No. 93981-1

SUPREME COURT OF THE STATE OF WASHINGTON

LORETTA LESURE,

Petitioner,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondent.

RESPONDENT FARMERS INSURANCE COMPANY OF WASHINGTON'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Farmers Insurance Company of Washington ("Farmers") is the Respondent in this matter. Farmers insured the Petitioner Loretta Lesure.

II. DECISION OF COURT OF APPEALS

On September 20, 2016, the Court of Appeals for Division II filed its decision for matter number 48045-0-II. Appendix A. Subsequently, on November 23, 2017, the Court of Appeals denied Ms. Lesure's request for reconsideration. Appendix B. Additionally, on December 21, 2016, the Court granted Farmers' Motion to Publish the decision. Appendix C.

III. ISSUES PRESENTED FOR REVIEW

Petitioner Lesure lists three issues on which she requests review. Those issues are discussed herein. Farmers believes that those issues do not justify Supreme Court review.

IV. INTRODUCTION

This Petition arises from the Superior Court's dismissal on summary judgment of a claim by Loretta Lesure that she is entitled to additional benefits under her Farmers homeowner's policy. CP 009-010. The Court of Appeals of the State of Washington for Division II agreed with and affirmed the Trial Court's conclusion. Appendix A.

V. STATEMENT OF THE CASE

A. Background

On or about January 4, 2014, a fire started in a shed located several feet from Ms. Lesure's residence. CP 057-062. The fire spread to the residence, causing partial damage. The residence was not a total loss. See CP 77-96. The cause of the fire is not disputed. A Port Angeles Fire Department investigation concluded that the fire started while Ms. Lesure's son was extracting THC oils from marijuana plants in the shed. CP 057. Ms. Lesure tendered a claim to Farmers later that same day and arrangements were made for Farmers to examine the scene. CP 064.

B. Ms. Lesure's Claim and Farmers' Response Thereto

The facts in this matter are largely undisputed. Farmers issued Washington Special Form Homeowners Policy 90923-16-10 to Ms. Lesure with a policy period of January 24, 2013 through January 24, 2014. CP 118-163. CP 119. This policy provides coverage pursuant to its terms and conditions and not otherwise.

The policy issued to Ms. Lesure provides coverage for direct physical loss.

> **Perils Insured Against**
> . . .
> We insure for accidental ***direct physical loss to property*** described in Coverage A and B, subject to the exclusions and limitations described elsewhere in Section I of this policy, except we do not insure for loss where earth movement, water damage, or nuclear hazard occur, however caused, as further explained in this policy.

CP 127 (emphasis added).

The direct physical loss in this case is the damage caused by the fire. As a result of the fire, the estimate for repairs to the damage of the structure totaled $22,248.25. CP 072-074. Ms. Lesure has never contested this amount as being the amount necessary to repair the damage caused by the fire. She has also never presented her own competing scope of repair or estimate.

Accordingly, on January 27, 2014, Farmers sent Ms. Lesure a letter explaining the loss settlement amount, including an explanation of the actual cash value of the repairs. CP 072. Also attached to the letter was a check for $17,384.47 representing the actual cash value of the repair totals minus depreciation, along with a copy of Farmers' estimate of repairs. CP 072-095.

On June 24, 2014, following the tender of the Actual Cash Value payment for the repair of fire damage, Ms. Lesure submitted a demand for payment of the full policy limits for the Dwelling coverage in the amount of $112,000 despite the fact that it was undisputed that the direct physical damage actually caused by the fire was limited to $22,248.25. CP 097. Ms. Lesure's demand for policy limits was based on a letter from the Port Angeles Community & Economic Development Department, which

required Ms. Lesure to bring the property into compliance with City of Port Angeles Municipal Code 17.95.030. CP 101-102.

Specifically, the City Code requires a structure that does not comply with zoning and building codes to be demolished and reconstructed to-code if the damage is greater than 75% of the tax assessed value of the structure. CP 102. Ms. Lesure claimed in her demand letter that as a result of the City's position, a complete rebuild would be required, thus entitling her to the full limits under the policy. CP 101-102. Ms. Lesure's demand did not include any reports from any experts or contractors verifying any amounts claimed. CP 101-102.

