

84500-0

NO. ~~83949-2~~

SUPREME COURT  
OF THE STATE OF WASHINGTON

DAVID MOELLER,

Respondent,

vs.

FARMERS INSURANCE  
EXCHANGE, and FARMERS  
INSURANCE COMPANY OF  
AMERICA,

Petitioners.

MEMORANDUM OF AMICI  
CURIAE AMERICAN  
INSURANCE ASSOCIATION  
AND PROPERTY  
CASUALTY INSURERS  
ASSOCIATION OF  
AMERICA IN SUPPORT OF  
GRANTING PETITION FOR  
REVIEW

Pursuant to RAP 13.4(h), the American Insurance Association (“AIA”), and the Property Casualty Insurers Association of America (“PCI”), *amici curiae*, urge this Court to grant the Petition for Review submitted by petitioner Farmers Insurance.

**A. DECISION BELOW**

In this case, “Moeller insured his automobile through Farmers Insurance Company. After the vehicle sustained damage in a collision, Farmers paid the full costs of repairs, less a deductible, Moeller claimed that the policy covered loss for the diminished value of his vehicle, but Farmers disagreed.” *Moeller v. Farmers Ins. Co.*, 2010 WL 927989

(Wash. App. 2010), at ¶ 1. The Court of Appeals ruled in Moeller's favor.

The opinion below states:

The policy defines "property damage" as "physical injury to or destruction of tangible property, including loss of its use.

*Moeller*, at ¶ 12. Despite the fact that property damage is unambiguously limited to "physical" injury or destruction to property, the Court below held that the policy provided coverage for "diminished value" because diminished value was proximately caused by the collision and thus was a "direct" result of the collision:

***Here the policy covers diminished value.*** "[D]irect losses include those proximately caused by the initial harm. CP at 19. A collision begins a chain of events that sometimes results in a tangible, physical injury that cannot be fully repaired. Absent an intervening cause, ***diminished value is a loss proximately caused by the collision and this is covered.***

*Moeller*, at ¶ 22 (emphasis added).

The Court further held that the policy's limits of liability clause -- which limits Farmers' liability to the cost to repair or replace the damaged property with other property of "like kind or quality" -- did not exclude coverage for diminished value. *Moeller*, at ¶¶ 24-30.

**B. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER DIVISIONS OF THE COURT OF APPEALS WHICH HOLD THAT POLICIES WHICH DEFINES PROPERTY DAMAGE AS REQUIRING “PHYSICAL” INJURY DO NOT COVER THE INJURY OF DIMINUTION OF VALUE.**

Amici urge the Court to grant Farmers’ petition for review in order to resolve the conflict between the decision below and the following decisions of Divisions One and Three of the Court of Appeals: *Prudential Property and Casualty Ins. v. Lawrence*, 45 Wn. App. 111, 724 P.2d 418 (1986); *Guelich v. American Protection Ins. Co.*, 54 Wn. App. 117, 772 P.2d 536 (1989); and *Walla Walla College v. Ohio Casualty Ins. Co.*, 149 Wn. App. 726, 204 P.3d 961 (2009).

The other two divisions of the Court of Appeals have explicitly recognized that a policy which provides coverage for “physical” injury to property does *not* provide coverage for diminishment in the value of the property. In *Prudential* the insureds demanded that Prudential defend them in a suit brought against them by their neighbors which alleged that construction by the insureds had obstructed their view. Prudential argued that it had no duty to defend the Lawrences because loss of view was not “property damage” as that term was defined in either the Lawrences’ homeowner’s policy or in their “Catastrophe policy.” Division One noted the key difference between the two policies was that the first policy used

the word “physical” in the definition of property damage, and the second policy did not. Relying on an Oregon Supreme Court decision, Division One held that the diminished value of the neighbors’ real property which resulted from an obstruction of their view was not a “physical” injury, and therefore the homeowner’s policy did not cover this type of injury:

The present policy defines “property damage” as “*physical* injury to . . . tangible property.” (emphasis added). . . . ***The inclusion of this word negates any possibility that the policy was intended to include*** “consequential or intangible damage,” such as ***depreciation in value, within the term “property damage.”*** The intention to exclude such coverage can be the only reason for the addition of the word. . . .

