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Supreme Court No. 2073  
Court of Appeals No. 30880-1-II

**FILED**  
JUN 27 2010  
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STATE OF WASHINGTON

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DAVID MOELLER,

Plaintiff/Respondent

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and  
FARMERS INSURANCE EXCHANGE,

Defendants/Petitioners.

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AMICUS CURIAE MEMORANDUM OF NATIONAL ASSOCIATION OF MUTUAL  
INSURANCE COMPANIES IN SUPPORT OF PETITION FOR REVIEW

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**AMICUS CURIAE MEMORANDUM OF NAMIC  
IN SUPPORT OF PETITION FOR REVIEW**

The National Association of Mutual Insurance Companies  
("NAMIC") as *amicus curiae* supports the Petition for Supreme Court  
Review filed by Farmers Insurance Company of Washington and Farmers  
Insurance Exchange (collectively, the "Farmers' Defendants").

**I. INTRODUCTION**

NAMIC urges review of the decision by the Court of Appeals in this case because it involves issues of substantial public importance that should be determined by this Court. Although the Court attempted to limit its holding to the specific policy at issue in a footnote, the Court's analysis and decision have far reaching consequences that could impact the insurance and auto industries as a whole. These consequences include confusion for insurers, consumers, repair shops, adjusters and every group that services the insurance and automobile industry. Ultimately, this confusion will result in higher premium rates being charged to Washington consumers and judicial, economic and environmental waste.

As set forth more fully below, this Court should review the decision of the Court of Appeals because, first, the Court of Appeals' unsupported and illogical creation of a definition of "diminished value" raises issues of substantial public importance. Second, this Court must

review the Court of Appeals' decision that the Farmers' policy at issue covers "diminished value" damages because of its fundamentally flawed analysis of the terms of the policy. Finally, the Court should review the Court of Appeals' affirmation of class certification as the class does not meet the class certification requirements prescribed by Washington law.

## II. ARGUMENT

### A. JUDICIAL CREATION OF "DIMINISHED VALUE" WHICH IS ILLOGICAL AND AN UNWORKABLE CONCEPT

The Court of Appeals' unsupported definition of "diminished value" is premised on false assumptions and will create an unworkable and immeasurable standard that needs to be reviewed by the Supreme Court. Without citing any support, the Court of Appeals determined a "vehicle suffers diminished value when it sustains physical damage in an accident, but due to the nature of the damage, it cannot be fully restored to its pre-loss condition" and that "stigma damages occur after the vehicle has been fully restored to its pre-loss condition, but it carries an intangible taint due to its having been involved in an accident." *Moeller v. Farmers Ins. Co. of Wash.*, No. 3088-1-II, 2010 Wash. App. LEXIS 562, ¶17 (Wash. App. Mar. 16, 2010). The Court of Appeals cites "weakened metal" as an example of "diminished value" damage. *Id.* at ¶21. This definition has far reaching consequences that include confusion for

insurers, consumers, repair shops, adjusters and every group that services the insurance and automobile industries.

The Court of Appeals' definition of "diminished value" does not comport with logic. It is premised on a concept that after a vehicle has been properly repaired, the vehicle may still have components that will be comprised of weakened metal that cannot be repaired. *Id.* at ¶6. Simply stated, vehicles that have been properly repaired do not have components that that are irreparably damaged or have "weakened metal". For example, if a vehicle is in an accident and that vehicle's unibody becomes damaged, the auto repair industry has developed standards as to how to repair the unibody components that have been affected or that should be replaced. It is standard industry practice that those unibody structural components that are compromised need to be replaced and those components that can be realigned should be realigned.

Introducing a "weakened metal" concept into the post-repair evaluation of a vehicle's value will distort the public's perception of the auto repair industry and consumers' sense of the structural safety of a repaired motor vehicle. It will inappropriately and unnecessarily impact automobile values and introduce unfounded confusion. Furthermore, consumers, automobile dealers and repair shops' insurers, will have no way of measuring or evaluating these esoteric "diminished value"

damages. This confusion and inability to accurately measure the value of the damages will result in increased litigation and, consequently, judicial waste.

Moreover, the Court of Appeals' definition will create unnecessary economic and environmental waste and cause insurance premiums to rise. For example, the definition will likely result in declaring more repairable vehicles as "total losses," which in turn will lead to additional economic and environmental waste and increasing costs to Washington consumers. Ultimately, this standard could result in a negative impact on the auto repair industry and in the demise of smaller "mom and pop" auto repair shops. Skilled repair technicians will become less valuable, and as for the remaining vehicles that are not "totaled", repair collision shops will replace all parts on the vehicle and discard parts that could have been repaired. Finally, allowing a party to repair a vehicle and then seek "diminished value" damages will result in insurers making a payment in excess of the vehicle's actual cash value and then obligate insurers to consider actions against auto repairers for improper repairs.

