97326-1

NO. 78107-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MOUNT ZION LUTHERAN CHURCH,

Appellant,

v.

CHURCH MUTUAL INSURANCE COMPANY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendant/Appellee Church Mutual Insurance Company ("Church Mutual") submits this Answer to the Petition for Review of Plaintiff Mount Zion Lutheran Church ("Mt. Zion") pursuant to RAP 13.4(d). This Court should deny Mt. Zion's Petition for Review of the Court of Appeals' decision in *Mount Zion Lutheran Church v. Church Mutual Insurance Company*, No. 78107-3-I, __Wash. App. 3d __, 442 P.3d 22 (Wash. Ct. App. 2019) (the "Decision").

Mt. Zion fails to satisfy its burden under RAP 13.4(b)(4) to show that its Petition involves an issue of substantial public importance that should be determined by the Supreme Court, or that the Decision conflicts with either a decision of this Court or a published decision of the Court of Appeals pursuant to RAP 13.4(b)(1) and (2). The Decision correctly interprets and applies established Washington law and does so in a manner that (1) buttresses and clarifies the Supreme Court decision in *Hess v. North Pacific Ins. Co.*, 122 Wn.2d 180, 89 P.2d 586 (1993), with respect to replacement cost claims where the insured actually rebuilds and, (2) aligns fully with the rules of policy interpretation set forth in the Supreme Court decision in *Moeller v. Farmers Ins. Co of Wash.*, 173 Wn.2d 264, 267 P.3d 998 (2011). Accordingly, further review by this Court is unwarranted.

II. STATEMENT OF THE CASE

Church Mutual adopts the Decision's "Facts" section as its Statement of the Case. Although it is not a part of the formal record before this Court, Church Mutual states that after analyzing Mt. Zion's replacement cost claim, it issued two checks in 2016 totaling $68,333.05, representing a partial release of the depreciation holdback on the replacement cost claim with respect to necessary repairs actually made. Church Mutual notes this because the panel of judges in Division One asked about this fact at the appellate hearing. To the extent necessary, Church Mutual can provide documentation proving this assertion.

III. NO GROUND FOR REVIEW EXISTS

A. The Decision is not in Conflict with any Supreme Court Decisions

1. The Decision does not conflict with *Hess*

Mt. Zion incorrectly argues that the Decision conflicts with *Hess v. North Pacific Ins. Co.*, 122 Wn.2d 180, 89 P.2d 586 (1993). Mt. Zion argues that the Decision "directly contradicts *Hess* because it holds that 'the Policy does not impose on Church Mutual the obligation to pay for Mount Zion's remodeling choices just because the remodeled space serves the same function as the old.'" Petition at 15. Thus, Mt. Zion argues that, "under *Hess*, the Policy does indeed obligate Church Mutual to pay for Mount Zion's remodeling choices, up to the amount of Church Mutual's repair cost estimate (or the policy limit, whichever is less)." *Id.* (Emphasis added.) As has been the case from the outset, Mt. Zion ignores

the third limitation in the replacement cost coverage, *i.e.*, the amount actually spent that is necessary to repair or replace the lost or damaged property, which is specifically at issue in this appeal. Thus, Church Mutual agrees that it is responsible for Mt. Zion's *necessary* remodeling choices actually performed, which do not include the items at issue in this appeal such as upgraded building components and items undamaged by the fire.

In *Hess*, the Supreme Court analyzed whether an insurer was required under a replacement cost provision in a property insurance policy to pay the replacement cost of a fire damaged building where the insured did not actually perform any repairs or replacement of the building. The replacement cost provision at issue in *Hess*, which is substantially similar to the provision in the Church Mutual policy at issue here, stated as follows:

> 3. *Loss Settlement.* Covered property losses are settled as follows:
>
> * * *
>
> b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of

> deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> (a) the limit of liability under this policy that applies to the building;
>
> (b) the replacement cost of that part of the building damaged for like construction and use on the same premises; or
>
> (c) the necessary amount actually spent to repair or replace the damaged building.