*Prudential*, 45 Wn. App. at 421, quoting *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 578 P.2d 1253, 1256 (1978).

On the other hand, because the Catastrophe policy did *not* include the word “physical” in its definition of “property damage,” the Court concluded that there was coverage under that policy:

Under the terms of the Catastrophe policy, Prudential agreed to pay the sums the insured became obligated to pay as damages because of “property damage.” “Property damage” is defined as: “damage to or destruction of tangible property. ‘Property damage’ also includes the loss of the use of the damaged or destroyed property.” Thus, unlike the Homeowner’s policy, the Catastrophe policy does not require *physical* injury to tangible property.

*Prudential*, 45 Wn. App. at 117 (italics in original). Relying on the fact that the word “physical” was **absent**, the Court concluded that the

Catastrophe policy “encompass[ed] damage involving diminution in the value of the property even though no physical damage has otherwise occurred.” *Id.* at 117

Similarly, in *Guelich* Division One again ruled that the diminishment in the value of real property caused by nearby construction which blocked the view from that property was not covered “property damage” because the policy in question covered only “physical” injury to tangible property:

Here, the American policy contains the limiting term addressed in *Prudential*, “physical injury.” *Prudential* provides persuasive authority that this policy language requires a claim to allege physical injury to tangible property so as to give rise to a duty to defend. Here the neighbor alleged that Guelich’s construction resulted in the neighbor losing the use of his view. This loss does not constitute physical injury to tangible property.

*Guelich*, 54 Wn. App. at 119-120.

Loss of use of a view does not constitute property damage as defined in the American policy. The view obstruction suit does not allege physical injury to tangible property. Thus, American had no duty to defend Guelich.

*Guelich*, 54 Wn. App. at 121.

Finally, in *Walla Walla College*, the insured college argued that its general liability insurance policies covered the decrease in the value of a gasoline storage tank which had ruptured and leaked. Relying upon Division One’s decision in *Guelich*, Division Three held that there was no coverage for the diminishment of the tank’s value because the policies in

question required “physical” injury to the property:

The policies define “property damage” as “physical injury to tangible property including all resulting loss of use of that property.” CP at 35. In *Guelich v. American Protection Insurance Company*, 54 Wn. App. 117, 119-20, 772 P.2d 536 (1989), the Court examined the same definition and determined that the loss of a view did not constitute physical injury to tangible property. Likewise here, the College cannot establish that diminution in the value of the tank is property damage under the policies.

*Walla Walla College*, 149 Wn. App. at 735.

In the present case, the insurance policy’s definition of “property damage” is identical to the definitions used in the policies at issue in *Prudential*, *Guelich*, and *Walla Walla College*. Like the policies in those cases, Farmers’ policy used the word “physical.” Accordingly, by holding that this policy language includes coverage for diminution in value, the decision below conflicts with the decisions in *Prudential*, *Guelich*, and *Walla Walla College*. Amicus urges this Court to grant review to resolve this conflict. RAP 13.4(b)(2).

**C. THE NINTH CIRCUIT HAS RELIED UPON GUELICH AND HAS CONSTRUED WASHINGTON STATE LAW AS PRECLUDING COVERAGE FOR DIMINUTION OF VALUE IN CASES WHERE PROPERTY DAMAGE IS DEFINED AS REQUIRING “PHYSICAL” INJURY TO THE PROPERTY.**

Washington case law precluding insurance coverage for diminution of value where the policy in question defines property damage as requiring “physical injury” is well established. It dates back to the *Prudential* case

decided nearly a quarter of a century ago. Insurance companies and insureds alike have relied upon this line of case law. Recently, the Ninth Circuit recognized that Washington law precludes coverage for diminution of value where the policy includes “physical injury” language:

