

ORIGINAL

Supreme Court No. 84500-0

FILED
JUN 29 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MOELLER,
Plaintiff/Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON and
FARMERS INSURANCE EXCHANGE,

Defendants/Petitioners.

**PETITIONERS' ANSWER TO AMICUS CURIAE
MEMORANDUM OF NATIONAL ASSOCIATION OF MUTUAL
INSURANCE COMPANIES IN SUPPORT OF
PETITION FOR REVIEW**

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**PETITIONERS' ANSWER TO AMICUS CURIAE
MEMORANDUM**

Petitioners agree with amicus curiae National Association of Mutual Insurance Companies that the Court of Appeals' decision has created a new category of covered "loss" that is supported neither by Moeller's insurance policy nor by Washington law. It is commonly understood that a car damaged in a collision either is a "total loss" or is "repairable." See WAC 284-30-391 (describing how a vehicle total loss claim can be settled); see also WAC 284-30-3902 (repealed 2009) (describing what an insured could expect when a vehicle is repairable). If the car is a total loss, the insured customarily receives a cash settlement based on the actual cash value of a comparable motor vehicle, less any applicable deductible. See WAC 284-30-391(2). If the car is "repairable," the pre-collision value of the car, or the value of a comparable car, is irrelevant. See, e.g., *Sims v. Allstate Ins. Co.*, 365 Ill. App. 3d 997, 851 N.E. 2d 701, 705-07 (Ill. Ct. App. 2006) (rejecting claim that insurer's repair obligation requires insurer to restore a vehicle's pre-accident market value); *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E. 2d 243, 247 (Ind. 2005) (holding insurer's promise to repair a damaged vehicle was not a promise to restore the vehicle's pre-collision value: "repair means to

restore something to its former condition, not necessarily to its former value”).

Ignoring the difference between a total loss and a repairable loss, the Court of Appeals created an entirely new loss category that might be described as “repairable, but not repairable.”¹ Unless this Court accepts review and reverses the Court of Appeals’ decision, Petitioners agree with amicus that the ruling is likely to result in widespread confusion on the part of insurers *and* consumers. There will be confusion over such issues as whether a car that formerly would have been considered repairable

¹ The Court of Appeals created this category out of thin air, citing no case law and making no reference to the record. The court also ignored contrary case law from other jurisdictions. *See, e.g., O’Brien v. Progressive N. Ins. Co.*, 785 A.2d 281 (Del. 2001) (upholding dismissal of insureds’ diminished value claims, after assuming insureds would be able to prove allegation that physical damage remains after proper repairs); *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732, 734 n.1, 739-40 (Fla. 2002) (denying diminished value claim asserted by insured who agreed vehicle had been repaired “to the best of human ability”); *Sims*, 851 N.E. 2d at 707 (rejecting insureds’ claim that policy contemplated repair of their damaged vehicle “plus an additional payment of money for unrepairable diminished value”); *Black v. State Farm Mut. Auto. Ins. Co.*, 101 S.W.3d 427 (Tenn. Ct. App. 2002) (upholding summary judgment in favor of insurer on insureds’ claim that cars had been diminished in value as result of accident and repairs, and that insurer breached insurance contract by not paying for diminution in value in addition to cost of repair); *Bickel v. Nationwide Mut. Ins. Co.*, 206 Va. 419, 143 S.E. 2d 903 (Va. 1965) (rejecting claim for diminished value, where insured conceded that best repairs possible were made, but argued that because car was not restored to its pre-accident market value, it could not be repaired properly); *see also* Thomas O. Farrish, “*Diminished Value*” in *Automobile Insurance: The Controversy and Its Lessons*, 12 Conn. Ins. L. J. 39, 75 (2005/2006) (concluding courts should not imply coverage for diminished value into auto insurance policies, as the policies “unambiguously entitle the insurer to limit its liability to the cost of physical repairs”).

should now be considered a total loss, whether a car that has been fully repaired contains a “not repairable” part, and whether an insurer’s repair obligation means that the actual cash value of every damaged car must now be determined before and after repairs are performed. The Court of Appeals’ ruling raises issues of substantial public interest warranting review by this Court.

Petitioners also agree with amicus that the Court of Appeals’ analysis of class certification was cursory, at best, and did not adequately address whether the trial court met its obligation to perform a rigorous analysis of CR 23’s requirements. For example, there is no mention in the appellate opinion of how the trial court will distinguish between those class members who allegedly have a diminished value claim and those who, as Moeller admits, have no such claim. And although the Court of Appeals’ opinion contains a footnote quoting the trial court’s description of Moeller’s trial plan, App. 14 n.14, the opinion does not address the management problems posed by Moeller’s inability to prove liability on a class-wide basis.² For these reasons and the reasons discussed in the

² See, e.g., *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812 (Colo. 2009) (rejecting class certification in case where “separate inquiries would be necessary to determine the defendants’ liability as to each class member”); *In re NCAA I-A Walk-On Football Players Litig.*, No. C04-1254C, 2006 U.S. Dist. LEXIS 28824, at *41 (W.D. Wash. May 3, 2006) (finding generalized proof of damages

(continued . . .)

Petition for Review, this Court should also accept review of the class certification decision.

DATED: June 29, 2010.

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(... continued)

“unacceptable” in case where “individual issues permeate the determination of *both liability and damages*,” rejecting class certification where potential for thousands of jury trials on injury and damages rendered a class action unmanageable).

CERTIFICATE OF SERVICE BY MAIL

I certify that on June 29, 2010, I caused copies of the foregoing

PETITIONERS' ANSWER TO AMICUS CURIAE
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Approximately an hour ago, I mistakenly sent you the wrong version of Petitioners' Answer to Amicus Curiae Memorandum of National Association of Mutual Insurance Companies in Support of Petition for Review. Please replace that version with the attached version. This replacement filing is submitted by Jill D. Bowman, WSBA #11754, (206) 624-0900, jdbowman@stoel.com.

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