Hess, 122 Wn.2d at 183.

As the Court can plainly see, this limiting language is substantially different from Mt. Zion's argument above insomuch as it contains a third limitation in addition to the policy limits and the hypothetical replacement cost – the necessary amount actually spent to repair or replace the damaged building.

Although it is not entirely clear from the Petition, it appears Mt. Zion argues that the Decision is in conflict with *Hess* because the *Hess* court's summary of the limitations on replacement cost coverage did not analyze the term "necessarily" even though that term was explicitly used in the limitation. Thus, Mt. Zion appears to argue that because *Hess* did not analyze or address that term in the context of that case, this Court need not address it either. As discussed herein, Mt. Zion's argument is in direct

contravention of a court's duty to give effect to each word in an insurance policy.

The facts in *Hess* are substantially different than this case. In *Hess*, it was undisputed that the insured did not repair or replace the damaged building at issue. Given this, the *Hess* court only addressed the "actually" component in its analysis since the issue was whether the insured "actually" repaired or replaced the building, which it did not. Because of the lack of any actual repairs or replacement, there was no need to address the "necessarily" component because there was no need to determine how much of any money actually spent was necessary to effect the repairs. Simply put, the issue before this Court was not before the *Hess* court.

The Decision clarifies *Hess* in instances where an insured actually repairs or replaces a building insomuch as it analyzes and gives meaning to the word "necessary" in the subject policy language concerning replacement cost. As this Court is aware, a court should construe the language of an insurance policy to give meaning to all the words of the policy. *Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 876, 784 P.2d 507 (1990). Mt. Zion fails to do so in its argument, effectively writing the word "necessary" out of the policy. Consequently, the Decision clarifies that actual work which is not "necessary" to repair damaged property pursuant to a replacement cost provision in a property

insurance policy is not covered under the pertinent limiting language analyzed in this case.[1] Given the rule of insurance policy interpretation identified above, the only plausible explanation for the *Hess* court to have only focused on the "actually" component is because of the fact that it was undisputed that the insured in *Hess* did not rebuild and had no intention of doing so. That court had no reason to determine whether any effected repairs were "necessary." As a result, Mt. Zion's use of this summary from *Hess* is unavailing as that excerpt fails to address a material word in the limiting language. As a result, the Decision actually buttresses the holding in *Hess* by including this analysis, which is required given that Mt. Zion did perform repair work unlike the insured in *Hess.*

In addition, Mt. Zion argues that the Decision somehow conflicts with *Hess* because the court in *Hess* indicated that the policy did not require "repair or replacement of an identical building on the same premises." This is a red herring. As noted in the Decision, Church Mutual has never taken the position that Mt. Zion must rebuild an identical structure. Decision at 9-10. Moreover, the Church Mutual policy explicitly states that "[t]he term 'on the same premises' is a limitation on the amount of loss or damage we will pay. <u>It does not</u>

[1] Mt. Zion has admitted the unnecessary nature of using upgraded building components and refurbishing an undamaged sign which it demanded be paid by Church Mutual as part of the replacement cost claim. See CP 154-157, 235-36.

require you to replace lost or damaged property at the same site." Decision at 7 (emphasis added).

Additionally, Mt. Zion focuses on the second limitation (the hypothetical cost to rebuild on the same premises with materials of like kind and quality) as the amount it necessarily should receive. However, this limitation is a ceiling, not a floor. An insured only receives the amount of the hypothetical cost to rebuild to the extent it actually performs all of the necessary work to rebuild, *i.e.*, the third limitation. This necessary work was set forth in the agreed scope and it is undisputed that Mt. Zion failed to replace the ceiling beams and substituted unnecessary upgrades and refurbishing undamaged signage. To the extent unnecessary work is performed, Church Mutual need not pay replacement cost proceeds, consistent with the third limitation at issue here.