Thereafter, on August 21, 2014, Farmers issued yet another correspondence to Ms. Lesure, this time detailing Farmers' analysis of the claim, including any potential benefits due as a result of the enforcement of the building code by the City of Port Angeles. CP 106-112. In this letter, Ms. Lesure was specifically advised of the fact that the primary coverage part specifically excluded coverage relating to the enforcement of any ordinance or law.

Exclusions

...

Applying To Coverage A, B and C

We do *not* cover direct or indirect loss from:

1. Enforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed to this policy.

CP 129.

However, Ms. Lesure was also advised that her Policy included a Building Ordinance or Law Coverage Endorsement, which provides as follows:

BUILDING ORDINANCE OR LAW COVERAGE ENDORSEMENT

Under **Section I - Property, Losses Not Insured or Losses Not Covered**, the following exclusion is deleted:

Enforcement of any ordinance or law regulating construction, repair or demolition of a building or oilier structure, unless endorsed on this policy.

Under **Section I -Property, Additional Coverages**, the following coverage is added:

Building Ordinance or Law Coverage

1. ***Our limit of liability for this coverage will not be more than 10% of the total limit of insurance applying to the covered property under Coverage A*** - Dwelling or Coverage B - Separate Structures, shown in the declarations or premium notice, whichever is most recent at the time of loss. This endorsement applies to all coverages whether in the policy contract or subsequently added by endorsement.

    a. If there is a covered loss and you decide not to repair or replace the damaged building, we shall pay the actual cash value not to exceed the limits of insurance that apply to

the damaged portion of the building. You have the option of making a claim within 180 days after the date of the loss for any additional payment on a repair cost basis if you repair or replace the damaged building.

b. This coverage does not increase the limit of insurance applying to the covered property under Coverage A - Dwelling or Coverage B - Separate Structures.

...

3. We will pay for the increased costs you incur due to the enforcement of any ordinance or law in force at the time which requires or regulates:

a. The construction, demolition, remodeling, renovation, repair, or replacement of that part of a covered building or other structure damaged by a covered accidental direct physical loss.

b. The demolition and reconstruction of the undamaged part of a covered building or other structure which must be totally demolished due to damage caused by a covered accidental direct physical loss to another part of the covered building or other structure.

c. The remodeling, renovation, or replacement of the undamaged part of a covered building or other structure necessary to complete the remodeling, renovation, or replacement of that part of the covered building or other structure damaged by a covered accidental physical loss.

d. The legally required modifications to any undamaged portion of the structure which are caused by the enforcement of any building ordinance or law, zoning or land use ordinance if the law enforcement is directly caused by a covered accidental physical loss.

CP 144-145 (emphasis added).

The above extension of coverage provides the insured with additional benefits in the event that a covered loss triggers the enforcement of a regulation or ordinance requiring demolition or reconstruction of covered property. The additional benefits are owed when the insured incurs the code upgrade costs and the coverage is limited to 10% of the "Coverage A – Dwelling" Limit.

It is undisputed that as of the date of Farmers' August 15, 2014 letter, Ms. Lesure had not actually incurred any actual repair costs or any costs associated with code compliance. Regardless, in its letter of that date, Farmers tendered the replacement cost holdback and the code upgrade limit. The payments tendered by Farmers were issued as a matter of good faith and fair dealing, despite the fact that the depreciation and code upgrade coverage were not owed until replacement had occurred and the expenses were actually incurred by Ms. Lesure. It is Farmers' understanding that Ms. Lesure has not initiated any repairs on the structure.

C. Ms. Lesure's Lawsuit

Despite Farmers issuing the above-discussed good faith payments, Ms. Lesure filed this lawsuit on October 31, 2014. CP 197-201. In her Complaint, Ms. Lesure alleges that she is entitled to the policy limits for

Coverage - A Dwelling of $112,000 and code upgrade coverage of $11,200, for a total of $123,200. CP 200.

