its motion for post trial relief.

On October 21, 2005, Defendant filed with the Court a motion to stay pending final disposition by the United States District Court for the Southern District of Florida in *Leger v. Kia Motors America, Inc.*, Case no. 04-80522-CIV-ZLOCH. Although denied at the trial level and again denied by the Superior Court by Order dated December 1, 2005, no dispositive action was taken by this Court until the Federal Court affirmed the action of this Court in proceeding with the trial.

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[7] 5/27/05 Jury Trial Verdict, at 7.

[8] 5/27/05 Jury Trial Verdict, at 10.

On October 25, 2005, pursuant to Rule 227.4 Plaintiffs filed a Notice of Praecipe to Enter Judgment on the Jury Verdict of May 27, 2005. Judgment on the Jury Verdict of May 27, 2005 in the amount of $5,641,200.00 was entered by the Prothonotary.

On October 28, 2005, Defendant Kia Motors timely appealed. A 1925(b) Order was entered on December 14, 2005. On December 28, 2005, Defendant filed a "Concise Statement of Matters Complained of on Appeal," raising five category headings of alleged error. These five categories of alleged error included numerous subparts.[9] Defendant claims error in certifying the class and in denying their motion to decertify. The Defendant claims that the jury's verdict was against the weight of the evidence. The Defendant claims error in denying Defendant's motion to bifurcate the trial. The Defendant claims error in allowing

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[9] Although Defendant's post trial motions identified 29 allegations of error, each having subparts amounting to 93 claims, the Court does not have to address each purported issue raised. The Pennsylvania Superior Court stated in *Kanter v. Epstein*, 866 A.2d 394 (Pa. Super. Ct. 2004).

> "[t]he Defendants' failure to set forth the issues that they sought to raise on appeal in a concise manner impeded the trial court's ability to prepare an opinion addressing the issues that the Defendants sought to raise before this Court, thereby frustrating this Court's ability to engage in a meaningful and effective appellate review process. By raising an outrageous number of issues, the Defendants have deliberately circumvented the meaning and purpose of Rule 1925(b) and have thereby effectively precluded appellate review of the issues they now seek to raise."

Since Defendant has limited its issues on appeal in accord with Rule 1925(b) and waived all other issues, the Court will attempt to seriatim address the issues raised in the 1925(b) statement as understood.

Plaintiffs' experts, R. Scott King and Dr. John Matthews[10] to testify. The Defendant claims it was significant error to use the phrases "market price" and "fair market value" instead of "contract price" in instructing the jury about the claim of decrease in value,[11] and by not using the words "actually incurred and paid" by not charging Kia's proposed charges No. 26 and 37; by explaining to the jury the nature of a class action, in charging the jury about awarding damages; and, by not instructing the jury that Plaintiffs' claims were limited "solely to the repair or replacement of parts defective in Kia-supplied material or workmanship by an authorized Kia dealer at its place of business." Defendant also claims the Court erred in not using the exact jury verdict form requested by the defense. Finally, the Defendant claims that the Court erred in failing to continue the trial until the parties had finalized the terms of the settlement, finalized the form of notice and the claim form, voided the California settlement applicable to 47 states which had already been agreed upon, filed a petition to settle on a national basis the Florida Federal Court action before Judge Zloch and awaited his decision.

On November 2, 2005, Plaintiffs filed a Notice of Cross-Appeal. On December 20, 2005, Plaintiffs filed a Concise Statement of Matters Complained of on Appeal. Plaintiffs appeal only this Court's September 21, 2004 Order denying class certification of Plaintiffs' UTPCPL claim. Plaintiffs acknowledge the ruling of the Superior Court as set forth in *Debbs v.*

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[10] The Court notes that Dr. Matthews' testimony relates only to claims upon which a defense verdict was returned.

[11] The Court notes that these words also relate to claims upon which a defense verdict was returned.

Chrysler, 810 A.2d 137 (Pa. Super. Ct. 2002), requires proof of individual reliance for UTPCPL claims. Plaintiffs appeal in the hope that what they believe to be incorrectly decided law will be changed on appeal herein.[12]

The Court held a hearing on Plaintiffs' motion for attorney fees and expenses on September 13, 2005. On January 11, 2006, this Court awarded reasonable attorney fees in the amount of $4,125,000.00 based on actual time expended, and awarded reasonably incurred costs and expenses of $267,513.00, to be added to the judgment as required by 15 U.S.C. 2310 (d)(2).

FACTS:

I. *Systemic Sephia Brake Problem, 1995-2001*

A. *All Kia Sephias Were Created Equal*

The Kia Sephia is manufactured in Korea by Kia Motors Corporation. It is sold in the United States through Kia's American subsidiary, Defendant Kia Motors America, Incorporated. Kia began selling the Kia Sephia in the Commonwealth of Pennsylvania in 1997. By the time Plaintiffs' Complaint was filed on January 17, 2001, Kia had sold 10,042 Sephias.[13]

All Sephias sold during the class period are substantially the same car. The engineering of the braking system remained unchanged for the duration of the class period, despite periodic modifications to the brake pads and slight changes to the rotors in unsuccessful attempts to resolve the defects demon-

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[12] Since Plaintiffs candidly admit their appeal is grounded in the belief that the law as presently articulated should be corrected, the Court need say nothing more than that the Court's oath of office requires it to follow the law.

[13] 05/23/05, morning session, at 11.

strated at trial. Kia's Director of Technical Operations, Timothy McCurdy,[14] testified that all Sephias sold from 1995 to 2000 in Pennsylvania had interchangeable braking system components:[15]

> In every case from 1994, '95 on, whenever there has been an improvement or change in a part, whether it's brakes or engine or whatever, we superseded the part number so that the previous part—we generally push it aside and scrap it then we replace everything with the latest part so we don't keep adding additional problems into the system unnecessarily.[16]
>
> In every case from the—because the brake system from 1993 through 19—2000, that whole Sephia model, everything is interchangeable. There is nothing that doesn't fit an earlier car or an earlier car that won't fit a later car. So, in every case there is an evolution of improved parts. We just supersede it. And now those parts will be applicable for any Sephia from 1994 on . . .[17]

Plaintiffs' class expert agreed:

> Q. Mr. King, before we reach the Field Fix change in the braking system for January 20, '02, to what extent was the design of the braking system in all earlier Sephias similar or identical?
>
> A. The underlying design of that braking system remained constant. There were tweaks or

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[14] Designated portions of the deposition of Timothy McCurdy were read to the jury at trial.

[15] In January of 2002 Kia redesigned the entire Sephia braking system. 05/18/05, afternoon session, at 88.

[16] 05/18/05, afternoon session, at 76.

[17] 05/18/05, afternoon session, at 78.

modifications as evidenced by various TSBs, but generally underlying design remained the same. It was constant from throughout 1997 all the way through 2001 prior to this Field Fix.

Q. In fact, Mr. King, did you hear Mr. McCurdy say that all the brake system components in all the Sephias up to model year 2000 were interchangeable?

A. They were interchangeable, yes.

Q. Does that mean you could take a rotor from a '97 and a pad from a '99 and interchange them in the vehicle and they would work?

A. They would, yes.

Q. And does that support your conclusion that the braking systems of the vehicle shared a common design?

A. Yes, it was a common design.[18]

B. *Sephia Brake System Problems*.

Kia sold the Sephia with a known brake-system-defect that caused premature wear of brake pads and rotors. Kia engineers determined that a major cause of the Kia braking system problem was the brake system's inability to effectively dissipate heat.

Timothy McCurdy was Kia's Director of Technical of [sic] Operations and had been with Kia since 1993. Mr. McCurdy's responsibilities at Kia included, "product investigation of vehicle, product concerns, and reporting to our factory, Kia Motor Corporation." Mr. McCurdy was also responsible for all technical communications with dealers, publication of techni-

[18] 05/19/05, morning session, at 108-109.

cian newsletters called Technical Service Bulletins, and the development of all technical repair information for dealers through a website.[19] Mr. McCurdy was designated by defendant Kia as the corporate designee most knowledgeable about the Sephia systemic brake defect.[20]

Mr. McCurdy admitted there was a [sic] known systemic design problems with the system:

> Q. The problems that you said related to the brakes included brake pad wear, that was one; is that correct?
>
> A. Uh-huh.
>
> Q. Another was pulsing of the brakes or vibration of the brakes?
>
> A. Vibration, pulsation.
>
> Q. Was there a third problem that you discovered relating to warping of rotors?
>
> A. There was brake vibration. Pulsation is a result of rotors being—the thickness variation in running, yes.
>
> Q. Is that in itself a product of heat not being dissipated sufficiently?
>
> A. That's a major source, yes.
>
> Q. Was one of the principal foundational problems that you at least determined to exist in the Kia braking system the failure or inability to dissipate heat effectively?

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[19] 05/18/05, morning session, at 80.

[20] 05/18/05, morning session, at 80.

A. The development of vibration and pulsation—the heat is a major cause, yes.

Q. And was the heat a major cause in these braking issues at least from 1995 through the year 2000 in the Sephia?

A. The fact that the rotors created vibration, heat was one of the causes, yes.[21]

Plaintiffs also called[22] Kia's Vice President of Parts and Service, Donald Pearce, to testify. He said:

> "[F]rom years of operational experience, there are a couple of general issues that usually will create wear. And heat is one of them. The ability of the brake system to dissipate heat quickly will eliminate premature wear and judder problems. What that simply means is if a brake pad heats up, it becomes very hard. If it becomes very hard, then it is more abrasive to the rotor, which then creates warpage on the rotor, which creates the vibration symptom."[23]

Plaintiffs' expert agreed:

Q. What's the problem with the brakes on the Kia Sephia that causes them to wear out, make noise and vibrate?

A. Heat is a natural consequence of braking, of applying the brakes. When we apply the brakes and the brake pads squeeze against the rotor, heat is generated, and its normal. Heat is

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[21] 05/18/05, afternoon session, at 41-42.

[22] Designated portions of the deposition of Donald Pearce were read to the jury at trial during Plaintiffs' case in chief.

[23] 05/23/05, morning session, at 64-65.

normal. Its just like rubbing your hands together very rapidly, heat is built up and that's normal.

There's a normal level of heat that you should expect from braking, but in this particular case, with this particular rotor, and this particular designed vehicle, there's too much of it and the heat is destructive and it begins to break down components.

Q. What is the result of excessive heat?

A. Excessive heat causes excessive wear.

Q. Does heat also associate with vibration and noise?

A. There's evidence that it absolutely is, yes.[24]

C. *Kia Knew About The Sephia Systemic Brake Problem*

Timothy McCurdy, Kia's Director of Technical Operations, testified that Kia became aware of Sephia brake system problems as early as 1995.[25] He acknowledged that the braking system of the Sephia continued to be a problem in subsequent model years.

Q. To what extent do you have a recollection that the braking system of the Kia Sephia continued to be a problem in subsequent model years?

A. The—all components of cars as well as the brake system, if we have issues with it, it's continued. In the case of the brakes, we've had issues on the brakes where we—it's an ongoing—it's an ongoing issue where we're

[24] 05/19/05, morning session, at 109-110.

[25] 05/18/05, afternoon session, at 3.

> continuously trying to make improvement and make part changes and so on.[26]

Kia's Senior Vice president of Fixed Operations, Lee Sawyer, testified: ". . . [a]fter—after a while, you know, as you get into '98 and '99, it becomes, quote, unquote, a known product problem."[27] Indeed, numerous Kia records and documents offered into evidence illustrate the systemic Sephia braking problem. Kia documents also demonstrated defendant Kia Motors America's mostly unsuccessful attempts to convince Kia Motors Corporation in Korea to fix the Sephia braking problem.

Donald Pearce was Kia's Vice President of Parts and Service.[28] Prior to 2003, Mr. Pearce had been Kia's Vice President of Service. He was responsible for all warranty claim administration, product quality, and technical operations support for Kia's field and retail organization. He participated in a "Customer Satisfaction Program".[29]

Mr. Pearce explained that "warranty claim rate" is a mathematical calculation of the percentage of total claims versus the total number of vehicles sold.[30] In all his experience in the automotive industry, Mr. Pearce had never seen brake claim rates as high as the Sephia.[31] There was a 91% claims rates for

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[26] 05/18/05, afternoon session, at 4.

[27] 05/23/05, morning session, at 23.

[28] 05/24/05, morning session, at 48.

[29] 05/24/05, morning session, at 49, 54.

[30] 05/24/05, morning session, at 59.

[31] 05/24/05, morning session, at 64.

brake problems on the '97 Sephia.[32] In 1998, Kia sold 45,847 Sephias and had 70,000 claims about the brakes.[33] In 1999 Kia sold 57,000 Sephias and 97.9 percent of that number of cars had brake claims.

These records were not compiled for litigation, they were created for Kia's business purposes. In 1999, Kia compiled warranty claims rate records for the Sephia from September 1997 to July 1999 to present to Korea Kia Motors vendors visiting the United States. This chart was shown to the jury.[34] Timothy McCurdy testified:

> In 1999—the years 1999, 2000, we—the manufacturer, Korea Kia Motor Corporation, sent all of the vendors who make components parts for the manufacturer, Korea Kia Motors Corporation, sent all of the vendors who make components parts for our vehicles to the United States. There is [sic] 103 vendors. They sent them to us for us to make a presentation to them to their president on their particular component that they made or manufactured for our vehicle in Korea. And for each vendor we used this format, and we provided them warranty history, parts sales, obviously the component name, and the problem with the component, and any comments or recommendations. So just a brief overview. So this particular one was for the vendor,

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[32] 05/24/05, morning session, at 63. Q. "[i]f Kia sold 42,713 cars, the number of claims was 90 percent of that number?" A. "In total raw volume, yes sir."

[33] 05/24/05, morning session, at 63.

[34] 05/19/05, morning session, at 91.

> the manufacturer in Korea, of the brake rotor—yeah, the brake rotor.[35]

Kia's own warranty repair records over a two year period demonstrated that Sephias had a 41.8% warranty claims rate due to the defective brake system. In contrast, the rate for the Kia Sportage was 6.3%.[36]

Plaintiffs' automotive engineering expert, Mr. King, found this huge discrepancy significant:[37]

> The difference is significant. The difference is significant because I think it would be unreasonable to expect that a driver of a Kia Sephia is any different than a driver of the Kia Sportage, that Sephia vehicles are driven in any different conditions or at any different locations than a Sportage.
>
> So the only difference between those two vehicles, then, really is the braking system. So if there's that much of a difference in the claims rate, then it points to a problem with the braking system on that vehicle and nothing else.[38]

Kia also learned about Sephia brake problems from Kia District Parts and Service Managers in the field. Kia distributors around the country routinely had to deal with worn out brakes and customer complaints. Of course they told Defendant Kia about these problems. District Parts and Service Managers told

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[35] 05/18/05, afternoon session, at 60-61.

[36] 05/18/05, afternoon session, at 63-66.

[37] Defendant Kia's engineering expert, Bruce Bowman, also relied on the same Kia warranty claims data in forming his opinion 05/24/05, afternoon session, at 4, 15.

[38] 05/19/05, morning session, at 92-93.

Defendant Kia about the Sephia's brake problems through Quality Assurance Field Product Reports. Mr. McCurdy testified that Defendant Kia relied on these Field Product Reports as their primary authoritative source for product issues.

> Q. The field product reports, which I'll be asking you about in a little bit, are they documents that you rely upon in attempting to figure out whether there is a problem with a particular component and why that problem exists?
>
> A. We rely on it to get information from the field on product issues.[39]

Kia repeatedly received these reports complaining of systemic Sephia brake problems.[40] One report, typical of the many Kia received, was from a Kia District Parts Service Manager in May of 1999:

> Condition: Brake vibration at 1602 miles owner drives vehicle very little; Cause: Front rotors warped; Action/results: Replace front rotors. Comments/recommendations: This is a well known condition and needs to be corrected ASAP. It is the cause of numerous buy backs, BBB arbitrations, and legal cases.