Importantly, Mt. Zion received exactly what its insurance policy states it should have received. Although it is not part of the appellate record, subsequent to receiving Mt. Zion's replacement cost claim and prior to the filing of the lawsuit, Church Mutual issued two checks for a portion ($68,333.05) of the depreciation at issue in the replacement cost claim. This amount represented that portion of the withheld depreciation regarding the necessary repairs which were actually performed. Thus, any argument that Mt. Zion was deprived of any covered replacement cost proceeds in contravention of the replacement cost language is without merit.

Finally, Church Mutual notes that the Policy clearly indicates that replacement cost proceeds are not owed until repair or replacement has actually taken place. Decision at 7. It is undisputed that Mt. Zion did not replace the ceiling beams as contemplated in the agreed scope. Thus, pursuant to Section C.7.a.(3)(a) in the Policy, Mt. Zion is not entitled to the replacement cost of the beams, but only the repair cost given that was the work actually performed. Decision at 7-8.

For these reasons, the Decision is not in conflict with *Hess*.

2. The Decision does not conflict with *Moeller*

Mt. Zion also incorrectly argues that the Decision conflicts with *Moeller v. Farmers Ins. Co of Wash.*, 173 Wn.2d 264, 267 P.3d 998 (2011). Mt. Zion argues that the Decision somehow violates the following rules of insurance policy interpretation set forth therein: (1) the court must view an insurance contract in its entirety and cannot interpret a phrase in isolation, (2) ambiguities must be resolved in favor of the policyholder, and (3) the contract as a whole must read as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results. Petition at 15-16.

Initially, Church Mutual notes that the interpretation set forth by Mt. Zion (the Policy obligates Church Mutual to pay for Mt. Zion's remodeling choices, up to the amount of Church Mutual's repair cost estimate or the policy limit, whichever is less) violates the rule of policy interpretation requiring a court to give meaning to each word or phrase in

a policy, *i.e.*, "necessary." Thus, Mt. Zion's interpretation is unreasonable on its face.

Second, Mt. Zion provides no viable explanation as to how giving meaning to the word "necessary," which is required under the rules of policy interpretation, somehow violates the rule that a court must view an insurance contract in its entirety and cannot interpret a phrase in isolation.

Third, Mt. Zion has not previously argued that the replacement cost provision is ambiguous or that the word "necessary" is ambiguous. New arguments raised for the first time on appeal are not normally considered. RAP 2.5(a); *Savage v. State*, 72 Wash. App. 483, 495 n. 9, 864 P.2d 1009 (1994), *reversed in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995). As such, and absent any of the grounds in RAP 2.5, the Court should not consider this new argument.

If the Court entertains this new argument, which it should not, Church Mutual notes that to the extent Mt. Zion is arguing that the term "necessary" is ambiguous, it has not provided an alternative reasonable definition of that term. The fact that a term in an insurance policy is undefined does not automatically render a provision ambiguous. *Truck Ins. Exch. v. Rohde*, 49 Wn.2d 465, 303 P.2d 659 (1956); *International Marine Underwriters v. ABCD Marine, LLC,*179 Wn.2d 274, 313 P.3d 395 (2013). Instead, undefined terms will be given their plain, ordinary, and popular meaning. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 77, 882 P.2d 703, 891 P.2d 718 (1995). To determine the plain meaning of an undefined term, courts often refer to standard English

language dictionaries. *Id.* Policy language is only considered ambiguous if it is fairly susceptible to two different, but reasonable interpretations. *Washington Pub. Util. Dists. Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989).

Here, the only definition in the record is the reasonable definition supplied by Church Mutual at the trial court level. CP 168, lines 6-16. Mt. Zion has no basis to argue an ambiguity without providing a second reasonable definition of "necessary." Moreover, Division I correctly held that the replacement cost provision was unambiguous. Decision at 8.