Farmers answered Plaintiff's Complaint denying that she was entitled to any of the relief requested therein. CP 188-191. Farmers also asserted appropriate affirmative defenses and asked that Ms. Lesure's Complaint be dismissed in its entirety, with prejudice. CP 190-191.

Subsequently, Farmers filed a Motion for Partial Summary Judgment on the sole coverage issue of whether Ms. Lesure was entitled to any further benefits for the fire loss under Coverage A - Dwelling. CP 167-180. Farmers' Motion detailed the coverage issue, including the interplay between the Loss Payment Provision's "equivalent construction" language, the building and ordinance exclusion and Endorsement, and Washington law, particularly as set forth in *Allemand.* CP 167-180.

Ms. Lesure responded to Farmers' motion arguing that the Efficient Proximate Cause rule somehow applies to re-draft the terms of the policy to provide greater coverage than those expressly provided by the unambiguous terms of the policy. CP 40-50. Ms. Lesure's brief, as the Superior Court pointed out, did not address the *Allemand* case. CP 40-50.

> Despite the fact that the *Allemand* case is so closely on point, Ms. Lesure does not mention it in her memorandum.

> There is no attempt to distinguish the case, presumably because it is almost directly on point.

CP 13.

Ms. Lesure's opposition was based solely on her efficient proximate cause argument. CP 40-50. She did not contest the amounts paid by Farmers for direct physical loss, nor did she dispute the scope of repair adopted in Farmers' estimate. CP 40-50.

On June 4, 2015, after considering the briefing and hearing oral argument, the Superior Court issued a Memorandum Opinion on the coverage issue. CP 011-014. In that Memorandum Opinion, the Superior Court held the policy is unambiguous and that Farmers has met its coverage obligations. CP 011-014. The Trial Court then entered an Order granting Farmers' Motion for Summary Judgment, which stated that Farmers owes no additional benefits under the Coverage A – Dwelling policy provision. CP 009-010.

Following the Superior Court granting Farmers' Motion for Partial Summary Judgment, in order to secure a final judgment for purposes of triggering the right of appeal, the parties agreed to resolve all of her other claims. As a result, all remaining claims, including the remaining coverage claims and any extra-contractual claims, were resolved. The Superior Court entered Final Judgment on September 8, 2015. CP 005-006.

Subsequently, Ms. Lesure appealed this matter to the Court of Appeals for Division II. On September 20, 2016, the Court of Appeals for Division II filed its decision for matter number 48045-0-II. Appendix A. Notably, the Court rendered its decision without hearing oral argument on this matter. Further, on November 23, 2017, the Court of Appeals denied Ms. Lesure's request for reconsideration. Appendix B. Then, on December 21, 2016, the Court granted Farmers' Motion to Publish the decision. Appendix C.

VI. ARGUMENT

A. Review Is Not Justified Under RAP 13.4

1. The Decision of the Court of Appeals does not Conflict with a Decision of the Supreme Court.

In this case, the Decision from the Court of Appeals for Division II (the "Decision") does not conflict with a decision of the Washington State Supreme Court. In fact, the Decision corroborates decades of established Washington law. For example, in *Kish v. Ins. Co. of N. Am.*, 25 Wn.2d 164, 170, 883 P.2d 308 (1994) the Supreme Court analyzed the efficient proximate cause rule. Specifically, the *Kish* Court held the following with regard to the efficient proximate cause rule:

> "When, however, the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various

> characterizations, the efficient proximate cause analysis has no application.

Kish, at 170.

According to the above, the EPC rule is only applied in cases where there are multiple losses or in chain of causation cases. See also, *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992) (additional analysis that the EPC Rule applies to matters with multiple causes of loss); *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983) (the EPC Rule applies only to determine coverage where a loss involves multiple causes, some of which are covered, and some of which are specifically excluded). In this case, however, there is only one cause of loss: the fire.