Kia also maintained a National Technical Assistance Center hotline for repair technicians at Kia dealerships to call for technical advice. These calls documented that systemic design problems existed causing unreasonably early wear-out of brakes and rotors.[41] Kia recorded these technician calls in reports

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[39] 05/18/05, afternoon session, at 79.

[40] 05/19/05, morning session, at 79.

[41] 05/19/05, morning session, at 80-81.

called Technical Assistance Center Incident Reports. One typical Technical Assistance Center Incident Report for a Sephia with 27,135 miles listed the condition of the car as: "Brake pads worn out after about 3,000 miles." The report continued,

> "12/01/99: LKM > Customer states the brakes are squeaking. Harold states the vehicle has had the brakes replaced about 3,000 miles ago. He states the pads are worn down to the indicators."[42]

Similarly, a report dated June 8, 1999 for a Sephia with 21,092 miles stated: "Condition: Weldon the service mngr, said this vehicle is in for the third time for brakes pulsation caused by disk warpage."[43]

Plaintiffs' engineering expert used Kia Technical Assistance Center Incident Reports in forming his opinion: ". . . [t]he indication that it's in for its third brake repair within just over 21,000 miles, that's an abnormal scenario."[44]

D. *Sephia Brakes Continued To Be Problematic Despite Attempts To Fix The Problem*

In response to the mounting customer and service technician complaints about systemic Sephia brake system problems, Kia repeatedly modified the Sephia pad specifications. Timothy McCurdy testified:

> [O]ver time we've had several different brake pad materials and changes in the brake system. There has been a lot of change in the Sephia brake system over time, and those have all come

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[42] 05/19/05, morning session, at 82-83, P21.

[43] 05/19/05, morning session, at 84-85.

[44] 05/19/05, morning session, at 85.

> about trying to improve on vibrations and brake pad wear noise.[45]
>
> [W]e saw that they were being replaced earlier and more frequently than we would like. I mean, we had a—we knew that improvements could be made, you know. We knew we had consumer complaints. We knew we had warranty history, you know. So we were doing everything we could over time, and we've been continuously doing that since 1995, to try to reduce the number of claims and customer complaints. And the only way you can do that that I know of is to make improvements on the brake parts, and that's been our objective all along . . .[46]

Mr. Sawyer, Kia's Senior Vice President of Fixed Operations, outlined Kia's attempts to remedy the Sephia brake problem:

> "There was probably some squeaking and then it evolved to soft pads to fix the squeaking, the soft pads evolve to premature wear, premature wear evolved to brake vibration in the rotor and lots of heat generation. And then I can chamfering, C-H-A-M-F-E-R-I-N-G, brake pads. Lots of attempts to fix the car. So this is a function of quality assurance, feeding back to the factory we have a problem, the factory engineers are working on fixing it by putting chamfers or changing the composition of the pads, et cetera. I think even at some point they changed the pad manufacturer."[47]

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[45] 05/18/05, afternoon session, at 21.

[46] 05/18/05, afternoon session, at 22-23.

[47] 05/23/05, morning session, at 22-23.

Defendant Kia developed and issued Technical Service Bulletins to disseminate information to dealers about the new pads Kia developed in an attempt to remedy significant repair problems. Kia issued five Technical Service Bulletins[48] related to the Sephia brakes alone.[49]

Plaintiffs' expert agreed with corporate designee McCurdy and Kia's own analysis:

> Q. Could you describe for the jury what a Technical Service Bulletin is?
>
> A. Technical Service Bulletin is a document that outlines or prescribes a new component or a new procedure that's to be used within the repair shop. Sometimes it can implement a change or implement a superseded part, if you will. But it's a communication from the corporate office, if you will, to the technicians at the service dealerships of a change in a service or procedure.
>
> Q. Do you agree that the description that Mr. McCurdy offered of the Technical Service Bulletin yesterday as being issued in connection with "significant repair problems?"
>
> A. I do, yes.
>
> Q. Was there a series of technical Service Bulletins issued for the Kia Sephia regarding the braking system?

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[48] The first Technical Service Bulletin regarding Sephia brakes was issued by Kia in March 1997. The March 1997 TSB stated "[t]he new brake pads are a replacement for previous Sephia brake pads and should also be used to correct Sephia brake noise complaints in models produced between 5/26/95 and 2/3/97." 05/19/05, morning session, at 100-101, P13A.

[49] 05/18/05, afternoon session, at 84-85.

A. There were. There were, as I recall, five or six such bulletins.[50]

Trying to analyze and fix the Sephia brake defect, Kia hired an outside engineering testing firm to perform industry standard brake tests to determine the effectiveness of the new pads that had been developed.[51] Mr. McCurdy stated: "in our ongoing development of improved pads and so on, we did hire an outside engineering testing firm to do the L.A. city brake test for new pads that had been developed to determine the effectiveness of the new pads."[52] The L.A. City Brake Test is an objective test used by automobile manufacturers in the United States to determine a vehicle's brake pad life and effectiveness. Kia conducted L.A. City Brake tests on Sephia brake pads in 1999, in 2000, and again in 2001. These tests showed that the Sephia's brake pad life fell substantially below U.S. market standards. Mr. McCurdy reported the results of the brake tests to Korea in support of his continual for Sephia brake improvement:[53]

Q. There is a document numbered 0412 called "Sephia Brake Pad Test Overview," and then in the L.A. City Brake Test, appears to be dated 7/12/99. Did you prepare this document?

A. Yes.

Q. There is a reference to the test results and to the pad wear, and then it says "minimum" in parens. Now, do I understand that on the auto-

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[50] 05/19/05, morning session, at 99.

[51] 05/18/05, afternoon session, at 69.

[52] 05/18/05, afternoon session, at 24-25.

[53] 05/18/05, afternoon session, at 75.

matic transmission the pad wear that resulted from the test was an expected 9,400 miles?

A. Yes, that's correct. That was the results of the test from objective measurements.[54]

The tests objectively showed that the Sephia brakes would last only 9,400 miles.[55]

Defendant's own trial expert, Mr. Bowman, ordered tests for litigation which confirmed the results of Kia's brake tests. Mr. Bowman, testified that he had commissioned tests on the pad life of the original design of the Sephia brakes.[56] The jury heard that the defense trial expert's own tests showed an average minimum pad life of 7,000 miles.[57] The results of defense expert Bowman's tests, which were performed exclusively for litigation purposes, were 2,000 miles worse than Kia's previous poor test results of 9,400 miles.[58]

In a last ditch attempt to salvage some customer goodwill and avoid lemon law lawsuits because of a seriously increasing brake problem, Kia instituted a "Brake Coupon Program." The defendant provided free brake repairs to Sephia owners who had three or

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[54] 05/18/05, afternoon session, at 85.

[55] 05/18/05, afternoon session, at 34.

[56] 05/24/05, afternoon session, at 61. Defendant did not ask their expert about the testing he had commissioned. Plaintiffs elicited this testimony on cross exam.

[57] 05/24/05, afternoon session, at 64. Defendant's expert also performed testing of the 2001 Sephia brakes after the "field fix." The 2001 Sephia brakes lasted only 14,000 miles, still well below Kia's goal of 20,000 miles.

[58] Mr. Bowman testified that he did not rely on the brake test results in forming his expert opinion. 05/24/05, afternoon session, at 61.

more warranty brake repairs, without regard to general driving conditions or particular driver habits or the specific version of brake components on the car.[59]

The brake coupon was sent to 15,259 Sephia owners.[60] Donald Pearce, Kia's Vice President of Parts and Service testified how Kia determined which Sephia owners would receive the brake coupon:

> Q. Why was the '97 through 2000 vehicle years chosen for this program?
>
> A. Looking at a number of factors that we've already talked about, but predominantly focused in a couple of key areas of those customers that had three or more warranty claims within the 3/36 time frame. That puts us into a critical customer satisfaction effort, as well as, to be frank, puts us at risk with a number of state lemon laws.[61]

Even given Kia's restrictive view of "customer good will" the program readily discovered cars which had more than 45,750 warranty brake repairs.

Plaintiffs' expert witness concurred with Kia's conclusions and testimony and relied on the Defendant's own conclusions, records and testimony in formulating opinions.

II. *Kia Warranty Promises*

A. *Kia Sephia Warranty*

Defendant Kia sold all Sephia models in the United States with identical written warranties. The Kia written warranty stated:

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[59] 05/24/05, morning session, at 33-39.

[60] 05/24/05, morning session, at 35-37.

[61] 05/23/05, morning session, at 68-69.

> Kia Motors America, Inc. warrants that your new Kia Vehicle is free from defects in material or workmanship, subject to the following terms and conditions.
>
> Except as limited or excluded below, all components of your new Kia Vehicle are covered for 36 months or 36,000 miles, whichever comes first, from the earlier date of either retail delivery or first use of the Kia Vehicle.

Kia gave purchasers the same written Warranty Booklet with every new Kia vehicle. The Kia Warranty Booklet also contained a Maintenance Schedule. The first recommended inspection of the braking system was at 30,000 miles or 30 months for ordinary driving use, and 15,000 miles or 15 months for instances of severe driving conditions.[62] This same Warranty and Maintenance Schedule was provided for every model of Kia Sephia vehicle.[63]

B. *American Consumer Expectations*

Corporate designee McCurdy, testified that the expected minimum brake pad life in the U.S. market is 20,000 miles or 32,000 kilometers. "[I]n the United States customer expectation is 20,000 miles."[64] Mr. McCurdy explained:

> There is no—there is no—there is no written or firm expected brake life by Kia. There has

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[62] 05/17/05, afternoon session, at 73-74. For normal use Kia claimed the brakes didn't even need to be inspected before 30,000 miles. The reader would not expect to face actual replacement of brake pads and rotors six times before reaching 30,000 miles as Ms. Samuel-Bassett's car required.

[63] 05/18/05, afternoon session, at 14, 24.

[64] 05/18/05, afternoon session, at 72.

> been a—that term "expected brake life," over the years we've used a brake life of 20,000 miles expected. And that number has been used—nobody knows exactly, you know, it's nothing firm, its not a standard, but it's a number that's been used over the years by other manufacturers based on what customers think that if they were asked the question—what do you expect the average brake life in your car should be, and 20,000 miles seems to be a number.
>
> That number came up in the past at Toyotas in brake issues; it came up at Hyundai; it's been at Ford.[65]

Timothy McCurdy also testified regarding recommended inspection intervals:

> Q. Do you know if there are standards from any entity with respect to appropriate or expected intervals between inspection or repair of braking components?
>
> A. Only the recommended maintenance interval and owner's manuals.[66]

Kia's national manager of the consumer affairs department, Michelle Camron, agreed with Mr. McCurdy that minimum customer expectations for pad wear in the United States is 20,000 miles.[67] Plaintiffs' engineering expert, R. Scott King, agreed with Kia, Ms. Cameron, and Mr. McCurdy. He testified that the expected minimum brake life in the United States is between 20,000 and 30,000 miles.

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[65] 05/18/05, afternoon session, at 15-16.

[66] 05/18/05, afternoon session, at 14.

[67] 05/24/05, morning session, at 18.

Mr. King testified that the normal life of a rotor is in the range of 60,000 miles.

C. *Kia Brakes Not Meeting Consumer Expectations*

Owners of the Kia Sephia experienced accelerated brake pad and rotor wear requiring replacement parts at well below 20,000 miles. Kia Technical Incident Reports indicated that Sephia brakes required replacement with only 3,000 miles of use.

> "12/01/99: LKM > Customer states the brakes are squeaking. Harold states the vehicle has had the brakes replaced about 3,000 miles ago. He states the pads are worn down to the indicators."[68]

Mr. Lee Sawyer, Kia's Senior Vice President Fixed Operations until June 30, 2001, testified that Sephia brakes were not meeting consumer expectations:

> "[T]ypically you would expect brakes in a normal environment to last 20, 25,000 miles. I mean, we have all owned cars all of our lives, be they Mercedes or Ford or whatever; and the brakes typically go that long. Some of the Sephia owners were experiencing brake pad life in the 10-12,000 mile range, not all of them, but some of them. And that's kind of below expectations."[69]

Despite repeated requests to Korea, Sephia brakes continued to fall below American market expectations. Mr. McCurdy testified:

> [A]ll along, in any development of brake pads or trying to increase brake improvement on the Sephia brakes, we've always asked for from the

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[68] 05/19/05, morning session, at 82-83, P21.

[69] 05/23/05, morning session, at 16-17.

factory who makes the car, not us—they do all the R & D and engineering—we don't have control obviously of brake life, they do—and we have requested that we would like a brake pad life to be 20—expectation's 20,000 miles. So we're pushing—we push them in that direction at all times in their development of parts to hopefully get close to that number.

Q. Why did you ask Korea to meet that threshold?

A. Because we—ongoing—that's what we're here for today. We've had brake issues and we've tried to improve on the situation over the years by changing pad materials, pad vendors and so on. And the brake issues always had to do with either vibration or wear in trying to push the factory to make corrections to improve on the product. We set this target for them. We would like to see this. We know we're not there, but we would like to see it.

Q. And did you make those requests to the factory in Korea and push that target because you considered the existing performance of the brakes to be unacceptable?

A. We believe that the—depending on what model year it was and what pad and what the complaint was, that improvements had to be made, yes.[70]

[70] 05/18/05, afternoon session, at 16-18.

D. *Kia Knew The Design Of The Sephia Braking System Was Inadequate*

Despite the minimum American expected brake pad life of 20,000 miles, Kia's own brake pad wear specifications were only 16,000 miles (25,000 km).[71] Mr. McCurdy testified to his difficulty convincing the Korean engineers that their Korean standard was inadequate for the American market and that the Sephia brakes were not even meeting Kia's 16,000 mile specification:

> Q. This particular document is described as a document involving product concern for the Sephia brake vibration, 1999; is that right?
>
> A. Uh-huh, yes.
>
> Q. At the bottom of the document there appears a request to KMC to investigate the Korea Beram brake pad wear; is that right?
>
> A. Yes, that's right.
>
> Q. And then there are some handwritten entries. Are those in your handwriting?
>
> A. Yes.
>
> Q. Could you read them please?
>
> A. "KMC wear spec is 25,000 kilometers." That's what they told us, so I wrote that down. And my request—this is a note to myself and was presented to them in the meeting—that we request 32,000 miles, which equates to the 20,000 mile—we talked about earlier pushing for. This is—I remember what this is now. This is 25,000 kilometers, is what they told us during

[71] 05/18/05, afternoon session, at 70-71.

this meeting in response; that our spec for this pad was 25,000 kilometer or whatever their tests have revealed that that pad, the wear on that pad, and that equates, if you calculate it to, I don't know what it would be.

Q. 16,000?

A. Yeah, right. That's not good enough. So we want—like we said before, we're shooting for that 20,000 mile, and here KMS requests 32,000—we made it kilograms so they'd understand. So we were just reiterating that that's not good enough; we want what we've talked about, pushed for a target of at least 20,000 miles on pad life.[72]

Mr. McCurdy continued,

A. We request target of any new brake pad to have a—an expected pad life of 20,000 or more miles.

Q. All right. So I'm clear, you requested that KMC provide Kia America with a brake pad that had an expected pad life of 20,000 or more miles?

A. Yes.

Q. And that was the phrase you used, "expected pad life"?

A. Yes, yes. We always told them that in the U.S.—in the United States customer expectation is 20,000 miles.

Q. Do you recall, incidentally, how KMC responded to your request?

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[72] 05/18/05, afternoon session, at 70-71.

A. They said—they basically said they understood and they would continue attempting to develop new pad materials to reach that objective.