Ultimately, this unworkable definition will result in higher premium rates being charged to Washington consumers. As the standard set forth by the Court of Appeals would create industry confusion, create judicial, economic and environmental waste and adversely impact

Washington consumers, the Supreme Court should accept review of the Court of Appeals' decision.

**B. IMPROPER COVERAGE ANALYSIS**

Alternatively, this Court should review the Court of Appeals' finding that the Farmers' policy at issue covers "diminished value" damages because its coverage analysis is fundamentally flawed. The Court of Appeals opinion notes that the policy contains the following language:

**DEFINITIONS**

**Accident or occurrence** means a sudden event, including continuous or repeated exposure to the same conditions, resulting in bodily injury or property damage neither expected nor intended by the Insured person.

\* \* \*

**Damages** are the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**.

\* \* \*

**Property damage** means physical injury to or destruction of tangible property, including loss of its use.

\* \* \*

The foregoing three definitions referenced by the Court of Appeals as "relevant portions of the policy" are, in fact, policy definitions that are completely irrelevant to Collision claims. *Id.* at ¶10. Only those sections

of the policy that concern Coverage G-Collision should have been “relevant” to the Court of Appeals’ decision.<sup>1</sup>

As set forth in the policy’s coverage clause, Farmers “will pay for **loss to your Insured car** caused by **collision . . .**” *Id.* at ¶10. The Court of Appeals states that the policy’s definition of the term “loss” is the “direct and accidental loss of or damage to **your Insured car**, including its equipment.” *Id.* at ¶18. The Court of Appeals then wanders into policy terms applicable to a liability claim to equate “accidental” with the policy’s definition of “accident” and also erroneously refers to “property damage”. *Id.* at ¶18. In misapplying the definitions of “accident” and “property damage”, the Court of Appeals improperly held that the alleged “diminished value” is a “loss proximately caused by the collision and thus is covered.” *Id.* at ¶22. The definitions that are erroneously cited are only applicable to liability claims where a third party seeks to recover damages against an insured.

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<sup>1</sup> **Coverage G-Collision** We will pay for **loss to your Insured car** caused by **collision** less any applicable deductibles . . . . **2. Loss** means direct and accidental loss of or damage to **your Insured car**, including its equipment . . . . Our limits of liability for loss shall not exceed: 1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation . . . . **Payment of Loss** We may pay the **loss** in money or repair or replace damaged or stolen property.

### C. IMPROPER CLASS CERTIFICATION FINDING

In addition to NAMIC's urging review of the Court of Appeals' unsupported finding that Farmers is responsible for paying "diminished value" damages, NAMIC urges this Court to review the Court of Appeals' affirmation of the trial court's decision to certify a class in this action. *Moeller*, at ¶¶45-46. Despite the Court of Appeals' statements that only "[t]enable reasons support the trial court's determination that common issues predominated over individual issues" and that "individual issues may pose management problems for the trial court," the Court of Appeals upheld class certification. *Id.* at ¶44. The class at issue here was certified pursuant to Washington Superior Court Rule 23(b)(3), which requires that the court find that questions of law or fact common to the members predominate over any issues affecting only individual members, and that a class action be superior to other available methods for the fair and efficient adjudication of the controversy. Despite the fact that CR 23(b)(3) expressly lists the difficulties likely to be encountered in the management of a class action as pertinent to this analysis, the Court of Appeals upheld calls certification. CR 23(b)(3)(D). For the reasons set forth in the Farmers' Defendants' Petition and because the class would be wholly unmanageable, the Court of Appeals' class certification decision must be reviewed by this Court.

**III. CONCLUSION**

For all of the foregoing reasons, this Court should accept discretionary review and reverse the Court of Appeals' decision.

DATED this 14th day of June 2010.

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Attached please find a pdf containing the following for filing in *Moeller v. Farmers Insurance Company of Washington*, Supreme Court No. 2073, Court of Appeals No. 30880-1-II:

- (1) Motion To File Amicus Curiae Brief on Behalf of National Association of Mutual Insurance Companies;
- (2) Amicus Curiae Memorandum of National Association of Mutual Insurance Companies In Support of Petition for Review; and
- (3) Certificate of Service.

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