Notably, the Decision even cites the above case law from the Supreme Court of Washington. Appendix A, pg. 6. Moreover, the Decision states the following in the Court's analysis of the EPC rule with regard to this case:

> There is no uncovered peril here. Fire is the only cause of loss. Non-compliance with a city's building code is not a peril. There is no chain of events. Thus, the EPC rule does not trigger coverage for additional repair costs due to building code violations other than what is allowed under the building ordinance or law endorsement.

Appendix A, pg. 6.

As a result of the above, the Decision clearly does not conflict with a decision of the Supreme Court. In fact, the Decision uses case law from the Supreme Court as support for its ruling. Therefore, Ms. Lesure's Petition does not meet the criteria for acceptance of review according to RAP 13.4(b)(1).

2. *The Decision of the Court of Appeals does not Conflict with a Decision of the Court of Appeals.*

In this case, the Decision does not conflict with a decision of the Court of Appeals. On the contrary, the Decision is supported by decisions from the Court of Appeals in **each** Division in the State.

Although Ms. Lesure argues in her Petition that the Decision is in conflict with a Division I case entitled *Starczewski v. Unigard Ins. Group*, 61 Wn. App. 267, 810 P.2d 58 (1991), that argument is without merit. *Starczewski* is easily distinguished from this matter and a more recent decision from the Court of Appeals for Division I is directly on point with this case.

Starczewski involved a claim relating to a fire loss to a duplex where the policy provided for loss payments up to the actual cash value or 'the amount necessary to repair or replace" the property. *Id.* at 269, 810 P.2d 58. The *Starczewski* Court found that the "repair or replace" language in the loss payment provision necessarily required payment for building

code compliance. *Id.* at 274, 810 P.2d 58.

Four years later, however, Division One was once again confronted with this question in a matter entitled *Roberts v. Allied Group Insurance Co.*, 79 Wn. App. 323, 901 P.2d 317 (1995). *Roberts* involved a fire loss to a single family home that was not in compliance with the current codes. Unlike the policy in *Starczewski*, however, the *Roberts* policy provided for loss payments "for like construction". *Id* at 325, 901 P.2d 317. That policy also specifically defined replacement cost as the costs associated with repairing or replacing property "with new materials of like kind and quality." *Id.* at 325, 901 P.2d 317.

The *Roberts* Court therefore determined that the *Starczewski* dicta relating to code compliance benefits was not applicable, and instead relied on *Gouin v. Nw. Nat'l Ins. CO. of Milwaukee*, 145 Wn. 199, 259 P. 387 (1927) to determine that code compliance benefits were not available where the policy contains "like kind and quality" type language. *Starczewski,* at 325, 901 P.2d 317. As a result, the *Roberts* decision in Division I actually supports the Decision at issue here.

Similarly, in Division II, the Court in *Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 928 P.2d 1127 (1996) found that the insurer was not required to pay for code upgrade costs under the terms of the policy. In *Dombrosky*, as here, the policy provided for repair or

replacement of damaged or destroyed property with "equivalent construction." *Id.* at 257, 928 P.2d 1127. In fact, as is also the case in the instant matter, the *Dombrosky* policy also had a specific exclusion for costs related to the enforcement of building codes or ordinances. *Id.* The *Dombrosky* Court determined that the term "equivalent construction" had the same effect as the term "like kind and quality" in the *Roberts* policy and rejected the arguments of the insureds based on *Starczewski*. Thus, the Court concluded that based on "equivalent construction" language in the loss payment provisions of the Farmers' policy, along with the existing exclusion, there was no coverage available for code compliance.