Mr. McCurdy testified that the Sephia brake pads were not even meeting Kia's 16,000 mile pad wear specification:

Q. Did you have any information at or about the time of this meeting as to whether the brake pads being used in the Sephia even met the KMC wear specification?

A. In cases there—that's not a spec again. That's where they found what their brake dyno test indicated, what their projected mileage for the pad was, and it is. And yes, we did experience poorer wear than that, considerably, yes.[73]

Indeed, independent testing revealed that Sephia brakes were not meeting Kia's substandard pad specifications of 16,000 miles. Although the Sephia brakes were not meeting Kia's 16,000 mile pad specification, Timothy McCurdy testified that the 9,400 mile test results were at least an improvement from earlier pads:

Q. Why did you find pad wear of 9,400 miles to be acceptable in any sense?

A. There is a couple of issues here. The—this is a very severe brake pad wear test, so you know, 9,400 miles, sure, we like to see more, but this was a new pad and we were—KMC asked us if this was acceptable or not. If we said no, we would still have been using the other pad which

[73] 05/18/05, afternoon session, at 72-73.

> was not as good as this pad. So we said, Please put it in production, let's use it, but a qualifier is "marginally acceptable." We wouldn't say it's not acceptable, so that was the word we had to use.
>
> When you are working—you're dealing with the manufacturers, Korean, and their language some of these words are very important to get things done, so this was worded and approved by the—my coordinator, but these are words that—these are the words we should do to make sure that they do go ahead with this pad, and the pad is an improvement; it's not as much as we want, but every little step we can get we want, so—[74]

Kia recognized that the Sephia brake system was defective. Donald Pearce, Kia's Vice President of Parts and Service, testified that brakes and rotors are only covered by warranty if there is a defect in workmanship or material.[75]

> Q. [W]hen there's warranty coverage, it's because an item comes within the warranty, correct?
>
> A. Yes, sir.
>
> Q. So if pads and rotors are being replaced under the warranty, it's because they're defective; isn't that true?
>
> A. Yes.[76]

Mr. Pearce testified that Kia reimbursed at least 95 percent of dealer warranty reimbursement

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[74] Kia's litigation expert testified at trial that his objective tests showed only 7,000 miles of utility . . .

[75] 05/24/05, morning session, at 66.

[76] 05/24/05, morning session, at 70.

requests. There was a 91% claims rates for brake problems on the '97 Sephia.[77] In 1998, Kia sold 45,847 Sephias and had 70,000 claims submitted about the brakes, a 154 percent claims rate.[78] In 1999 Kia sold 57,000 Sephias and 97.9 percent had brake claims. Additionally, Kia mailed out roughly 15,000 brake coupons to customers who experienced three or more warranty repairs.[79] Mr. Pearce testified that at least 21 percent of all Sephias sold from 1997 to 2000 had three or more brake warranty repairs.[80]

III. *Samuel-Bassett's Experience Was Typical*.

Class representative Plaintiff, Shamell Samuel-Bassett, experienced the typical brake problems reported to Defendant from numerous sources. On October 27, 1999, she purchased a year 2000 Kia Sephia from an authorized Kia dealer for personal use. Like every other Sephia sold in the U.S., her vehicle had a three year/36,000 mile warranty. Like every other Sephia sold in the U.S., the maintenance manual that came with her Sephia advised that no inspection of the front and rear disc brakes would be needed until 30 months or 30,000 miles had passed. Ms. Shamell-Bassett's Sephia repeatedly needed brake work. Her car repeatedly demonstrated premature pad and rotor wear out, brake squeaking and grinding, and excessive shuddering and vibration on braking.

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[77] 05/24/05, morning session, at 63. Q. "[i]f Kia sold 42,713 cars, the number of claims was 90 percent of that number?" A. "In total raw volume, yes sir."

[78] 05/24/05, morning session, at 63.

[79] 05/24/05, morning session, at 59. For a certified minimum of 45,000 prior warranty repairs to brakes.

[80] 05/24/05, morning session, at 60.

Ms. Shamell-Bassett had to repeatedly replace the brake pads and rotors on her Sephia. Her first problem arose after only 4,000 miles of driving. She had to bring her car into the shop to have her brakes replaced. Despite assurances that the problem had been resolved, her car was back in the shop again for the same brake problem 5,000 miles later (9,196). Only 3,800 miles later the same repairs had to be done again (12,922). These brakes lasted only 4,000 miles before the dealer had to replace the them (16,883). The new "improved" brake pads and rotors lasted only 3,400 miles before the car was again in the shop with the same problem (20,297). These pads and rotors lasted only 2,500 miles before being replaced again (22,712). One can presume that Ms. Samuel-Bassett breathed a sigh of relief when the sixth brake pads and rotors worked for more than 5,000 miles—but her relief was short-lived because at 9,500 miles, the brakes again wore out from excessive heat due to poor design (30,125). Finally, for the first time, those pads lasted 10,000 miles (40,000). This eighth replacement lasted only 5,000 miles before needing repair.

Although Kia knew brake pads should last a minimum of 20,000 miles, and their own inadequate brake specifications called for 16,000 miles, Ms. Samuel-Bassett needed five sets of pads and rotors in the first 17,000 miles of driving. Although Kia told her these parts should not even need inspection for 30,000 miles, Ms. Samuel-Bassett needed seven pads and rotor replacements in the first 30,000 miles.[81]

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[81] And an eighth set 125 miles later.

Sometimes Kia charged her, sometimes they covered the repair under warranty, sometimes they acknowledged a systemic defect.[82]

DEFENDANT KIA MOTOR AMERICA, INC.'S CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL'S 1925(B)

Although unclear, confusing and possibly intended to preserve by generalities non-specific "issues" for appeal through vague language, defendant's 1925(b) Statement does in fact trim the issues presented on appeal from the unreasonably broad Motion and Supplemental Motion for Post Verdict relief.[83] This Court believes it can ascertain five categories of alleged error, many of which have subparts. These will be addressed herein seriatim. Many of the "issues" presented in the 1925(b) statement have not been preserved for appeal because no objection had been raised at trial.

WAIVER

Issues that are not raised by timely and specific objection during trial may not be raised for the first time on appeal. Now thirty years old, in the land-mark decision, *Dilliplaine v. Lehigh Valley Trust Company*, 457 Pa. 255, 322 A.2d 114 (1974), the Pennsylvania Supreme Court clearly ruled that the

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[82] Ms. Samuel-Bassett testified that the first, second, and third time she took her car in for repairs, the dealer replaced her pads and rotors for free. After that, sometimes replacement rotors was covered under warranty, and she was charged for the pads. Sometimes she was charged for both the pads and rotors. See 05/17/05, afternoon session.

[83] Post Verdict Motions purported to raise at least 23 distinct points many of which contained multiple subparts.

trial court must be given an opportunity to correct any errors at the time they allegedly occurred. If no timely objection has been made during trial, the issue has not been preserved for appellate review. Subsequent Pennsylvania procedural rules incorporated the *Dilliplaine* rule: Pennsylvania Rule of Appellate Procedure 302 states: ". . . [i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Likewise, Pennsylvania Rule of Civil Procedure 227.1(b)(1) requires litigants to make timely objections at trial in order to preserve issues for post-trial relief and appellate review on the merits. According to the note to Rule 227.1(b)(1), "[i]f no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief."

Likewise, Pennsylvania Rule of Evidence 103(a)(1) states: ". . . [e]rror may not be predicated upon a ruling which admits or excludes evidence unless (1) In the case the ruling is one admitting evidence, a timely objection, motion to strike or motion *in limine* appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Even "plain errors affecting substantial rights although they were not brought to the attention of the court" cannot form the basis of reversible error.[84]

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[84] The official commentary to Pa. R. Evid. 103(a)(1) makes clear that this language fund in Federal Rule of Evidence 103(d) was specifically and intentionally omitted from the Pennsylvania Rule because it was inconsistent with Pennsylvania law as established in *Dilliplaine*.

In *Dilliplaine*, the Supreme Court articulated the policy underlying the requirement for contemporaneous objections. The Supreme Court explained that timely and specific objections advance judicial economy by allowing a trial court to immediately address errors which are subject to correction before the trial ends:

> This opportunity to correct alleged errors at trial advances the orderly and efficient use of our judicial resources. First, appellate courts will not be required to expend time and energy reviewing points on which no trial ruling has been made. Second, the trial court may promptly correct the asserted error. With the issue properly presented, the trial court is more likely to reach a satisfactory result, thus obviating the need for appellate review on this issue. Or if a new trial is necessary, it may be granted by the trial court without subjecting both the litigants and the courts to the expense and delay inherent in appellate review. Third, appellate courts will be free to more expeditiously dispose of issues properly preserved for appeal. Finally, the exception requirement will remove the advantage formerly enjoyed by the unprepared trial lawyer who looked to the appellate court to compensate for his trial omissions.[85]

Following *Dilliplaine*, in 1993 the Pennsylvania Supreme Court held that a party waived a post-trial challenge to the jury's answers to special interrogatories because that party did not preserve the challenge

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[85] *Dilliplaine*, 322 A.2d at 116-117.

by objecting to the verdict when it was rendered.[86] Likewise, Court indicated that the *Dilliplaine* rule required a party to object to the jury charge and the wording of the jury interrogatories before the case went to the jury.[87] Subsequently, the Pennsylvania Supreme Court squarely held that to preserve any issue for appeal a party must object to the jury charge and the wording of the jury interrogatories before the case goes to the jury.[88] Thus, if a contemporaneous objection is not raised as evidence is received or the jury charge is given or the verdict sheet submitted to the jury, any alleged appellate issues have been waived.

CERTIFICATION

Plaintiff claims error in certifying the class and trying the case on a class wide basis.[89] After a full hearing the Court rendered a detailed Opinion outlining the facts and reasoning for the approval of certification. A copy of the Court's previously issued Opinion is attached hereto and incorporated herein. While the detailed analysis is articulated in the previously issued opinion, the conduct of trial reaffirmed the appropriateness of that class certification

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[86] *Philadelphia v. Gray*, 537 Pa. 467, 633 A.2d 1090, 1095 (1993).

[87] *Id*. at 1095.

[88] *Straub v. Cherne Industries and Dealers Service*, 583 Pa. 608, 880 A.2d 561 (2004).

[89] Although the defendant alleges error in refusing to decertify the class, the Court can find no record of any specific decertification filing prior to trial. Nonetheless, with or without any motion for decertification the exact issues are presented in the question of whether the case had been properly certified initially.

decision. Testimony at trial reaffirmed the reasonableness of this litigation being presented on a Class basis, reaffirmed the ability of counsel to reasonably and fully present the issues for jury resolution on a class basis and reaffirmed the ability of the jury to sincerely, productively, appropriately and justly resolve all issues on a class basis.[90] In order for a class to be certified various procedural requirements must be met.[91]

At trial the defendants stipulated that the class numbered 9,402 members. The jury evaluated class damages at $600.00 per class member. Clearly the criteria of numerosity was satisfied. It strains credibility that a party could sincerely suggest that more than 9,402 product defect design warranty cases claiming damages in the amount of only $600.00 each could be individually tried. If not tried as class litigation, individual claims would place an absurd burden on the both Courts, and on each of the 9,402 plaintiffs.

In this case counsel sought, justified and were awarded fees and costs in the amount of Four Million

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[90] The sagacity of the jury determination is demonstrated by their individualized evaluation of every claim. While the jury found a breach of the express warranty and determined that each class member suffered damage in the amount of $600.00, it also determined that no implied warranty had been breached and that no difference in value of these old cars had been proven at trial. The Court notes that the jury did not blindly accept the representative plaintiff's damages as precisely those sustained by every class member but rather rendered an evaluative verdict on a class basis in the amount of $600.00, significantly less than the named representative plaintiff's individual experience.

[91] *See* Rules of Civil Procedure 1708, 1709, 1710.

One Hundred and Twenty-Five Thousand Dollars. Although this trial was longer and more complicated, because it was presented on a class basis,[92] expert testimony to prove that each vehicle had the same common defect would be required in each individual case. Proof that Kia knew of this defect and therefore breached its warranty and expert testimony that brakes and brake linings should last more than 5,000 miles would have been required in each of the 9,402 cases. In fact, in the instant class trial the defendant attempted to show that the systemic problems experienced by Kia owners were due to individual driving variation. The jury rejected this defense. However, if remanded for 9,402 trials each individual plaintiff will be required to retain and present expert testimony that their individual driving habits did not cause the systemic problems experienced by Sephia drivers. This would be necessary in 9,402 trials even through Kia knew the same problem were [sic] being experienced by all Sephia owners.

The Constitution of Pennsylvania at Article 1 Section 11 states: "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law. . . ." Clearly requiring each of the 9,402 class members to individually litigate damages in the amount of $600.00[93] amounts to sealing shut our Courtroom doors in violation of the Pennsylvania Constitution. Failure to certify this class in reality

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[92] As individual cases there would be no need for any certification process.

[93] Whether a $600 claim began in Municipal Court in Philadelphia County (or at the District Justice level in other counties) or before a panel of arbitrators, each case could result in a jury trial in Common Pleas Court.

creates a now proven valid claim without remedy for 9,402 citizens of the Commonwealth. This is precisely why Pennsylvania law permits class action litigation and has adopted specific Rules of Procedure for its conduct. This case presents the perfect claim for class resolution. Either there is class litigation or defendant Kia receives a $5,640,600 windfall because everyone knows that no other individual cases will ever be tried.[94]

Commonality was clearly demonstrated at trial. Plaintiff's expert witnesses, and the defendant's own actions and records, and the testimony of key defendant corporate executives proved that the brake system was the same for all class vehicles and that Kia was aware that the braking system of the Kia Sephia had a systemic problem and that Kia America worked hard to find the design defect and attempt to correct the problem. Kia made repeated unsuccessful design changes to parts in an effort to resolve these problems on a systematic basis. The testimony at trial clearly demonstrated the commonality decision described in the Certification Opinion was appropriate and properly made.

Typicality was clearly demonstrated throughout the trial both in the testimony of Ms. Samuel-Bassett and the supporting testimony including the defendant's own documents and executive testimony that her problems were representative of class issues. The decision on Typicality as more fully set forth in the Class Certification Opinion was proper.

Adequacy of representation is not an issue and has never been questioned. The "adequacy" of the class

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[94] Presumably the named representative's verdict would be paid.

counsel can be appreciated simply by reading the trial testimony.

The trial testimony clearly demonstrated superior preparation and effective presentation by Plaintiff's counsel team. The only issue which could possibly be raised concerning counsel's representation was the question of why they entered into negotiations for a 50 state settlement significantly lower than the true value of the case as reflected in the Pennsylvania state verdict. Interestingly, although this is the only possible criticism of class counsel, the defense claims the opposite. On this issue, it is difficult to fault counsel's sincere efforts to settle a case rather than run the risks of trial and the risks of reversal on appeal.[95] Nonetheless the adequacy of counsel's representation is demonstrated in a trial verdict for Pennsylvania residents alone which is dramatically better than the best settlement offers ever made by the defendant.[96]

Clearly, the results of this trial which required fine discriminations by the jury and precise count by

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[95] Although defendants are pursuing the claim that this proper verdict after a full trial should be reversed because the Court refused to continue the trial to allow counsel to negotiate a 50 state settlement, subsequent events have rendered this claim moot. A procedural and substantive quagmire not dissimilar to the problems encountered by our military in Viet Nam and their current difficulties would result if the Court's refusal to grant a continuance is found to be reversible error. The California 47 state settlement has now advanced significantly including notice sent to all class members. The Federal Court has rejected the proposed settlement because it is clearly inadequate.

