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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

By: *[Signature]*

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 289541

REX and BRENDA ALLEMAND, husband and wife,
Plaintiffs/Respondents,

vs.

STATE FARM INSURANCE COMPANIES, also known as STATE
FARM GENERAL INSURANCE COMPANY; and STATE FARM
FIRE & CASUALTY COMPANY,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

1. The "Similar Construction" coverage requirement is relevant.

Interestingly, the Respondents argue that the issues in this case "have nothing to do with whether or not the Allemands replaced their house with similar construction." Brief of Respondents p. 3. To the contrary, the Loss Settlement Provision in the State Farm policy states that State Farm will pay the cost to repair or replace with similar construction subject to several qualifications including the building code upgrade limitation.

Rex Allemand's Declaration states that his house had no foundation at the time of the fire and to comply with the current building code it was necessary to tear the house down and lay a proper foundation. CP 45. Mr. Allemand also admitted that at the time of the fire his house did not meet the existing building code because of insufficient crawl space clearance and electrical system. CP 27-28. Mr. Allemand admitted that without the requirement to bring his house up to code, his house could have been repaired to the condition it was in before the fire for a cost of \$50,676.95. CP 28. The construction necessary to meet the

code requirements was not similar to the construction of the home at the time of the fire. Therefore, the cost of the non-similar construction in excess of the Option OL \$8,986.60 limit is not covered.

2. "Similar construction" is the same as "like construction."

The Allemands argue that *Roberts v. Allied Group Ins.*, 79 Wn. App. 323, 901 P.2d 317 (1995), is distinguishable even though its loss settlement provision used the term "like construction." Nonetheless, the Allemands quote a dictionary definition for the State Farm policy term "similar" as meaning "like; resembling; having a general resemblance but not exactly the same." Brief of Respondents p. 21. The very definition quoted by the Allemands for "similar" containing the term "like" actually supports State Farm's argument that the *Roberts* case is applicable because of the nearly identical terms used in the Loss Settlement Provision. State Farm's argument is further supported by *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 259, 928 P.2d 1127 (1996), which interpreted "equivalent construction" to have the same effect as the "like, kind and quality" language in *Roberts*.

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3. The Allemands admit they knew the amount of their code upgrade (Option OL) coverage.

Mr. Allemand admitted that the applicable State Farm coverage limit for building code and ordinance upgrades (Option OL) was \$8,986.60. CP 29. Despite this binding admission, Respondents argue the reference to the Option OL amount in the Declarations is ambiguous. Declarations is defined in the policy to include the most recent Renewal Certificate which states the applicable coverages and limits. Consistent with Washington law, page 2 of the Renewal Certificate advises that it is up to the insured to choose the coverages and limits that meet the insured's needs. *See, Gates v. Logan*, 71 Wn. App. 673, 867 P.2d 134 (1993). The Allemands "had an affirmative duty under Washington law to read their policy and be on notice of the terms and conditions of the policy." *Dombrosky v. Farmers Ins.*, 84 Wn. App. 245, 257, 928 P.2d 1127 (1996).

4. The Respondents' public policy argument should not be considered.

The Respondents admit that they did not raise their public policy argument in the trial court proceedings. Respondents' Brief

p. 34. Failure to present an issue, theory or argument to the trial court precludes a party from raising it on appeal. *Erickson v. Chase*, 156 Wn. App. 151, 231 P.3d 1261 (2010).

5. The Ordinance and Law Provision does not violate public policy.

Should the Court consider the public policy argument, it should be noted that the Respondents have not cited any case law that the Option OL policy limits are contrary to public policy.

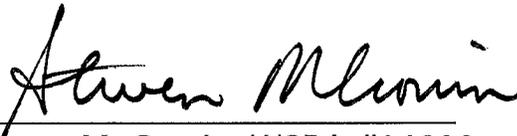
An insurer's limitation on its contractual liability will be enforced unless it is contrary to public policy or a statute. *Certain Underwriters at Lloyds of London v. Valiant Ins. Co.*, 155 Wn. App. 469, 477, 229 P.3d 930 (2010). Generally a contract does not violate public policy unless it is prohibited by statute, condemned by judicial decision, or contrary to the public morals. *Id.* at 478. "Washington courts rarely invoke public policy to override the express terms of an insurance policy." *Id.* at 477. *Valiant* held that a prior case law statement insisting upon full compensation for insureds in the context of commercial general liability policies would not prevent the insurer from limiting the amount of coverage. *Id.* at 478.

II. CONCLUSION

The Loss Settlement Provision contains valid contractual insurance limits and should be enforced. It is requested that the Court of Appeals reverse the trial court and enter judgment in favor of State Farm as a matter of law declaring that it does not owe any further insurance payment to the Allemands and that the Allemands are not entitled to attorney fees or costs.

DATED this 21 day of July, 2010.

MULLIN, CRONIN, CASEY & BLAIR, P.S.

By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21 day of July, 2010, I caused to be served a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT by the method indicated below, and addressed to the following:

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