In addition to the above, the Court of Appeals for Division III has addressed the exact issue in this case. Specifically, the Court in *Allemand v. State Farm Ins. Co.*, 160 Wn. App. 365, 248 P.3d 111 (2011). Notably, the facts in this matter are nearly identical to those in *Allemand.*

> It cost the Allemands $96,669.56 to replace the house under modern building requirements. Their State Farm homeowners policy provided a maximum of $89,866.00 under "Coverage A" to repair or replace the home "with similar construction." The policy also excluded "increased costs resulting from enforcement of any ordinance or law" including "construction repair or demolition" from coverage except as provided by optional "Option OL." That optional coverage provided an additional sum, equal to 10 percent of the policy maximum, for costs resulting from building code enforcement. The Allemands had purchased Option OL.

> State Farm paid the Allemands $59,663.55, consisting of the estimated repair costs from the fire plus the maximum OL coverage for the code updates. The Allemands then filed an action for declaratory judgment and damages, arguing that State Farm was required to pay the maximum under both Coverage A and Option OL.

Allemand, 160 Wn. App. at 367-68, 248 P.3d 111.

The *Allemand* Court analyzed issues nearly identical to the issues in this matter: (1) a loss payment provision similar to the *Roberts* and *Dombrowsky* cases; (2) a building and ordinance exclusion, like that in *Dombrosky*; and (3) a building and ordinance optional insurance endorsement limited to 10% of the Dwelling Limits.

As all of those cases show, the ultimate controlling language is that found in the policy. The Coverage A language states in part that

> a. We will pay the cost to repair or replace with similar construction and for the same use on the premises … subject to the following:…
>
> (4) we will not pay for increased costs resulting from enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, except as provided under Option OL – Building Ordinance or Law Coverage.

Allemand, 160 Wn. App. at 371, 248 P.3d 111.

Based on this language, the *Allemand* Court concluded that there would generally not be any coverage available to the insured for code compliance costs based on cases such as *Gouin*, *Roberts*, and *Dombrosky*.

> The policy at issue here covers "similar construction" and is the same as the "like" construction at issue in *Gouin* and *Roberts* and the "equivalent" construction in *DePhelps* and *Dombrosky*. Thus, the Coverage A component of this policy does not include building code upgrades as the policy in *Starczewski* did.

Allemand, 160 Wn. App. at 372, 248 P.3d 111.

However, the Court also held that because the *Allemand* policy contained the optional coverage for building ordinance and code compliance costs, the case was similar to the *DePhelps* case, but with one key distinguishing feature.

> Unlike that case, however, the policy here expressly limits the code upgrade coverage to 10 percent of the policy maximum.

Allemand, 160 Wn. App. at 372, 248 P.3d 111.

The *Allemand* Court then specifically held that the 10% of Coverage A limit was valid and enforceable.

> In light of the foregoing authority, the policy language is clear and this court is not in a position to find it ambiguous. *Quadrant Corp.*, 154 Wn.2d 165. State Farm's original obligation under Coverage A is to provide "similar construction" in rebuilding the home. Unlike Starczewski, that phrase does not include paying for required code upgrades. Instead, the policy provides for necessary upgrades by Option OL. That coverage is the sole source of the obligation to pay for bringing the remodeled home up to code. But that coverage is limited to the 10 percent of Coverage A that the Allemands purchased. The necessary upgrades required more than that figure and State Farm thus properly tendered its limits under that coverage. ***It was not required to pay more for the upgrades***.

Allemand, 160 Wn. App. at 373, 248 P.3d 111 (emphasis added).

As discussed above, the Court's decision in *Allemand* is directly on point in this matter. As a result, each Division for the Court of Appeals for the State of Washington has decisions that support the Decision in this matter. Therefore, Lesure's Petition does not meet the criteria for acceptance of review of this Court according to RAP 13.4(b)(2).

3. *This Matter does not Involve a Significant Question of Law Under the Constitution.*

This matter does not involve a significant question of law under the Constitution of the State of Washington or the United States. In fact, Petitioner Lesure does not even argue that this matter involves a Constitutional issue.

This matter stems from Lesure's misinterpretation of the terms and conditions of her insurance policy. Further, this is a contractual dispute between the parties. Ms. Lesure's Constitutional rights have not been violated, nor does she allege any Constitutional violation.