[96] The Pennsylvania 9,402 class member verdict of $600 per claimant a total of $5,641,200 translates into a value of $120 million nationally.

count evaluations demonstrates that the class action procedure was a fair and efficient method of adjudication. Clearly common questions of law and fact predominated over the individualized issues that Ms. Samuel-Bassett presented. Clearly, the jury was able to differentiate between the common issues and the individualized proof.[97]

Although every trial has management difficulties and class actions must be intensely managed the trial of this case demonstrates that there were no insurmountable difficulties encountered in the management of this trial as a class action. The Court greatly appreciates the "ingenuity of counsel"[98] which was relied upon in resolving these management issues as they arose. Trial counsel for both sides worked diligently in representing their clients zealously and presenting the issues so the jury could understand and resolve them rationally, trying this class action to verdict in a serious, significant, and just way.

The possibility of inconsistent adjudications of 9,402 individually tried cases is another factor in evaluating a certification decision. In the event that the possibility of 9,402 individual trials of a defective product could be seriously considered it should be noted that inconsistent verdicts would be a virtual certainty.

The Philadelphia Court of Common Pleas is a most appropriate forum for the trial of this Pennsylvania class action. Philadelphia has a long history of the

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[97] The Court notes that the defendant did settle, 47 state class actions on a common basis and offered to settle 50 state claims on a class basis.

[98] *Janick v. Prudential Ins. Co. of America*, 305 Pa. Super 120, 451 A.2d 451 (1982).

prompt and just resolution of complex cases and is justifiably proud of its complex litigation center which is nationally recognized as the premier mass tort, asbestos, and complex litigation center in the Country.[99]

The claims of individual class members are clearly insufficient in amount to support separate claims. The separate claim of the representative plaintiff under the UTCPL which could not be certified on a class wide basis was tried contemporaneously with this class action. Clearly the case was properly certified as more fully detailed in the Order and Memorandum of September 17, 2004.

WEIGHT OF EVIDENCE

The defendant claims that the jury verdict was against the weight of the evidence. While such a generalized statement of error has in the past been considered waived by the Superior Court[100] the verdict as demonstrated by the most perfunctory review of the evidence in this case clearly supported the verdict. Expert testimony, the testimony of

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[99] Philadelphia is a national forum of choice. In excess of 15,000 Fen-Phen cases were filed in Philadelphia County and resolved within ABA time standards for resolution within 2 years. The vast majority of these cases were filed by out of state attorneys some from as far away as Texas which concerned cases of Fen-Phen ingestion across the country including many plaintiffs from the State of Utah. In excess of 8,000 Baycol cases were likewise resolved within appropriate time limits as counsel representing plaintiffs from across the country chose to file in Philadelphia. This Court itself has handled close to one hundred class action matters and has tried four class action cases to verdict.

[100] *See* for example *Jackson v. Spagnola*, 1985 Pa. Super. Lexis 8742.

defendant executives including Mr. Pierce, Vice President of Service, Mr. McCurdy, defendant's Director of Technical Operations and Corporate Designee and significant documentary evidence created by defendant contemporaneously with the brake problem detailing defendant's knowledge and efforts to rectify the class wide problem on a systematic basis clearly demonstrates the sufficiency of the evidence. Indeed, one need only review the efforts of the American subsidiary to find the cause of the problem and convince its superiors in Korea to rectify the systemic problems and the difficulties the automotive engineers had in resolving the problem to recognize that the verdict was fully supported by the weight of the evidence.[101]

BIFURCATION

The defendant claims error in denying defendant's motion to bifurcate the trial. The trial transcript clearly demonstrates that bifurcation was not needed. The trial was most reasonably tried with damages and liability together. In no way did the testimony concerning damages impact on the liability aspect of the verdict. The jury was clearly capable of and in fact did differentiate between the different claims rendering a defense verdict on some of the claims and rejecting some of plaintiff's damages proof. This is not a case where catastrophic personal injuries are involved. The $600.00 in financial dam-

[101] In evaluating a weight of the evidence claim the Court must conclude that plaintiff's expert testimony was found credible. Primarily plaintiff's expert explained defendants own knowledge, conclusions and efforts. Defendant's own litigation expert's objective test results confirmed the systemic brake pad and rotor deficiencies. N.T. May 24, 2005 afternoon session pgs. 65-67.

ages sustained by each class member could not possibly evoke such horror or sympathy as to have any influence on the liability verdict. Although everyone who owns a car may sympathize with the aggravation of every Sephia owner facing the same brake problem over and over again, this does not compare with the horror of permanent lifelong neurological damage at birth.[102]

The decision on Bifurcation is entrusted to the sound discretion of the trial Court.[103] Bifurcation is not encouraged.[104] The purpose of bifurcation is to avoid prejudice. The jury was able to make fine distinctions, finding for the defense on two separate issues. There was absolutely no prejudice and no abuse of discretion in refusing to bifurcate. It was a reasonable decision.

EXPERT TESTIMONY OF DR. JOHN MATTHEWS

The defendant claims reversible error in allowing plaintiffs' experts R. Scott King and Dr. John Matthews to testify. The claim that there was reversible error in allowing Dr. Matthews to testify is incomprehensible. Dr. Matthews' testimony related only to the claim that the old cars still on the road suffered a reduction is [sic] residual value because of the defective brake system. In question 4 of the jury interrogatories this damages claim was rejected. The

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[102] The Court notes that whatever compassion or sympathy the aggravation of repeat visits to the car dealer does occasion, all such testimony would have been needed in the liability portion of even a bifurcated trial.

[103] *See*, *Sacco v. City of Scranton*, 540 A.2d 1370 (Pa. Commonwealth 1988).

[104] *Coleman v. Philadelphia Newspapers, Inc*., 391 Pa. Super. 140, 570 A.2d 552 (Pa. Super. 1990).

jury found $0 damages. There was certainly nothing prejudicial in Dr. Matthews' testimony that could have in any way affected the other verdicts. Indeed Dr. Matthews' theory having been rejected, it is impossible to determine how the defense possibly claims reversible error in allowing him to testify, even if incorrectly permitted, which it was not.

EXPERT TESTIMONY OF R. SCOTT KING

After a full hearing, the plaintiff's expert R. Scott King was found in fact to be qualified and did in fact render appropriate opinions. The Court notes initially that the bases of expert King's testimony derived primarily from the contemporary records and internally documented activity of Defendant Kia trying to correct the systemic brake problem and testimony from defendant's own employees. Defendant's Motions in Limine to Exclude the Testimony of Plaintiff's Expert R. Scott King was properly decided.

Plaintiff's expert Raymond Scott King is a mechanical engineer. He is employed by D.J.S. Associates consulting in automotive investigation and automotive failure analysis. After attending the Automotive Training Center, Mr. King worked as a mechanic for ten years. As an automobile mechanic he diagnosed and repaired brake problems and was a certified State Inspector. He has performed more than 10,000 Pennsylvania State Inspections each of which required an evaluation of the brakes and a specific notation of the mileage at time of inspection. In 1997 he received a degree in Mechanical Engineering from Drexel University. After graduating from Drexel University he became the chief designer in the flight controls design group for Boeing Helicopter Company. He has received additional training

from the Society of Automotive Engineers, and certification from the Automotive Service Excellence Group including certification in brake systems. Expert King was clearly qualified to testify to the expected brake pad life, the causes of brake deterioration and the costs of replacement and repair in motor vehicles in the United States.

Mr. King explained how a brake system works. He showed the jury brake pads, rotors, and brake calibers from the Kia Sephia and demonstrated how they work together. As required by Pa. R.E. 705, he fully explained the basis of his opinion, including his extensive experience with automotive brakes and braking systems, the recommended mileage interval contained in the Kia Sephia warranty manual[105] which stated that the brakes should not even need to inspection until thirty thousand miles, and the Memo dated February 3, 1999 from Mr. McCurdy to James Lee[106] in which Mr. McCurdy said the expected brake pad life in the United States market is a minimum of 20,000 miles. He reviewed and agreed with the testimony of Kia's technical director and corporate designee Mr. McCurdy. He reviewed the LA brake tests performed on Kia's behalf, the technical service reports, technical service bulletins, warranty claim data, and testimony from Kia executives.

Mr. King also inspected the Sephia vehicle in question together with the car's repair records and found unreasonably short intervals between brake lining and brake pad replacement. Mr. King's inspection of Ms. Bassett's car in September 2001 ruled out any possibility that any cause other than brake design

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[105] P-26.

[106] Offered into evidence as P-7.

defect had caused these brake repair problems. He found no evidence of damage, component failure or abnormal driving which may have caused or even contributed to her unreasonably frequent need for brake replacement.

Mr. King reviewed Kia's own Quality Assurance Records the Quality Assurance Field Product Reports. These field reports prepared by district parts and service manager employees of Kia revealed that the generalized customer issues: ". . . echoed the complaints of the Plaintiff's vehicle." He reviewed "Technical Assistance Center Incident Reports" and warranty claims data whose purpose was to track failure rates and failure trends in Kia vehicles for Kia's internal business purposes. Mr. King reviewed for the jury that the Sephia's own records showed a warranty claims rates for brakes which was huge when compared to a different Kia vehicle, the Sportage. Mr. King's told the jury that the only difference between the two vehicles was the design of braking systems and that such a significant difference in claims rate demonstrated a vehicle-wide problem with the design of the Sephia braking system. Such a dramatically different brake claims rate "to me it was significant and it was indicative of a systematic and model wide defect with the brake system." He agreed with Mr. McCurdy's testimony that this data clearly demonstrated excessive brake repair.

Mr. King explained the results of Kia's own internal investigations into the braking problem. These documents demonstrated that for model year 1997 the Sephia braking system had a warranty claims rate of 91.8 percent. For the model year 1998 braking system warranty claims rate in the Sephia was 154.1

percent. For 1999 the braking system warranty claim rate was 97.9 percent.

Mr. King reviewed the technical service bulletins for the Kia Sephia braking system. He explained that technical service bulletins were sent to dealers to describe new components or new procedures to be used. Mr. King agreed with the testimony of Mr. McCurdy that technical service bulletin [sic] were issued in connection with "significant repair problems" and that numerous bulletins had been issued concerning the Sephia braking system. He testified that Kia had tried repeated but unsuccessfully to remedy the problems with the brakes, explained in detail the technical service bulletins and explained that they were issued to address vibration, noise, and premature wear problems in the Sephia brakes. Based on his review of all the Kia reports, data and analysis he noted that changes made to parts did not significantly reduce the problem, and that finally, in January of 2002 two new components, a different brake pad and a different brake rotor were introduced.

Mr. King reviewed the testimony of Kia executives and corporate designees and agreed with it. Mr. McCurdy testified the documents and testimony established that Kia was well aware of the problem with the brakes and that the technical service bulletins were an effort to address the systematic brake problems. Mr. McCurdy testified that even Kia's internal targets for expected brake wear of 9,400 miles was less than half that expected by the U.S. market. Mr. King reviewed complete test results by KETT Engineering which produced studies for Kia. These studies evaluated the pad life performance of the brake design for Kia.

Indeed, although it may not have been necessary, Dr. King testified to the specific problem that caused Sephia brakes to wear out prematurely, make noise and vibrate. "Heat is a natural consequence of applying the brakes. When we apply the brakes and the brake pad squeeze against the rotor, heat is generated and it's normal. Heat is normal. It just like rubbing your hands together very rapidly, heat is built up and that's normal. There is a normal level of heat that you should expect from braking. But in this particular case with the particular rotor and this particular design vehicle there is too much of it and the heat is destructive and it begins to break down components. . . . excessive heat causes excessive wear." He testified that he agreed with Kia executive and corporate designee. [sic] McCurdy that the old rotor design problems were associated with the failure to dissipate heat and that there was "an improvement, absolutely" with the finally installed new design. He testified that when there was finally an improved design heat was better carried away from the surface. He demonstrated the differences between the repaired brake system and the earlier defective design. He concurred with McCurdy's testimony that the best pad life achieved with the earlier design had been 9,400 miles and that the new design succeeded in achieving a pad brake life of 22,000 miles. Dr. King testified in detail as to how he derived his opinion for the costs associated with repair and there is no question that he was qualified to testify upon to the costs of brake jobs and the information on which he relied upon was totally reasonable and permissible under the law of Pennsylvania.[107]

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[107] The Court notes that no objection was raised by defense counsel about his testimony on costs for replacing pads and

Mr. King did not disagree with the sworn testimony of Kia executives, adopted the findings of the engineering testing performed on Kia's behalf and accepted Kia's own findings as to excessive brake warranty claims. He interpreted these facts to the jury and concluded that the Sephia breaking system had been defectively designed. Mr. King expressed his opinions to a reasonable engineering certainty.[108]

> Q. Mr. King based upon your review of all that data that you have described to the jury, your review of the invoice of Shamell Samuel-Bassett and your inspection of the vehicle did you draw a conclusion as to whether or not the braking system of the Kia Sephia model years 1997 through 2000 suffered from a systematic defect that caused brake pads and routers to prematurely wear and cause noise and vibration in the braking system?
>
> A. I did. In my opinion the data was clear that there was a systematic or vehicle wide problem with the braking system resulting in premature wear."

Mr. King further testified that there was a common underlying common design of the braking system for all class Sephia models and agreed with Mr. McCurdy's testimony that all brake system components in all the Sephia were interchangeable. Mr.

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rotor either at trial or in limine. Although this testimony occurred over five recorded pages of testimony an objection was raised only to the one question which asked him to do a mathematical calculation of extra expenses over the life of a car. Additionally, the Court notes that the jury had before it the actual charges to repair Ms. Bassett's vehicle.

[108] N.T. May 19, 2005, pg. 107.

King's opinion also agreed with Kia that the reasonable range for pad life was between 20,000 and 30,000 miles. He expected rotors to last 60,000 miles. He testified: "My conclusion was that the brake system was defective in that the brake rotor on that Sephia cannot adequately dissipate the heat that is generated during normal braking."

Defendant challenges this testimony because Mr. King is not a licensed engineer or a certified mechanic. They claim he should not have been permitted to testify because he has neither authored publications or taught courses on automobile brakes, or worked for a car company designing brakes.

The standard for qualification of an expert witness is a liberal one. In determining whether a witness is qualified to testify as an expert, the trial judge determines whether the witness "has any reasonable pretension to specialized knowledge on the subject under investigation."[109] Any individual with a "reasonable pretension to specialized knowledge on the subject under investigation" is qualified to give expert opinion testimony except in a medical malpractice case governed by Statute.[110] Experience, formal education, informal training, or any combination can qualify a witness as an expert, so long as the area of expertise fits the question at issue in the trial. An expert does not have to be a specialist. An expert does not have be preeminent in the field or know everything there is to know in the area of expertise. "To qualify one to testify it is not necessary that he

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[109] *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480-481, 664 A.2d 525, 528 (1995).

[110] The MCare Act sets forth additional requirements for expert testimony in medical malpractice litigation.

possess all the knowledge in his special field of activity or that his opinions coincide with the opinions of all others skilled in the same department."[111] There is no requirement that an expert have personally performed independent research or teach or publish on the issue about which she is to offer opinion evidence.[112]

Expert witnesses may gain specific expertise through experience separate and apart from or even instead of formal training. In *Commonwealth v. Puksar*,[113] a witness with general medical qualifications testified to "blood stain pattern interpretation" because he had experience, having reviewed blood spattering at hundreds of crime scenes.

Even formal education is not required to testify as an expert witness. The managing partner of an employment agency with thirty-two years of experience was permitted to testify to the employability and earning capacity of an injured plaintiff, in *Ruzzi v. Butler Petroleum Company*.[114] A football coach with only experiential knowledge of the "customs and safety standards utilized by coaches of high school teams" was qualified to testify about safety practices and procedures appropriate for high school football practice, in *Rutter v. Northeastern Beaver County School District*.[115] A police officer was permitted to

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[111] *Follansbee Bros. Co. v. Garrett-Cromwell Engineering Co*., 48 Pa. Super. 183, 188 (1911). See also, *Pratt v. Stein*, 298 Pa. Super. 92, 444 A.2d 674 (1982).