[T]he language of the policy supports our conclusion that Goodstein’s claim for diminution in value cannot be covered under Industrial’s policy. First, diminution in value does not alone constitute “property damage” where the policy language requires “physical injury to tangible property.” [FN 11] In *Guelich v. American Protection Ins. Co.*, 54 Wn. App. 117, 772 P.2d 536 (1989), the issue was whether a homeowner’s umbrella liability insurer has a duty to defend him in a view obstruction suit. The court held that diminution in property value resulting from an obstructed view does not constitute a “physical injury to tangible property” that would give rise to the duty to defend, because such diminution is not itself a physical injury, and a view is not tangible property. [FN 12] *Id.* at 538. ***Thus, it appears that under Washington law, diminution in property value would not be covered as property damage under the “physical injury” language if the Industrial general liability policy.*** See also *New Hampshire Ins. Co. v. Viera*, 930 F.2d 696, 701 (9<sup>th</sup> Cir. 1991) (“[W]e are persuaded that diminution in value is not ‘physical damage’ to ‘tangible property’” under California law); *Auto-Owners Ins. Co. v. Carl Brazell Builders*, 356 S.C. 156, 588 S.E.2d 112, 116 (2003) (“Most courts hold the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury.”).

*Goodstein v. Continental Casualty Co.*, 509 F.3d 1042, 1053-54 (9<sup>th</sup> Cir. 2007) (emphasis added).

Given the fact that courts have been relying on *Guelich* and

*Prudential* for so long, the decision below upsets the legitimate expectations of insurers and effectively changes the insurance policy contracts of tens of thousands of policyholders. Division Two's modification of so many policies in defiance of the settled rule of the *Lawrence/Guelich/Walla Walla College* trilogy of cases creates profound uncertainty in the law. Therefore, whether the *Moeller* decision should stand is also a question of substantial public interest that should be decided by this Court. RAP 13.4(b)(4).

**D. CONSTRUCTION OF THE LIMITS OF LIABILITY CLAUSE IS AN ISSUE OF FIRST IMPRESSION AND A QUESTION OF SUBSTANTIAL PUBLIC INTEREST.**

As Farmers Insurance properly notes in its petition for review, this case involves a question of first impression in this State: When a limit of liability clause limits the insurer's payment to the cost of repair or replacement of the damaged property with other property of like kind and quality, is the insurer obligated to pay an additional sum for the vehicle's "diminished market value" on top of the cost of repair? This is also an issue of substantial public interest which should be determined by this Court. RAP 13.4(b)(4).

In the petition for review, Farmers correctly asserts that a majority of courts that have examined identical or similar insurance contract provisions have concluded that the insurer is *not* obligated to pay for

diminished value on top of repair costs. In response, Moeller argues that Farmers' contention that the decision below is contrary to the "majority view" of courts from other jurisdictions "is disingenuous and grossly overbroad." *Answer to Petition for Review*, at 10. Moeller claims that the Court of Appeals was correct when it stated that "[m]ost courts have determined that diminished value is a covered loss under 'a direct and accidental loss' coverage clause." *Id.*, quoting the Slip Opinion issued below at page 8, n.8.

In a footnote, Moeller then cites 14 cases. But significantly, the Court of Appeals only mentioned 2 of these 14 cases.<sup>1</sup> *Answer to Petition*, at 10, n.3. Of the other 12 cases, many are clearly not on point, 9 of them were decided before 1980, and the scope of some of them has been severely curtailed by the courts which originally decided them.<sup>2</sup> In *Schulmeyer v.*

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<sup>1</sup> The two cases which the Court of Appeals did cite are *Hyden v. Farmers Ins. Exc.*, 20 P.3d 1222 (Colo.Ct.App. 2000) and *State Farm Mut. Auto Ins. Co. v. Mabry*, 274 Ga. 498, 556 S.E.2d 114 (2001). The Georgia case is clearly not on point because it relies on public policy exceptions inherent in Georgia insurance contracts which have no analog in Washington State law. In Georgia all insurance contracts implicitly cover both losses to utility and value.

