

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**NICHOLAS H. SMITH, ET AL.,**

**APPELLANT-RESPONDENTS,**

**v.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY,**

**RESPONDENT-APPELLANT.**

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DOCKET NUMBER WD68586  
CONSOLIDATED WITH WD68610

DATE: May 5, 2009

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Appeal From:  
JACKSON COUNTY CIRCUIT COURT  
THE HONORABLE EDITH L. MESSINA, JUDGE

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Appellate Judges:  
Division One: HAROLD L. LOWENSTEIN, Presiding Judge, JAMES M.  
SMART and VICTOR C. HOWARD, Judges.

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Attorneys:  
Michael E. Waldeck, Esq., Overland Park, KS, **for appellant.**

Edward D. Robertson, Esq., and Mary D. Winter, Esq., Jefferson City, MO,  
**for respondent.**

# MISSOURI APPELLATE COURT OPINION SUMMARY

## COURT OF APPEALS -- WESTERN DISTRICT

NICHOLAS H. SMITH, ET AL.,

APPELLANT-RESPONDENTS,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

RESPONDENT-APPELLANT.

WD68586 CONSOLIDATED WITH WD68610

Jackson County

Before Division One Judges: Harold L. Lowenstein, Presiding Judge, James M. Smart and Victor C. Howard, Judges.

In this class action brought by auto insurance policyholders for breach of contract against the insurance company, policyholders claimed the insurance company breached its contracts by basing its repair payouts on the cost of non-OEM (original equipment manufacturer) parts and by omitting certain necessary repairs. After a jury returned a verdict for the plaintiff class as to all counts, the trial court granted insurance company's motion for judgment notwithstanding the verdict finding a failure of proof. Policyholders appealed the grant of the JNOV and insurance company cross-appealed raising several claims of trial error.

**AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH DIRECTIONS.**

**Division One holds:**

The grant of the JNOV was error. The plaintiff class established that the insurance company breached its contracts upon payment of insufficient funds to return their vehicles to pre-loss condition. The issue of pre-loss condition is restricted to a finding of whether the part to be replaced was an OEM or an aftermarket part—a determination that could be made after the jury returned a verdict upon the predominant issue of whether the insurance company breached its contracts. Class claim of error associated with the interpretation of a regulation pertaining to the use of non-OEM parts is moot in light of this court’s analysis. The insurance company’s claims of evidentiary and instructional error on cross appeal are denied. The trial court did not err in failing to decertify the class.

The judgment of the trial court is reversed as to Counts I and II and the jury verdict is reinstated. Pursuant to Rule 72.01(c)(1), this court affirms the trial court’s denial of the insurer’s motion for a new trial. The cause is remanded to the trial court to entertain the plaintiffs’ motions for injunctive and declaratory relief, prejudgment interest, and attorney’s fees and to address individual circumstances or defenses as necessary.

**Opinion by: Harold L. Lowenstein, Judge**

**May 5, 2009**

**THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.**