[112] *See Carroll v. Avallone*, 869 A.2d 522 (Pa. Super. 2005).

[113] 559 Pa. 358, 740 A.2d 219 (1999), cert. denied, 531 U.S. 829 (2000).

[114] 527 Pa. 1, 588 A.2d 1 (1991).

[115] 496 Pa. 590, 437 A.2d 1198 (1981).

testify that an illustration of a crime scene was an accurate scale diagram based upon physical evidence found throughout the room, and measurements even though the officer's formal education had been exclusively in vehicular collision reconstruction. His experience in forensic investigation and applied physics alone gave him sufficient experience to testify. *Commonwealth v. Serge*.[116] A real estate agent with 18 years of experience selling houses in a specific community could testify to the value of a house even though she was neither a broker nor a certified real estate appraiser, in *Hein v. Hein*.[117] A police officer with 14 years of practical experience as a police chemical laboratory technician was qualified to identify drugs, in *Commonwealth v. Bulling*.[118]

No specific credentials or qualifications, or academic degrees or experience is required for an expert to present opinion testimony. It is beyond question that experience alone can be sufficient to provide expert opinion testimony. The standard for the presentation of expert opinion testimony in Pennsylvania is the nationally remarkably lax standard of "reasonable pretension" to specialized knowledge. Mr. King is a licensed safety inspection mechanic for the Commonwealth of Pennsylvania. He is certified by the National Association for Automotive Excellence in Braking. He is a member of the Society of Automotive Engineers. He is a member of the American Society of Mechanical Engineers. He spent a decade as an automotive technician and has diagnosed and

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[116] 837 A.2d 1255 (Pa. Super. 2003), aff'd on other grds., 586 Pa. 671, 896 A.2d 1170 (2006).

[117] 717 A.2d 1053 (Pa. Super. 1998).

[118] 331 Pa. Super. 84, 480 A.2d 254 (1984).

repaired braking systems on hundreds of occasions. He holds an engineering degree from Drexel University.

Mr. King's testimony was primarily grounded in his agreement with the admissions contained in Kia's own records and in the testimony of Kia's own executives. Kia's own records and the testimony of Kia designees and executives document that Kia knew for an extended period of time that Sephia brake problem existed. Kia documents and testimony also show that Kia was aware of consumer expectations in the U.S. automotive market. Indeed, defendant Kia's own records document that they tried to repair the brake problem but could not succeed because of the systematic design problems. Primarily Mr. King explained Kia's own records and admissions in testimony.

There can be no question that Mr. King was qualified to review, understand and explain to the jury the deposition testimony of Kia's own personnel, Kia's own records and to offer the opinion that there was a systematic problem. Likewise there can be no question that the expert was qualified to offer an opinion as to the reasonable charges for common automotive maintenance tasks such as a repair of the brakes.

Defendant also sought to disqualify expert King on the basis of a Frye challenge. The Frye rule applies only when a party seeks to introduce novel scientific evidence.[119] When technical expert opinion evidence has not been developed through a novel methodology, it cannot be precluded by Frye. For example, a

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[119] *Grady v. Frito-Lay, Inc*., 576 Pa. 546, 839 A.2d 1038 (2003); *Commonwealth v. Blasioli*, 552 Pa. 149, 713 A.2d 1117 (1998).

computer-generated animation is merely a graphic illustration demonstrative of an expert's opinion. Since it is not a simulation that asserts facts it cannot be the subject of a Frye challenge.[120]

The Frye rule is not applied every time expert opinion evidence enters the courtroom. "[T]he methodology of an expert testifying to a patient's medical record, which information was used by the patient's doctors to treat the patient was not subject to challenge. These are methods used by medical professionals every day and are not a proper subject for a Frye analysis.[121] DNA analysis has become commonplace and there can be no Frye challenge to such evidence.[122] The microscopic comparative examination of shell and bullet markings, a methodology in use since the 1930s and accepted by the Association of Firearms and Toolmark Examiners, is not subject to a Frye challenge.[123] Reliance on general population studies to determine the cause of a syndrome is not a novel methodology, and therefore the Frye rule is not applicable to this expert testimony.[124] Simply disputing an experts conclusions does not justify a Frye

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[120] *Commonwealth v. Serge*, 586 Pa. 671, 681 n.3; 896 A.2d 1170, 1176 n.3 (2006).

[121] *Folger ex rel. Folger v. Dugan*, 876 A.2d 1049, 1058 (Pa. Super. 2005) holding that a standard spinal fluid test for herpes and the interpretation of its result were neither junk nor novel science.

[122] *Commonwealth v. Hall*, 867 A.2d 619, 633 (Pa. Super. 2005), app. denied 895 A.2d 549 (Pa. 2006).

[123] *Commonwealth v. Whitacre*, 878 A.2d 96 (Pa. Super.), app. denied 892 A.2d 823 (Pa. 2005).

[124] *Ford ex rel. Pringle v. Philadelphia Housing Auth.*, 848 A.2d 1038, 1053-1054 (Pa. Commw. 2004), app. dism., 583 Pa. 439, 879 A.2d 162 (2005).

challenge. An attack on the expert's inferences or conclusions is merely an attack on the weight of the testimony.[125]

The Frye test is applicable only to novel science. It is entirely inapplicable to routine opinion testimony as has been given in the Courts of Pennsylvania for decades. Testimony about product liability design defects have been commonly received in Pennsylvania for decades and may not be challenged under Frye.

In Pennsylvania a Frye challenge goes to the methodology only. A Frye challenge cannot be grounded in the contention that other experts reached different conclusions. Mr. King's methodology consisted of an evaluation of Kia's own documents, engineering tests, efforts to correct the problem, admissions, field reports, technical service reports, and other information from defendant dealers. Mr. King evaluated and digested the testimony of defendant's own executives and corporate designee which revealed that they clearly knew about the ongoing Sephia brake problem, and tried desperately to correct it. Opinions derived from defendant's own tests, studies, technical analysis, field reports, and the sworn testimony of the defendant itself to which a qualified expert witness applies his own experience and knowledge is obviously a permissible methodology. There is no question that the decision of the Court to deny defendant's Motion in Limine was correct.

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[125] *See, Commonwealth v. Hall*, 867 A.2d at 633; *Cummins v. Rosa*, 846 A.2d 148, 151 (Pa. Super. 2004); *see also, Carroll v. Avallone*, 869 A.2d 522, 525, 526 (Pa. Super. 2005), app. granted, 897 A.2d 1183 (Pa. 2006).

JURY CHARGE

The Pennsylvania Supreme Court has repeatedly stated that the trial court has broad discretion in phrasing its instructions to the jury. The trial court may choose any appropriate wording if the law is clearly, adequately, and accurately presented for jury consideration. The entirety of the charge must be examined to determine whether this standard has been met. "It is axiomatic that a jury charge must be read as a whole to determine whether it is fair or prejudicial and that the trial court has broad discretion in phrasing its instructions so long as the law is clearly, adequately and accurately presented to the jury."[126] Error cannot be found by focusing on isolated words taken out of the context of the entire jury instruction.[127] The charge must be read as a whole to determine whether it was fair and accurate or not.

Even where the claim of error is rejecting a proposed points for charge, the rejection must be viewed within the context of the charge as a whole, and against the background of the evidence in the case. The trial judge is not required to use the exact language of any requested point. The Court may use any appropriate language which adequately and clearly covers the subject in question.[128] Even if a jury charge is to any degree inaccurate, the appealing party must demonstrate prejudicial error, and an objection must be raised.[129]

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[126] *Commonwealth v. Miller*, 560 Pa. 500, 746 A.2d 592 (2000).

[127] *Commonwealth v. Smith*, 548 Pa. 65, 694 A.2d 1086 (1997).

[128] *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272, 1276 (1990).

[129] *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272, 1276 (1990).

No objection was raised by counsel following the charge. At the conclusion of the charge the Court said:

> Court: Can I see counsel at side bar before I give final, noncontroversial standard closing instructions.

At side bar the Court asked: "Are there any objections to the charge?"

> Mr. McClure, [for the defense]: None, Your Honor.

Kia claims reversible error because the Court explained a class action trial to the jury. The description of the nature of class action litigation was totally accurate. A jury is entitled to an explanation of the case so that they can understand the nature of the task before them. In *Kimmel v. Yellow Cab Company*,[130] the Supreme Court said: "[t]he duty of a trial Judge in charging a jury is twofold: [1] he must make an accurate statement in plain language of the applicable principles of law, and [2] he must accurately, impartially, without prejudice to any litigant and without usurping the jury's functions assist the jury in applying these principles to the facts of the case before them."

In accordance with the Court's obligation, the Court explained the nature of the case to the jury. The Court said:

> But the other thing I think you need to know preliminarily is that this is a class action. I think we didn't hide it from you, but we didn't exactly discuss it until really towards the end of the

[130] 201 A.2d 417 (Pa. 1964).

case. The caption of the case is Shamell Samuel-Bassett on behalf of herself and all others similarly situated.

I am going to tell you what the claims are . . . and the number of class members, although counsel talked about 10,000 and that's right, the number of class members is 9,402.

So the law provides where there is a large number of similarly situated class members, and a small recovery so that one, it just doesn't pay, you can image the cost that are [sic] involved for both sides in bring [sic] this lawsuit that you have heard for these two weeks and paying these people who are experts and these demonstrations and everything that goes into a lawsuit.

So where there are many claims that are alleged to be similarly situated, and too small to warrant each individual suing on their behalf, the law provides that they can be brought as a class action, and you the jury decide the case for every member of the class. Whatever you decide today, tomorrow, next week, whenever you reach a verdict, will be binding on all 9,402 members of the class. On the one hand, the class members can't bring individual lawsuits because of the costs involved a lawsuit, and on the other hand, the Court can't handle 9,400 cases. Now, I am very proud of what our court has done in handling thousands and thousands of cases, but were we to take 9,400 separate cases, it would be 5, 7 years before the last of them had a jury trial. So the law provides that class actions can be brought under those circumstances.

> The Class in this case is all resident [sic] in the Commonwealth of Pennsylvania who purchased or leased model years 1997, 1998, 1999, and 2000 Kia Sephia automobiles for personal, family or household purposes. Now I haven't given you the whole definition but that certainly the only part of the definition that you need to know."

This instruction about class actions is totally accurate both generally and as applied to this case.

The defendant claims error in the specific words used during the jury charge. Initially, it must be noted that specific words taken out of the context of the entire charge cannot be a basis for reversible error.[131] The charge must be viewed in its entirety and in context and must be affirmed if it reasonably and accurately describes the law in a way that the jury can determine the issues and understand the law.[132] The conduct of the trial, the totality of the jury instruction and the fact that the jury was able to make fine distinctions rendering a plaintiff's verdict on some counts and a defense verdict on others clearly demonstrates that the charge was understood. The charge accurately described the law.

It is hard to understand why defendant claims error in the Court's use of the specific phrases: "market price" and "fair market value." The defense contends there was reversible error in not using the exact words they requested namely: "contract price." The choice of words cannot possibly constitute reversible error since the jury found for the defense on the interrogatory which these words explained.

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[131] *Commonwealth v. Smith*, 548 Pa. 65, 694 A.2d 1086 (1997).

[132] *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 568 A.2d 1272, 1276 (1990).

The Court fully and accurately described warranty and breach of warranty:

> Now, by the words of that warranty, defendant's written warranty is limited to the repair or replacement of defective parts or components. That means if the defendant repaired the brake system so that it was in a nondefective condition, and the defendant did that without charge, then the defendant met its obligation under the written warranty.
>
> And I think that's all the instruction that you need as to warranty law to answer the first question. Did defendant breach its expressed warranty on the cars purchased by the Class? Yes or no. If you find yes, they did breach their warranty, that's a verdict as to the plaintiff Class. If you find no, they did not breach their warranty, that's a verdict for the defendant on that aspect of the case.
>
> The third question reads: Did the defendant fail to remedy the common defect without charge after being given an opportunity to cure the problem? Now, this comes from a federal statute which uses the word cure. So it's in the question, but it really means to fix the problem. The question is, has the defendant failed to remedy a defect after reasonable opportunity to cure without charge? That's Question 3. Did the defendant fail to remedy the common defect without charge after being given an opportunity to cure the problem? If the answer is yes, you've reached a verdict for the plaintiff. Because the question is, did the defendant fail to do something. If you answer no, you've reached a verdict for the defendant because it's a double negative. I'm

> sure we could have come up with a better way of saying it.

The defendant also claims generally that by not using the words "actually incurred and paid" somehow the jury was mislead or the law was not fully explained. The Court fully and accurately explained the damages which could be awarded. The Court actually used what defense apparently considers a "magic word" and said: "That's the out of pocket, paid repair costs." The Court said:

> And the second question of damages asks you to find—state the amount of damages, if any, sustained by each Class member for repair, expenses reasonably incurred as a result of defendant's breach of warranty. That's the cost to repair or replace the affected parts. That's the out of pocket paid repair costs. Second, repair expenses. The evidence supported the verdict which could be supported by the evidence is any figure between zero and $1,249. That's the most that the evidence can support as a verdict for the out-of-pocket repair costs."

Kia specifically objects that their proposed charge number 26 and 37 were not given. Because multiple "amended" and "supplemental" requests were submitted by the defense during the closing days of trial, the Court recently requested clarity as to which specific charges had been refused. Copies of defense charges 26 and 37 as identified for appeal are attached hereto.

The Defendant objects that proposed jury instruction number 26 was not given. This instruction relates only to the implied warranty of merchantability upon which a defense verdict was rendered by the

jury. No reversible error could possibly have occurred by refusing to give a defense proposed jury charge on a claim upon which the defense succeeded. The Court does not believe a new trial is being requested concerning the implied warranty of merchantability count.

The defense claims error in not giving their proposed charge number 37. Charge Number 37 requested that damages be reasonable compensation for loss or injury suffered and that "The plaintiff bears the burden of proving damages by a reasonable certainty." The Court properly instructed the jury that damages were compensation for injury suffered and the proper burden of proof namely, "by a preponderance of the evidence." The Court said:

> This is a civil case. In a civil case it is the plaintiff who has the burden of proving those claims that entitle the Class to relief. When a party has the burden of proof on a particular issue, that claim must be established by a fair preponderance of the evidence. The evidence establishes a claim or contention by a fair preponderance of the evidence if you are persuaded it is more probably accurate and true than not.
>
> [b]ut I brought into the courtroom the scales of a balance beam scale because that's the classic example of the burden of proof. Into one pan you put all the evidence and factors and considerations that support the proposition, into the other pan you put all the evidence and factors and consideration that go against the proposition. If the pans tip ever so slightly or a lot to the side of the plaintiff, they've met their burden of proof. If the pans tip ever so slightly or a lot to the side of the defense, or if the pans remain equally balanced

> and don't tip in either direction, then the plaintiff has failed to meet the burden of proof on whatever you're evaluating.

The Court specifically went over the charge on express warranty[133] at the Charging Conference.

> The Court said: "So now we are up to warranty. If I understand it the defense agrees that there is an express warranty: Right?
>
> Mr. McClure: Yes Your Honor.
>
> The Court: So we really don't need a whole lot of instruction on express warranty, because they are not going to have to decide whether or not there is one. So really, the only general thing they need to know is that a warranty is a promise, either expressed or implied made by a seller of goods that the goods he or she possess will posses certain characteristics. The plaintiff claims a breach of an express warranty, claiming that the Kia Sephia for the model years 1997 to 2000 did not conform to an affirmation of fact or promise made by Kia Motors, Inc. to plaintiff about the vehicle. In this case the affirmation of fact or promise was in the warranty manual. Up to that point does anybody have any objections?
>
> Mr. McClure: No Your Honor.
>
> The Court: Why should I go any further than that? . . . . You can argue from it whatever is important.
>
> Mr. McClure: That's acceptable to the defendant, Your Honor.