Finally, Church Mutual's definition of "necessary," *i.e.*, absolutely required or indispensable, is consistent with how an average purchaser of insurance would view that term. There is not any evidence in the record that Mt. Zion believed the word necessary was defined in any other manner.

For these reasons, the Decision is not in conflict with *Moeller*.

B. This Case Does not Involve an Issue of Substantial Public Importance that Should be Determined by the Supreme Court

Mt. Zion also argues that its Petition should be accepted because the case involves an issue of substantial public importance that should be determined by the Supreme Court. In support of its position, Mt. Zion again attempts to bootstrap an ambiguity argument in the Petition despite not having made this argument previously.

Mt. Zion argues that the case should be accepted because of the lack of interpretation of the term "necessary" by the trial court or

Division I. As previously noted, the only definition of "necessary' provided by the parties was by Church Mutual, defining the term as absolutely required or indispensable. CP 168. Mt. Zion has not provided any alternative definition in this case, which is fatal to the argument since there must be at least two reasonable definitions of a term in order for a court to find an ambiguity. *Washington Pub. Util. Dists. Utils. Sys.*, 112 Wn.2d at 10. Given this, Church Mutual provided only reasonable definition which was adopted by the trial court and affirmed by the Division I. Consequently, there is no basis for and certainly no issue of substantial public interest to interpret the meaning of "necessary." If Mt. Zion believed the replacement cost provision was ambiguous, it should have made that argument long ago.

Moreover, the examples provided by Mt. Zion prove that the items it seeks replacement cost value for were not necessary. Mt. Zion argues that replacing a $3,000 refrigerator with one costing $10,000 would be unnecessary. Curiously, the very items for which Mt. Zion seeks replacement cost coverage are similarly upgraded items that were not present at the time of the fire. A review of Mt. Zion's "substitute" expenditures indisputably show they are nothing more than upgraded building components valued at approximately $75,000, including (1) a larger upgraded kitchen, including additional cabinetry, countertops, sinks, and faucets which were not present at the time of the fire, (2) refurbishing a street sign which was not damaged in the fire; (3) adding a closet which did not exist at the time of the fire; (4) upgraded flooring in the sanctuary

and foyer; (5) and upgraded lighting in the foyer, fellowship building, and sanctuary. CP 027, 154-55.

In its replacement cost claim, Mt. Zion asked Church Mutual to pay the difference between the cost of the building components it had at the time of the fire and the subsequent upgraded building components, which according to Mt. Zion was over $75,000, because it did not replace the ceiling beams as it said it would. CP 154-55. Church Mutual is confused as to why paying for an upgraded refrigerator (Mt. Zion's example) would not be necessary, but all of its upgraded items would be necessary. Mt. Zion's argument is nonsensical and should be disregarded.

Finally, Church Mutual again notes that it did not require Mt. Zion to rebuild an exact replica of what existed at the time of the fire. Decision at 9-10. It simply refused to pay the cost of replacing the ceiling beams that Mt. Zion did not replace. It also refused to consider substitute costs which represented upgraded building components or items not damaged in the fire. Church Mutual paid that portion of the replacement cost claim costs which were necessary and actually performed, just as mandated by the replacement cost provision at issue.

Consequently, there is no substantial public interest requiring review by this Court. Division I has already made that review and done so consistent with *Hess, Moeller,* and the rules of insurance policy interpretation discussed by the parties. The Decision should stand as written.

IV. CONCLUSION

For all of the foregoing reasons, Church Mutual respectfully requests that the Court deny Mt. Zion's Petition for Review.

RESPECTFULLY SUBMITTED this 12th day of July, 2019.

BETTS, PATTERSON & MINES, P.S.

By_____
Jeffrey S. Tindal, WSBA #29286
Attorneys for Respondent Church Mutual Insurance Company

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 12, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Response to Petition for Review; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of July, 2019.

Valerie D. Marsh
Valerie D. Marsh

BETTS, PATTERSON & MINES, P.S.

July 12, 2019 - 2:02 PM

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