<sup>2</sup> For example, Moeller relies on *Campbell v. Calvert Fire Ins. Co.*, 234 S.C. 583, 109 S.E.2d 572 (1959) for the proposition that diminished value is a covered loss under a direct and accidental loss policy. But in *Schulmeyer v. State Farm Fire & Casualty Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003), the South Carolina Supreme Court explicitly rejected such a broad reading of *Campbell* noting that the policy language in *Schulmeyer* was more specific than the contract language in *Campbell*, and that in addition "the *Campbell* court failed to apply traditional principles of contract interpretation in construing the insurance contract." *Id.* at 495. "The differing policy languages between the *Campbell* contract and the more specific language in the State Farm Contract combined with the requirement we apply traditional principles of contract interpretation render a contrary result from *Campbell*." *Id.* at 496.

*State Farm Fire & Casualty Co.*, 353 S.C. 491, 496, 579 S.E.2d 132 (2003), the South Carolina Supreme Court noted that “[t]here is a split of authority over whether a plaintiff should be allowed to recover diminished value beyond the cost of repairs, *with the recent trend disfavoring the claim.*” (Italics added, footnote omitted). “The majority of states to recently address the issue deny recovery for diminution of value.” *Id.* at 497.

Whether Washington should follow this trend and refuse to permit recovery for diminution of value where a policy contains an unambiguous clause limiting liability to the cost of repair is a issue of substantial public interest which this Court should decide. RAP 13.4(b)(4).

#### **E. CONCLUSION**

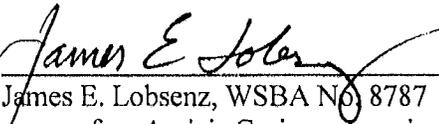
For the reasons stated above, amicus urges the Court to grant Farmers’ petition for review in this case.

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Similarly, Moeller cites to *Senter v. Tenn. Farmers Mut. Ins. Co.*, 702 S.W.2d 175 (Tenn. Ct. App. 1985). But in *Black v. State Farm Mutual Automobile Insurance Company*, 101 S.W.2d 427 (Tenn.Ct.App. 2003), the Court *rejected* the contention that *Senter* supported the contention that Tennessee law generally recognized the principle that diminution of value claims are generally valid in Tennessee: “The subsequent cases cited by plaintiffs, i.e., *Mason v. Tenn. Farmers Mutual*, 640 S.W.2d 561 (Tenn.Ct.App. 1982) and *Senter v. Tenn. Farmers Mutual Ins. Co.*, 702 S.W.2d 175 (Tenn.Ct.App. 1985), are not authority for holding the language in the policies before us is ambiguous, *nor do they establish diminution of value as a doctrine to be applied by Tennessee courts to all motor vehicle policies.*”

DATED this 10th day of June, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Attorneys for Amici Curiae, American Insurance  
Association and Property Casualty Insurers  
Association of America

**From:** Laemmle, Lily [mailto:laemmle@carneylaw.com]  
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Dear Clerk:

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Case Name: David Moeller v. Farmers Insurance Exchange, and Farmers Insurance Company of America  
Cause #: 83949-2

Filing Attorney:  
James E. Lobsenz, WSBA # 8787  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104  
Tel: 206-622-8020  
Fax: 206-467-8215  
[lobsenz@carneylaw.com](mailto:lobsenz@carneylaw.com)

Thank you.

Lily T. Laemmle  
Legal Assistant  
Carney Badley Spellman  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104  
Tel: (206) 622-8020  
Fax: (206) 467-8215  
[Laemmle@carneylaw.com](mailto:Laemmle@carneylaw.com)