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[133] N.T., May 25, 2005, pg. 43.

> The Court: Now what I read was a little stilted and formal. I am sure I'm not going to read it as I read it to you, so don't count on those words, but you can count on those concepts. Actually, 9.01 of the Standard Jury Charge which is entitled "Creation of an Express Warranty" really uses the same concepts in better words. That is all I think that the jury needs to know about an express warranty other than damages which we will get into. . . .

This is substantially the jury charge as given on warranty of merchantability to which no objection was taken.

With respect to damages the defense agreed to the charge for the only damages the jury found applicable.[134]

> The Court said: "So now we are up to damages. Standard Charge on damages will be explained the jury, and they will be explained that their obligation is to award damages for each class member and that the testimony they heard as to Ms. Samuel-Bassett's damages were presented only as representative of each class member. . . . one damage is the cost to replace or repair the defective parts. Correct Mr. Donovan?
>
> Mr. Donovan [on behalf of plaintiff]: Yes.
>
> The Court: Correct, Mr. McClure?
>
> Mr. McClure [on behalf of the defendant]: Correct Your Honor.

The defense claims that the Court improperly explained damages. The jury charge conference

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[134] N.T., May 25, 2005, pg. 56.

demonstrates substantial agreement between counsel in the explanation the Court gave on damages:[135]

> The Court: "In the out of pocket repair costs, what I had told you before was that I would say one, a measure of damages, the costs to repair or replace the affected parts, which is the out of pocket repair costs. I think I am saying the same thing in two difference ways. Does anyone have any objection to this formulation?
>
> Mr. Donovan, No.
>
> Mr. McClure: We would have an objection to that, Your Honor.
>
> The Court: What do you object to?
>
> Mr. McClure: The objection would be that under the limitation of remedies in the warranty that would not be recoverable. They could only recover the costs—Kia's objections under the warranty was to repair or replace any defective parts, if there were any.
>
> The Court: So let me understand. Maybe I can just go with you and—you don't want me to tell the jury that the amount they award has to have been something that the class members spent. That's what the words "out of pocket" mean.
>
> Mr. McClure: That part I can appreciate.
>
> The Court: That's OK?
>
> Mr. McClure: That's OK.
>
> The Court: The part you don't want is the cost to repair or replace the affected part. Is that what you don't want?

[135] N.T., May 25, 2005, pg. 60.

Mr. McClure: That's is fine. But I guess—

The Court: So the one phrase is fine, the other phrase is fine but the two phrases together are objectable. Can you explain that to the Superior Court for us on the record.

Mr. McClure: Maybe we just view it differently in terms of—my take on repair/replace the defective part would be, what would it cost to put the new rotor on the vehicle.

The Court: I am not going to deal with your take I'm going to the deal with the words I used to charge the jury. You can take however you take. I am going to assume that the jury will take it in the right way. That's the assumption we do all our jury trial [sic] on. Now do you object to the measure—that the plaintiffs are entitled to the costs to repair or replace the affected parts?

Mr. McClure: I would object to that charge Your Honor.

The Court: That's your charge no. 34. You have waived your objection to that language when you asked me to charge.

Mr. McClure: Number 34, is that the one that we gave your honor today?

The Court: I have no idea. [what day this charge number 34 was given to the Court] Does it matter? You can't on day one ask me to do something and on day four object when I say I will do it.

Mr. McClure: If Your Honor's question is, Is there an objection to that. Those two questions as far as it goes, the answer is there is an objection.

The Court: Fine. "As far as it goes" What does that mean?

Mr. McClure: Again, I don't know if that was part of a sequence as you are going down getting agreement on each sentence.

The Court: the plaintiff's are entitled to recover, should they prove a warranty claim, the costs to repair or replace the affected parts, which is the out of pocket repair costs. Any objection, Mr. Donovan?

Mr. Donovan: No.

The Court: Any objection Mr. McClure?

Mr. McClure: No, Your Honor.

The defense cannot request a specific charge, agree that each sentence of a two sentence jury instruction correctly states the law and may be used but still object to both sentences being given together. The defense cannot purport to have preserved an objection while specifically affirming no objection.[136]

The jury verdict interrogatories were also clearly, painstaking and specifically reviewed at the charging conference.[137] After going over the verdict sheet the court said:

The Court: Do you object to these three being the interrogatories as to liability Mr. Donovan?[138]

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[136] N.T., May 25, 2005, pg.Page 64. The instruction was as given to the jury was substantively correct, factually agreed to by defense counsel and not preserved by objection.

[137] Notes of Testimony May 25, 2005 page 66 through 73.

[138] N.T., May 25, 2005, pg.At Page 67.

Mr. Donovan: No. No, we do not object as to that.

The Court: As to liability Mr. McClure?

Mr. McClure: A couple of things. . . . With respect to the express warranty, I believe that they are required to show that—I think the jury would have to find that there was a common defect and that there were—and the plaintiff has proven that there were no alternative secondary causes. I am trying to remember the exact language.

The Court: I have defined express warranty in the charge; right?

Mr. McClure: Correct, Your Honor.

The Court: Why should the question they are asked be anything other than, do you find there was a violation of the expressed warranty?

Mr. McClure: I think I understand. Then, finally—

The Court: I understand" [sic] Does that mean it is OK?

Mr. McClure: That one, Your Honor, Yes." [sic]

Clearly Mr. McClure concurred in the jury verdict interrogatories as to liability. As the Court continued reviewing each verdict interrogatory Mr. McClure did not object, did not take exception and in fact agreed.[139] After a conference off the record concerning the final interrogatory form the Court said:

The Court: So, is that alright now?

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[139] N.T., May 25, 2005, pg. 69.

Mr. McClure: Yes, Your Honor.

The Court: Those are really the only three charges, the only three questions, we need as to liability; correct?

Mr. Donovan: Agreed.

The Court: Mr. McClure, isn't that correct? You can look at them again. . . . But if the charge is correct, aren't those the only three questions we need on liability?

Mr. McClure: Yes Your Honor." [sic]

After agreement as to liability was reached, the conference continued as to questions about damages:

The Court: "With respect to damages, I think the question should be couched as: State the amount of damages, if any, sustained by each class member. Then we go on in three different questions. So the first question would read: State the amount of damages, if any, sustained by each class member which is the difference in value of the Sephia as warranted and the Sephia as delivered. Any objections—

Mr. McClure No Your Honor:"[140] [sic]

The Court: And then the second question would be: State the amount of damages if any, if any sustained by each class member for additional repair, for repair expenses as a result of defendant's breach of warranty.

Mr. Donovan: No Objection.

The Court: Do you have any objection to that.

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[140] The Court notes that this was the question on which the jury found no damages.

Mr. Donovan: No, Your Honor.

Mr. McClure: No, Your Honor. All brake systems components in all the Sephia's were interchangeable.

Finally Mr. Donovan asked that the words "per class member" be added at the bottom of the verdict sheet after the space for the verdict amount. Mr. McClure objected because it was redundant and the Court agreed with defense counsel that it was redundant because it was clearly and specifically understood that the verdict would be per class member and that the verdict would be amended by the Court to a class verdict.

Counsel also specifically agreed on May 26th to a jury instruction and verdict interrogatory that if defendant repaired the brake system to a non defective condition without charge the defendant was not liable. Mr. McClure agreed[141] requesting only that the words without "without charge" be eliminated. Mr. McClure stated: "I think it's redundant." After further discussion the defense withdrew even this request.[142] The Court said: So given that discussion do you object to the words without charge being added.

Mr. McClure: Not at all." [sic]

To avoid any possibility of misapprehension the Court restated the charge.

The Court: If Defendant repaired the brake system to a non-defective condition without charge, then the defendant has met its obligation

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[141] N.T., May 26, 2005, Page 10, Line 11.

[142] N.T., May 26, at Page 11.

under the written warranty, correct Mr. Donovan?

Mr. Donovan: That is correct, Your Honor.

The Court: Correct Mr. McClure?

Mr. McClure: Correct.

The defense agreed to the language of the express warranty charge.

On May 26th upon final review of the jury interrogatory Mr. McClure objected to the change in terms from actually incurred to reasonably incurred. This however is a distinction without any difference and cannot constitute reversible error.

Finally, the defense somehow claims error in not specifically telling the jury that plaintiff's claims were limited "solely to the repair or replacement of parts defective in Kia-supplied material or workmanship by an authorized Kia dealer at its place of business" and excluded "brake and clutch lines." This is quite simply inaccurate. Plaintiff's claim was limited to an amount of money that compensates the class for the breach of warranty. The law of the warranty of merchantability and the explicit warranties stated and the damages claim had been clearly, appropriately and accurately explicated to the jury and the defense agreed that the measure of damage is ". . . the cost to repair or replace the affected parts."[143] There was no error in the instructions to the jury.

JURY VERDICT INTERROGATORY

Defendant claims non-specific error in the jury verdict form but does claim error in not using defendant's proposed special verdict form. Defend-

[143] N.T., May 25, 2005, pg. 64.

ant's "First Amended Special Verdict Form" consists of five pages asking 12 detailed questions. These suggested interrogatories included unnecessary and repetitive questions which complicated and would only confuse the jury. The purpose of a jury verdict form is to fairly and properly require the jury to answer those questions which are needed for the verdict and are not to be a substitute for clear and correct jury instructions. The verdict interrogatory fairly and properly stated the questions needed for a proper jury verdict to be rendered. As more fully outlined above, the defense agreed to the questions.

CONTINUANCE

And finally, defendant claims that the proposed settlement which itself was eventually rejected by the United States District for Southern District of Florida by Opinion of the Honorable Judge Zloch of the United States District Court, Southern District of Florida required a continuance of the trial. Even though all counsel were ready and prepared to proceed to trial and all witnesses were available, a continuance was requested to give the parties more time to: (1) void the California settlement, (2) amend the class definition, (3) resolve all issues concerning the "stipulation and agreement of settlement" (4) resolve all issues concerning the "form of mailed notice" to class members (5) resolve all issues concerning the "form of claim form" for class members to make any recovery and (6) resolve any issues arising during negotiations about alternative proofs required of class members for recovery, including form of proof, documentation required, recovery without documentation, (7) a Florida Federal Court Judge agreeing to certification of the national class for settlement, and (8) approval of a national settlement

by a Federal District Court Judge for the Southern District of Florida. Even those issues actually negotiated would have resolved the claims of an entire national class members in a sum which was only three time the total verdict awarded on behalf of a mere 9,402 plaintiffs in the Pennsylvania Class.[144]

In his opinion dated October 18, 2005 denying defendants' request to enjoin further proceedings in this action Judge Zloch agreed with this Court's analysis and affirmed the decision to proceed to trial:

> "The Court notes, however, that the agreement articulated in the MOU could not, by its terms, be either "accepted" or "rejected" by Judge Bernstein in any manner that passed on the inherent legitimacy of the same. Judge Bernstein was simply able to decide whether the MOU presented him with an occasion to stop the proceedings before him."

Judge Zloch concluded that no federal intervention had ever been warranted because the actions in 48 states had substantially progressed beyond the Federal Action.

> Kia represents that the classes have been certified in the California, Pennsylvania, New Jersey, and Florida state actions, and Plaintiffs do not contest this. The Pennsylvania action has produced a jury verdict after a trial on the merits. The California state court has given at least preliminary consideration to a settlement presented to it. The above-styled cause, on the other hand, has not been certified as a class

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[144] The value of the National Class as determined by Judge Zloch exceeds 120 Million dollars. Opinion of November 4, 2006.

> action, and features only a possible settlement that has not been granted preliminary approval. The primary actions Kia seeks to enjoin, therefore, are at stages of litigation well beyond the above-styled cause, which takes this case outside the ambit of the aforementioned causes.

In his final opinion dated November 4, 2006, Judge Zloch concluded that:

> Pursuant to the findings of Judge Bauer [in California] at a preliminary approval hearing on October 3, 2005, notice of the California action and the settlement thereof was sent out to class members on October 10, 2005. Pursuant to Judge Bauer's aforementioned Order (DE 56), class members were to file objections or requests for exclusion by November 18, 2005 and claim forms by December 19, 2005, and a Final Fairness Hearing is scheduled for January 23, 2006.
>
> To sum up the status of the state actions, the Court notes that numerous actions have been filed making factual allegations and stating claims against Kia similar to those made in the above-styled cause. The California action has seen the certification of a 47-state class of Sephia owners, preliminary approval of a settlement, and notice being sent to the class members. Of the states not included in the California settlement, namely, Pennsylvania, New Jersey, and Florida, all have certified classes of Sephia owners and the Pennsylvania action has a Final Judgment which was entered in favor of the Plaintiff class.
>
> A review of the cases detailed above, however, reveals that every Sephia owner in the United

> States has already been certified as a member of a Plaintiff class. There is, therefore, no owner of a Sephia in the United States without a remedy currently being pursued. Furthermore, all of the aforementioned actions have proceeded to a stage beyond the above-styled action.
>
> Sephia owners in forty seven states have received notice of a settlement through the California action, and a final judgment has been entered in favor of Pennsylvania class members.

There was no error in denying a continuance.[145]

CONCLUSION

For the reasons set forth above there was no error. While this was a complex and difficult trial, the case was admirably tried by all counsel and the justice of the jury system in America clearly reaffirmed. The verdict and Judgment of the Court below should be affirmed.

12/28/06
DATE

BY THE COURT:

<<signature>>
MARK I. BERNSTEIN, J.,

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[145] And the proposed "understandings" cannot now possibly be implemented.

APPENDIX D

IN THE COURT OF
COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

———

No. 2199

———

SHAMELL SAMUEL-BASSETT on behalf of herself and all others similarly situated,
Plaintiff,

v.

KIA MOTORS AMERICA, INC.,
Defendant.

———

Class Action
January Term 2001

———

ORDER

———

AND NOW, this 16th day, of May, 2005, upon consideration of the Motion to bifurcate of Defendant, Kia Motor [sic] America, Inc., it is hereby ORDERED that Defendant's Motion is DENIED. Each class member's entitlement to recover if plaintiff class prevails, shall be determined at claims proceedings.

BY THE COURT:

/s/ Mark O. Bernstein
Mark O. Bernstein, J.

APPENDIX E

COURT OF COMMON PLEAS OF
PENNSYLVANIA, PHILADELPHIA COUNTY.

———

No. 2199

———

SHAMELL SAMUEL-BASSETT on behalf of herself and
all others similarly situated
v.
KIA MOTORS AMERICA, INC.

———

Jan. Term 2001
Sept. 17, 2004

———

MEMORANDUM OPINION

BENSTEIN, J.

Plaintiff filed this action in January, 2001 "on her own behalf and on behalf of all other persons similarly situated" for damages arising out of an allegedly defective brake system in the model year 2000 Kia Sephia automobile which she purchased from Bemicker Kia in Philadelphia, PA. Specifically, Plaintiff alleges that her car suffers from a braking defect which causes it to shudder, vibrate, make grinding and groaning noises upon application of the brakes and that it often is unable to stop. At least five attempts were made to repair Ms. Bassett's Sephia within the first 17,000 miles by replacing the brake rotors and pads, apparently without lasting success. Although Plaintiff allegedly demanded timely rescission of her purchase of the vehicle from the defendant, her demand was refused.

By this action, Ms. Bassett seeks damages for the defendant's violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, et. seq., and breaches of implied and express warranties. She further seeks to represent a class consisting "of all residents of Pennsylvania who purchased and/or leased Kia Sephia automobiles for personal, family or household purposes within six years preceding the filing of the Complaint in this action."

After a tortuous sojourn in the Federal Courts, the case has returned to the Court of Common Pleas of Philadelphia County where a record, consisting in large part of the Federal Court Record was created, and briefing, argument and hearing were expeditiously completed.

DISCUSSION

The sole issue before this court is whether the prerequisites for certification as stated in Pa. R.C.P. 1702 are satisfied. The purpose behind class action suits is "to provide a means by which the claims of many individuals may be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate". *DiLucido v. Terminix Intern., Inc.*, 450 Pa.Super. 393, 397, 676 A.2d 1237, 1239 (Pa.Super.1996). For a suit to proceed as a class action, Rule 1702 of the Pennsylvania Rules of Civil Procedure requires that five criteria be met:

> (1) the class is so numerous that joinder of all members is impracticable:
>
> (2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709;

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Rule 1708 of the Pennsylvania Rules of Civil Procedure requires:

In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth [below]

(a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

The burden of showing each of the elements in Rule 1702 is initially on the moving party. This burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made." *Cambanis v. Nationwide Ins. Co*., 348 Pa.Super. 41, 45, 501 A.2d 635, 637 (Pa.Super.1985). The moving party need only present evidence sufficient to make out a prima facie case "from which the court can conclude that the five class certification requirements are met." *Debbs v. Chrysler Corp*., 2002 Pa Super. 326, 810 A.2d 137, 153-154 (2002) (quoting *Janicik v. Prudential Ins. Co.*, 305 Pa.Super. 120, 451 A.2d 451, 455 (Pa.Super.1982)

In other contexts, the prima facie burden has been construed to mean "some evidence," "a colorable claim," "substantial evidence," or evidence that creates a rebuttable presumption that requires the opponent to rebut demonstrated elements. In the criminal law context, "the prima facie standard requires evidence of the existence of each and every element." *Commonwealth v. Martin*, 727 A.2d 1136, 1142 (Pa.Super.1999), alloc. denied, 560 Pa. 722, 745 A.2d 1220 (1999). However, "The weight and credibility of the evidence are not factors at this stage." *Commonwealth v. Marti*, 779 A.2d 1177, 1180 (Pa.Super.2001).

In the family law context, the term "'prima facie right to custody' means only that the party has a colorable claim to custody of the child." *McDonel v. Sohn*, 762 A.2d 1101, 1107 (Pa.Super.2000). Similarly, in the context of employment law, the Common-

wealth Court has opined that a prima facie case can be established by "substantial evidence" requiring the opposing party to affirmatively rebut that evidence. See, e.g., *Williamsburg Community School District v. Com., Pennsylvania Human Rights Comm.*, 99 Pa.Cmwlth. 206, 512 A.2d 1339 (Pa.Commw.1986).

Courts have consistently interpreted the phrase "substantial evidence" to mean "more than a mere scintilla," but evidence "which a reasonable mind might accept as adequate to support a conclusion." *SSEN, Inc., v. Borough Council of Eddystone*, 810 A.2d 200, 207 (Pa.Commw.2002). In *Grakelow v. Nash*, 98 Pa.Super. 316 (Pa.Super.1929), a tax case, the Superior Court said: "To ordain that a certain act or acts shall be prima facie evidence of a fact means merely that from proof of the act or acts, a rebuttable presumption of the fact shall be made; . . . it attributes a specified value to certain evidence but does not make it conclusive proof of the fact in question."

Class certification is a mixed question of fact and law. *Debbs v. Chrysler Corp.*, 2002 Pa.Super. 326, 810 A.2d, 154 (Pa.Super.2002). The court must consider all the relevant testimony, depositions and other evidence pursuant to Rule 1707(c). In determining whether the prerequisites of Rule 1702 have been met, the court is only to decide who shall be the parties to the action and nothing more. The merits of the action and the plaintiffs' right to recover are excluded from consideration. 1977 Explanatory Comment to Pa. R. Civ. P. 1707. Where evidence conflicts, doubt should be resolved in favor of class certification. In making a certification decision, "courts in class certification proceedings regularly and properly employ reasonable inferences, presumptions, and judicial notice." *Janicik*, 451 A.2d at 454,

455. Accordingly, this court must refrain from ruling on plaintiff's ultimate right to achieve any recovery, the credibility of the witnesses and the substantive merits of defenses raised.

"The burden of proof to establish the five prerequisites to class certification lies with the class proponent; however, since the hearing on class certification is akin to a preliminary hearing, it is not a heavy burden." *Professional Flooring Co. v. Bushar Corp*., 61 Pa. D & C 4th 147, 153, 2003 WL 21802073 (Pa.Com.Pl.Montgo.Cty. Apr. 14, 2003), citing *Debbs v. Chrysler Corp.*, 810 A.2d 137, 153-54 (Pa.Super. 2002); *Janicik v. Prudential Inc. Co. of America*, 305 Pa.Super. 120, 451 A.2d 451, 455 (Pa.Super.1982). *See also Baldassari v. Suburban Cable TV Co*., 808 A.2d 184, 189 (Pa.Super.2002); *Cambanis v. Nationwide Insurance Co*., 348 Pa.Super. 41, 501 A.2d 635 (Pa.Super.1985). The prima facie burden of proof standard at the class certification stage is met by a qualitative "substantial evidence" test. However, where relevant defense evidence is presented, it is the plaintiff that has the burden of persuasion and plaintiff runs the risk of nonpersuasion.

Our Superior Court has instructed that it is a strong and oft-repeated policy of this Commonwealth that, decisions applying the rules for class certification should be made liberally and in favor of maintaining a class action. *Weismer by Weismer v. Beech–Nut Nutrition Corp*., 419 Pa.Super. 403, 615 A.2d 428, 431 (Pa.Super.1992). *See also Janicik*, 451 A.2d at 454, citing and quoting *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir.1968) ("in a doubtful case . . . any error should be committed in favor of allowing the class action").

Likewise, the Commonwealth Court has held that "in doubtful cases any error should be committed in favor of allowing class certification." *Foust v. Septa*, 756 A.2d 112, 118 (Pa.Commw.2000). This philosophy is further supported by the consideration that "[t]he court may alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied." *Janicik*, 451 A.2d at 454

Within this context, the court will examine the requisite factors for class certification.

I. Numerosity

To be eligible for certification, Appellant must demonstrate that the class is "so numerous that joinder of all members is impracticable." Pa. R.C.P. 1702(1). A class is sufficiently numerous when "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually." *Temple University v. Pa. Dept. of Public Welfare*, 30 Pa.Cmwlth. 595, 374 A.2d 991, 996 (1977) (123 members sufficient); [F N4] *ABC Sewer Cleaning Co. v. Bell of Pa.*, 293 Pa.Super. 219, 438 A.2d 616 (1981) (250 members sufficient); *Ablin, Inc. v. Bell Tel. Co. of Pa.*, 291 Pa.Super. 40, 435 A.2d 208 (1981) (204 plaintiffs sufficiently numerous). Appellant need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." *Janicik*, 451 A.2d at 456

In this case, the plaintiff's amended complaint avers that, "according to KMA's press releases, KMA sold over 166,000 Sephia automobiles in the United States of America for the years 1997, 1998 and 1999 alone." In her motion for class certification, Ms. Bassett cites to Defendant's response to her Interrogatory No. 8, which states that "for 1997-2000, the total number of Sephia automobiles sold or leased within the Commonwealth of Pennsylvania was 10,042." Joinder of 10,042 plaintiffs is impracticable, the numerosity requirement has been met.

II. Commonality

Common questions are those which arise from a "common nucleus of operative facts. The second prerequisite for class certification is that "there are questions of law or fact common to the class." Pa. R. Civ. P. 1702(2). Common questions exist "if the class members' legal grievances arise out of the 'same practice or course of conduct on the part of the class opponent." [sic] *Janicik*, supra. 133, 451 A.2d at 457. Thus, it is necessary to establish that "the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all." *Weismer by Weismer v. Beechnut Nutrition Corp*., 419 Pa.Super. 403, 615 A.2d 428 (Pa.Super.1992)). However, where the challenged conduct affects the potential class members in divergent ways, commonality may not exist. *Janicik*, supra. 457 fn. 5

"While the existence of individual questions is not necessarily fatal, it is essential that there be a predominance of common issues shared by all class members which can be justly resolved in a single proceeding." *D'Amelio v. Blue Cross of Lehigh Valley*, 347 Pa.Super. 338, 487 A.2d 995, 997 (Pa.Super.1985). In

examining the commonality of the class' claims, a court should focus on the cause of injury and not the amount of alleged damages. "Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification." See *Weismer by Weismer v. Beech–Nut Nutrition Corp*., 419 Pa.Super. 403, 409, 615 A.2d 428, 431 (Pa.Super.). Where there exists intervening and possibly superseding causes of damage however, liability cannot be determined on a class-wide basis. *Cook v. Highland Water and Sewer Authority*, 108 Pa.Cmwlth. 222, 231, 530 A.2d 499, 504 (Pa.Cmwlth.1987).

Here, Plaintiff argues that the potential class theory of liability is centered on a common grievance: that Kia knowingly sold one automobile model, the Sephia, with a uniformly defective braking system that affected all drivers, which Kia unsuccessfully attempted to remedy in a uniform manner. The Amended Complaint identifies the following common questions of law and fact:

> (1) Whether Defendant's Sephia automobiles possess the brake system defect alleged;
>
> (2) Whether Defendant lacks the means to repair the defect or replace the defective brake system;
>
> (3) Whether Defendant's conduct violates the Consumer Protection Law;
>
> (4) Whether the brake system defect constitutes a breach of the implied warranty of merchantability and of express warranty;
>
> (5) Whether Defendant has violated and continues to violate the Magnuson-Moss Warranty Improvement Act;

(6) whether members of the class are entitled to a declaration that Defendant's conduct constitutes a violation of the CPL, a breach of implied and express warranty, and a violation of the Magnuson-Moss Warranty Improvement Act;

(7) whether members of the class are entitled to be notified and warned about the brake system defect and are entitled to the entry of final injunctive relief compelling Defendants to issue a notification and warning to all class members concerning such a defect;

(8) whether members of the class are entitled to actual damages, representing (i) the failure of consideration in connection with or difference in value arising out of the variance between Defendant's automobiles as warranted and Defendant's automobiles containing the brake system defect; (ii) the depression of resale value of the automobiles suffered by Plaintiff and the class arising out of the brake system defect; (iii) sufficient funds to permit Plaintiff and the class to themselves repair each affected automobile using proper parts and adequately trained labor; and (iv) compensation for all out-of-pocket monies expended by the Plaintiff and the members of the class for repair attempts and loss of use of the vehicles.

There is sufficient record evidence that Defendant knew that a vast number of its Sephia automobiles between 1997 and 2001 required replacement of brake pads and rotors at intervals of less than 5,000 miles. According to Plaintiff's evidence, warranty repair statistics demonstrated for model year 1997 cars, 55% of all vehicles required brake warranty repair in the first year, and 40% in the second.

Warranty statistics demonstrated that for model year 1998 cars, 85% of all vehicles required brake warranty repair in the first year, and 58% in the second. Warranty statistics demonstrated for model year 1999 cars, 70% of all vehicles required brake warranty repair in the first year, and "only" 33% in the second. Improvement was achieved in the 2000 year model but warranty statistics still demonstrated that 36% of all vehicles required brake warranty repair in the first year, and 15% in the second. This data clearly indicates a systemic brake problem, identified by plaintiffs as related to a design defect causing inadequate heat dissipation from the front brakes. Plaintiff's evidence is that the common expectation is that brake pad life is between 20,000 and 30,000 miles and that the Kia manual itself recommends the first scheduled brake pad inspection at 30,000 miles. In the class vehicles, 1997 to 2000, 60% had one or more warranty brake repair and in the 1998 vehicle a full 80% of vehicles had at least one warranty brake repair. In view of this evidence and given that Ms. Bassett need only show one common question of law or fact and need not prove her case at this juncture, she has satisfied the requirement of commonality with one notable exception.

3. UPTCPL

Plaintiffs' claims under the UTPCPL fail to satisfy the commonality requirement. To recover under the UTPCPL, plaintiffs must prove reliance. *See Skurnowicz v. Lucci,* 798 A.2d 788 (Pa.Super.2002). A private UTPCPL plaintiff must show that he or she sustained injury as a result of a defendant's unlawful act. *Weinberg v. Sun Co. Inc*., 565 Pa. 612, 777 A.2d 442, 446 (Pa.2001). Because reliance is an integral element of any UTPCPL claim, it is an inappropriate

vehicle upon which to predicate a class action. In *Debbs v. Chrysler Corp*., 810 A.2d 137, 156 (Pa.Super.2002).

The Superior Court has said:

"The UTPCPL was addressed by our Supreme Court in *Weinberg*, *supra*. There, the Court held that a plaintiff bringing a private action under the UTPCPL must establish the common-law elements of reliance and causation with respect to all subsections of the UTPCPL. *Weinberg*, 777 A.2d at 446. Our Supreme Court stated: "the UTPCPL's underlying foundation is fraud prevention. Nothing in the legislative history suggests that the legislature ever intended statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation."

"Both fraud and UTPCPL claims were at issue in *Basile*, *supra*. There, the plaintiffs brought a class action against H & R Block as well as Mellon Bank alleging that the defendants failed to disclose that tax refunds under H & R Block's "Rapid Refund" program were actually short-term, high interest loans. *Basile*, 729 A.2d at 577. The plaintiffs alleged, inter alia, fraud and violations of the UTPCPL. *Id*. at 578.

This Court reasoned that, as to the UTPCPL claims, the plaintiffs must show detrimental reliance. The Court noted that "an action under the UTPCPL may not be amenable to class certification due to discrepancies in the respective levels of reliance displayed by individual class members." *Id*. at 584, citing *DiLucido*, 676 A.2d at 1241. The Court held that the plaintiffs need not show individualized detrimental reliance with respect to H & R Block, because H & R Block's fiduciary relationship with the

plaintiffs established detrimental reliance as a matter of law. *Id*. On the other hand, Mellon Bank had no such fiduciary relationship with the plaintiffs. *Id*. at 585. Therefore, the Court concluded that:

> [The plaintiffs] may not assert the reliance inherent in such a relationship to establish this requirement. Rather, because Plaintiffs' claims against Mellon, unlike those against Block, assert conduct outside the confines of an agency relationship, Plaintiffs must establish reliance as a matter of fact on the basis of the testimony of individual class members. Because such a showing would vary between class members, Plaintiffs' claims against Mellon are not appropriate for treatment as a class action.

Id. at 585."

The Court continued:

"As noted above, Rule 1702 requires, for class certification, that "there are questions of law or fact common to the class." When determining whether a class action is a fair and efficient means of litigating the dispute, "one factor to consider is whether common questions of law or fact predominate over any question affecting only individual members." Rule 1708(a)(1).

Our Supreme Court's directions in *Klemow* and *Weinberg*, as well as our own Court's directions in *Basile* and *DiLucido*, guide us here. In order to prove both common-law fraud and a violation of the UTPCPL, the plaintiffs must show that they suffered harm as a result of detrimental reliance on Chrysler's fraudulent conduct. See, *Klemow*, 352 A.2d at 16 (cause of action for fraud includes a showing that the plaintiff acted in reliance on defendant's misrepre-

sentations and, as such, is not generally appropriately resolved in a plaintiff class action); *Weinberg*, 777 A.2d at 446 (to sustain a private action under the UTPCPL, plaintiffs must show that they suffered "an ascertainable loss as a result of the defendant's prohibited action"). This Court has excused proof of individual detrimental reliance where the defendant has a fiduciary relationship with the plaintiffs. *Basile*, 729 A.2d at 585. Because no fiduciary relationship has been demonstrated between the class and Chrysler to excuse proof of individualized reliance, the individual questions involving reliance and causation would remain a significant barrier to class certification."

The Pennsylvania Supreme Court recently remarked that the causation requirement found in all private UTPCPL actions presented "questions of fact applicable to each individual private plaintiff that would be 'numerous and extensive'". *Weinberg v. Sun Co.*, 565 Pa. 612, 777 A.2d 442, 446 (Pa.Super. 2001). (The same is true in this case. This cannot be established using class wide proof.).

While one might question whether such a fundamental, dangerous and potentially life threatening defect as one involving proper breaking could be of such importance to any reasonable vehicle purchaser as to permit presumed class reliance, our Appellate Courts have clearly and uniformly defined the law as requiring individualized proof of reliance even under the "catch-all" clause of the UTPCPL unless there exists a "fiduciary" relationship between the parties. Accordingly, this one claim is not suitable for class treatment and certification is denied.

III. Typicality

The third step in the certification test requires the plaintiff to show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that pursuit of their interests will advance those of the proposed class members. *DiLucido v. Terminix Intern. Inc.*, 450 Pa.Super. 393, 404, 676 A.2d 1237, 1242 (Pa.Super. 1996).

Typicality is not identically and thus factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory. In other words, typicality will generally be found to exist when the named plaintiffs and the proposed class members challenge the same unlawful conduct.

In this case, the plaintiff asserts that her claims are typical of the claims of the proposed class because, like all proposed class members, she purchased a defective Sephia without having received any warning or notification from the defendant of the braking defect, because the defendant's repeated efforts to repair the vehicle have not been successful and because the defendant has refused to repurchase the vehicle from her. Plaintiff's claims are typical in these respects. Ms. Bassett has satisfied this prerequisite and presents a typical claim aligned with all other class representative [sic].

IV. Adequacy of Representation

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class." Pa. R. Civ. P. 1702(4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

> "(1) whether the attorney for the representative parties will adequately represent the interests of the class,
>
> (2) Whether the representative parties have a conflict of interest in the maintenance of the class action, and
>
> (3) Whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed." Rule 1709.

"Until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession." *Janicik*, 305 Pa.Super. at 136, 451 A.2d at 458. The court presumes that counsel is skilled in their profession. Throughout this litigation plaintiff's counsel has presented the issues and claims professionally and competently.

The plaintiff herself will adequately represent the interests of the proposed class despite the defendant's assertion to the contrary. Specifically, the defendant argues that Plaintiff is inadequate because she has failed to raise a claim under the Pennsylvania Lemon Law; that her interests are antagonistic to those of the remainder of the proposed class because the brakes on her Sephia actually failed to stop her vehi-

cle resulting in an accident in which she sustained personal injury and property damage on at least one occasion; and that an inspection of Plaintiff's vehicle by the defendant's representatives revealed nothing.

In reviewing all evidentiary materials produced, we note that although the defendant's expert did not find anything wrong with the braking system in the plaintiff's Sephia, there is ample evidence that Plaintiff had the brake pads and rotors repaired and replaced more than twelve times by the time the odometer read 45,000 miles and four times by the 12,000-mile mark. Thus, while we do not doubt that the vehicle's brakes properly function with new pads and rotors and that the vehicle's brakes may have been fully operational when inspected by Defendant's expert, the vehicle's repair history nevertheless strongly suggests that the brake pads and rotors could again wear out in an unusually short period of time due to an alleged defective design. Since this is the gravamen of the plaintiff's class complaint, the plaintiff's interests are sufficiently aligned with those of the proposed class to render her an adequate class representative.

Plaintiff's collision with another vehicle due to brake failure does not pit the plaintiff's individual interests against those of the class. Rather, this experience would likely make Ms. Bassett a more zealous advocate on behalf of the class which she seeks to represent since she has experienced the serious potential consequences of the brake design failure alleged. Plaintiff will function adequately as a representative of the proposed class despite her having had an accident.

Finally, Section 12 of the Pennsylvania Lemon Law, 73 P.S. § 1962 provides that "nothing in this act

shall limit the purchaser from pursuing any other rights or remedies under any other law, contract or warranty." Accordingly Ms. Bassett's failure to plead a claim under the Lemon Law does not render her inadequate as a class representative.

"Courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict." *Janicik*, 305 Pa.Super. at 136, 451 A.2d at 458. There is no valid issue presented concerning the adequacy of the representative plaintiff or counsel.

V. Fair and Efficient Method of Adjudication

The final criteria under Pa. R. Civ. P. 1702 is a determination of whether a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

1. Predominance of Common Questions of Law and Fact

The most important requirement in determining whether a class should be certified under 1702(a)(5) and 1708(a)(1) is whether common questions of law and fact predominate over any question affecting only individual members. In addition to the existence of common questions of law and fact, plaintiffs must also establish that the common issues predominate. The analysis of predominance under Rule 1708(a)(1) is closely related to that of commonality under Rule 1702(2) *Janick*, supra. 451 A.2d at 461.

Predominance of common questions does not require a unanimity of common questions but rather demands that common questions outweigh individual

questions. Herein, questions common to the class clearly predominate over those which only affect certain individual owners. Only one model is at issue in this case. The braking system is manufactured in such a way that the parts are fully interchangeable from one model year to the next. That the defendant attempted to correct the defect by numerous design changes is unavailing to rebut that common claims predominate because each change was ineffective.

While Defendant is no doubt correct that each vehicle was driven differently by different drivers in different locations and that the vehicles manifested varying symptoms such as pulsating, grinding, vibration, and failure to stop, there is nonetheless more than sufficient indicia that a vast number of those Sephias manufactured and sold between 1995 and 2001 experienced some or all of the above symptoms and were subject to the wear-out of their brake pads and rotors before reaching the 5,000 mile mark regardless of who was driving them or where or how they were being driven. There is no evidence to suggest that Kia drivers stop and go more than the drivers of any other vehicles. Moreover, there is further evidence that Kia was aware that there were ongoing problems with the Sephia's braking system by virtue of the parts sales history of the Sephia's brake pads and rotors, the Technical Service Bulletins which it issued, its ongoing efforts to redesign and improve its brake pads and rotors and to manufacture them for installation on all model year vehicles, its brake coupon program and the relatively high buy-back rate which the company had for the vehicle. We thus conclude that the questions of whether the Sephia possesses the brake system defect alleged and whether Defendant lacks the means to repair the defect or replace the defective

brake system such as to render it liable for breach of express and implied warranties and under the Magnuson-Moss Warranty Improvement Act do predominate over those issues unique to the individual class members.

2. The Existence of Serious Management Difficulties

Under Pa. R. Civ. P. 1708(2), the court must also consider the size of the class and the difficulties likely to be encountered in the management of the action as a class action. While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight. Problems of administration alone ordinarily should not justify the denial of an otherwise appropriate class action for to do so would contradict the policies underlying this device. *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir.1972). Rather, the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring. *Id* (citing *Buchanan v. Brentwood Federal Sav. and Loan Ass'n*, 457 Pa. 135, 320 A.2d 117, 131 (Pa.1974)). Except for some aspects of individual damage determinations plaintiff's class claims a uniformly defective brake system design. This case presents no serious management difficulties.

Neither do potential differences in individual damage claims based upon individual experiences and costs associated with attempts to repair the vehicle pose any serious management difficulty. What this case does pose, if not certified is the severe potential for inconsistent adjudications and the virtual impossibility of individual remedy.

3. Potential for Inconsistent Adjudications

Pennsylvania Rule 1708(a)(3) also requires a court to evaluate whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class. In considering the separate effect of actions, the precedential effect of a decision is to be considered as well as the parties' circumstances and respective ability to pursue separate actions. *Janicik*, 305 Pa.Super. at 143, 415 A.2d at 462. Were the impossible task of 10,000 individual lawsuits to occur, the costs would overwhelm any recovery and the likelihood of at least some inconsistent verdicts is a real and present danger amounting to a virtual certainty. Class certification is appropriate under these criteria.

4. Extent and Nature of any Preexisting Litigation and the Appropriateness of this Forum

Under Pa. R. Civ. P. 1708(a)(4), (a)(5), and (a)(6) a court should consider the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues, the appropriateness of the chosen forum and whether the amounts recoverable justify a class action. Considering these factors, the court notes that it is a Pennsylvania Class sought for certification and sees nothing inappropriate to the choice of Philadelphia as the jurisdiction for litigation. Philadelphia Courts have a well deserved reputation for effectively managing complex litigation to timely resolution.

Rule 1708 also requires the court to consider the amount of damages sought by the individual plaintiffs in determining the fairness and efficiency of a class action. Thus, a court must analyze whether in

view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate amounts Pa. R. Civ. P. 1708(a)(6). Alternatively, the rules require that the court analyze whether it is likely that the amounts which may be recovered by individual class members will be so small in relation to the expense and effort of the administering the action as not to justify a class action. Pa. R. Civ. P. 1708(a)(7). This criterion is rarely used to disqualify an otherwise valid class action claim. *See Kelly v. County of Allegheny*, 519 Pa. 213, 215, 546 A.2d 608, 609 (Pa.1988) (Trial court erred in refusing to certify a class on the grounds that the class members' average claim was too small in comparison to the expenses incurred.). However, in *Klusman v. Bucks County Court of Common Pleas*, (128 Pa.Cmwlth. 616, 546 A.2d 526) the Court said: "Where the issue of damages does not lend itself to a mechanical calculation, but requires separate mini-trials of a large number of individual claims, courts have found that the staggering problem of logistics make the damage aspect of the case predominate and renders the class unmanageable as a class action. *State of Alabama v. Blue Bird Body Co., Inc*., 573 F.2d 309 (5th Cir.1978)."

"To verify that each of the 108,107 claims suffered actual damages, would present an administrative nightmare because of the overwhelming number of transactions between parties that would be required to be examined. *Mekani v. Miller Brewing Co*., 93 F.R.D. 506 (E.D.Mich.1982). This evaluation of the question of manageability, though ultimately involved with the merits, must be examined in order to determine the efficiency of the class action. *In re Industrial Gas Litigation*, 100 F.R.D. 280

(N.D.Ill.1983). Numerous courts have certified classes of large numbers with small amounts of potential recovery. The damages alleged herein, much of which can be ascertained on a model year basis, do not present any such problems and can readily be ascertained and managed.

5. The Separate Claims of the Individual Plaintiffs are Insufficient in Amount to Support Separate Claims or their Likely Recovery.

Rule 1708 also requires the court to consider the amount of damages sought by the individual plaintiffs in determining the fairness and efficiency of a class action. Thus, a court must analyze whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate amounts.' [sic] Pa. R. Civ. P. 1708(a)(6). Alternatively, the rules ask the court to analyze whether it is likely that the amounts which may be recovered by individual class members will be so small in relation to the expense and effort of the administering the action as not to justify a class a action. Pa. R. Civ. P. 1708(a)(7). This criterion is rarely used to disqualify an otherwise valid class action claim. *See Kelly v. County of Allegheny*, 519 Pa. 213, 215, 546 A.2d 608, 609 (Pa.1988) (Trial court erred in refusing to certify a class on the grounds that the class members' average claim was too small in comparison to the expenses incurred.). However, in *Klusman v. Bucks County Court of Common Pleas*, (128 Pa.Cmwlth. 616, 546 A.2d 526) the court refused to certify a class whose average recovery would have been $3.55. The Commonwealth Court said: "Where the issue of damages does not lend itself to a mechanical calculation,

but requires separate mini-trials of a large number of individual claims, courts have found that the staggering problem of logistics make the damage aspect of the case predominate and renders the class unmanageable as a class action. *State of Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309 (5th Cir.1978)."

"To verify that each of the 108,107 claims suffered actual damages, would present an administrative nightmare because of the overwhelming number of transactions between parties that would be required to be examined. *Mekani v. Miller Brewing Co.*, 93 F.R.D. 506 (E.D.Mich.1982). Petitioners argue these determinations go to the merits. This evaluation of the question of manageability, though ultimately involved with the merits, must be examined in order to determine the efficiency of the class action. *In re Industrial Gas Litigation*, 100 F.R.D. 280 (N.D.Ill.1983). We recognize that numerous courts have certified classes of large numbers with small amounts of potential recovery. The damages herein are ascertainable, not de minimis and quite capable of determination. No problems exist herein for certification.

6. Appropriateness of Equitable or Declaratory Relief

Since plaintiffs seek injunctive relief, it is necessary to consider the criteria set forth in Pa. R. Civ. P. 1708(b). Under Pa. R. Civ. P. 1708(b)(2), where equitable relief is sought, a court should consider whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class. In their Amended Complaint and proofs, plaintiffs claim a

uniform defect, and a failure to remedy, warn, or appropriately compensate which may make injunctive relief appropriate under this rule.

Having weighed the Rule 1702 requirements, this court finds that a class action is a fair and efficient method for adjudicating plaintiffs' claim. Accordingly, this court makes the following conclusions of law.

CONCLUSIONS OF LAW

1. The classes are sufficiently numerous that joinder of all its members would be impracticable.

2. There are questions of law and fact common to the class.

3. Individual questions of fact exist as it pertains to Class claims for violation of the UTPCPL.

4. The claims raised by plaintiff is typical of those claims belonging to absent class members

5. Plaintiff will fairly and adequately assert and protect the interests of the Class.

6. Allowing this case to proceed as a class action provides a fair and efficient method for adjudication of the criteria set forth in Pa. R. Civ. P. 1708.

CONCLUSION

For these reasons, this court grants in part and denies in part Plaintiffs' Motion for Class Certification in accordance with the Order issued herewith:

1. A Class is hereby certified as to Count II, III and IV of the Amended Complaint and defined as follows:

> "All residents of the Commonwealth of Pennsylvania who purchased and/or leased model year 1995-2001 Kia Sephia automobiles for personal, family or household purposes for a period of six years preceding the filing of the complaint in this action"

2. Plaintiff Shamell Sameul-Bassett is designated class representative

3. Plaintiffs counsel are appointed as counsel for the Class.

4. The parties shall submit proposals for a notification procedure and proposed form of notice to class members within twenty days from the date of this Order. Discovery for trial, if necessary, shall commence.

BY THE COURT

/s/ Mark I. Bernstein
MARK I. BERNSTEIN, J.

ORDER AND MEMORANDUM

AND NOW, this 17th day of Sept, 2004, upon consideration of Plaintiffs' Motion for Class Certification, all responses in opposition, the respective memoranda, all matters of record, and in accordance with the contemporaneous Memorandum Opinion, it is hereby ORDERED and DECREED as follows:

1. Plaintiffs' Motion for Class Certification is GRANTED IN PART, DENIED IN PART.

2. A Class is hereby certified as to Count II, III and IV of the Amended Complaint and defined as follows:

> "All residents of the Commonwealth of Pennsylvania who purchased and/or leased model

year 1995-2001 Kia Sephia automobiles for personal, family or household purposes for a period of six years preceding the filing of the complaint in this action"

3. Plaintiff Shamell Sameul-Bassett is designated class representative

4. Plaintiffs counsel are appointed as counsel for the Class.

5. The parties shall submit proposals for a notification procedure and proposed form of notice to class members within twenty days from the date of this Order. Discovery for trial, if necessary, shall commence.

APPENDIX F

[J-31 A-C-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

———

Nos. 22-24 EAP 2008
Application for Reargument

———

SHAMELL SAMUEL-BASSETT on behalf of herself and all others similarly situated,
Appellees,

v.

KIA MOTORS AMERICA, INC.,
Appellant

———

ORDER

———

PER CURIAM

AND NOW, this 24th day of January, 2012, the Application for Reargument is DENIED.

A true copy
As of 1/24/2012

Attest: /s/ Patricia Johnson
Patricia Johnson
Chief Clerk
Supreme Court of Pennsylvania