Farmers also reminds the Court that the policy language and endorsement at issue in this matter were approved by the Washington State Office of the Insurance Commissioner. As a result of the foregoing, and in light of the fact that Ms. Lesure does not argue a Constitutional

issue, Ms. Lesure's Petition does not meet the criteria for review of the Supreme Court according to RAP 13.4(b)(3).

4. This Petition does not Involve an Issue of Substantial Public Interest that should be Determined by the Supreme Court.

Currently, as discussed above, the Court of Appeals for each Division in this State hold consistent views on these issues. In light of that, review from the Supreme Court is not necessary. In fact, review from the Supreme Court may only act to cloud the well-established law in Washington State.

The extent of Ms. Lesure's argument regarding whether this matter involves an issue of substantial public interest is that the Supreme Court accepted review in *Allemand.* Petition for Review, at 8. However, Ms. Lesure's argument was previously made and rejected in the *Allemand* case. The *Allemand* Court, rejecting this argument, specifically stated the following:

> This [OL Option] provision recognizes the efficient proximate cause rule; the Allemands' argument that the policy conflicts with that rule is without merit. The policy actually applies the rule and covers building code upgrades that are required when repairing a covered loss.

Allemand, 160 Wn. App. at 373 at fn 2., 248 P.3d 111.

Significantly, the Court of Appeals for Division II made its Decision in the instant matter without hearing oral argument from the

parties. The fact that the Court of Appeals did not wish to hear oral argument and denied Ms. Lesure's Motion for Reconsideration illustrates that this issue is thoroughly resolved in Washington and is not significant enough to warrant further argument.

Ms. Lesure's sole argument in this case is that the Efficient Proximate Cause rule somehow operates to alter the Building Ordinance or Law coverage in her policy. However, Ms. Lesure fails to set forth any legal authority in support of this position because this is not an Efficient Proximate Cause case. Once again, the policy in this case provides coverage for direct physical loss. CP 127. In this case, there was one direct physical loss – a fire. The issue before the Court is not what caused the loss, but what losses caused by the fire are recoverable.

Moreover, even if this Court were to engage in an Efficient Proximate Cause analysis, the conclusion would be the same. Under Washington law, the Efficient Proximate Cause Rule applies only to determine coverage where a loss involves multiple causes, some of which are covered, and some of which are specifically excluded. *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).

In order for the Efficient Proximate Cause Rule to apply a covered peril must set into motion an "unbroken sequence" of events, including an

uncovered peril, such that the uncovered peril does not operate to preclude coverage for the entire loss. *Graham, supra.* The Efficient Proximate Cause Rule "does not allow a claimant to focus on one covered cause out of a causal chain." *Wright v. Safeco,* 124 Wn. App. 263, 275, 109 P.3d 1 (2004).

Finally, even accepting Ms. Lesure's argument that the fire and the building code enforcement are somehow two causes within the same "unbroken sequence", the Efficient Proximate Cause Rule does not apply because Ms. Lesure had coverage for the fire loss and was also paid the full limit of her coverage for the building code enforcement.

As a result, the Efficient Proximate Cause Rule is inapplicable to the instant case and this matter does not warrant review from the Supreme Court.

VII. CONCLUSION

Based on the foregoing, Farmers asks that the Washington State Supreme Court deny Ms. Lesure's Petition for review.

DATED this 21st day of February, 2017.

LETHER & ASSOCIATES, PLLC

Thomas Lether, WSBA #18089
Eric J. Neal, WSBA #31863
Charles J. Carroll, WSBA #46835

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date below they caused the foregoing to be served upon the party(ies) at the address(es) and by the method(s) so indicated.

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DATED this 21st day of February, 2017.

Hugh Engelhoff

Hugh Engelhoff, Paralegal

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

September 20, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LORETTA LESURE, a single woman, Appellant, v. FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic corporation and a Washington State Stock Insurer, Respondent.	No. 48045-0-II UNPUBLISHED OPINION

LEE, J. — Loretta Lesure appeals the trial court's order granting Farmers Insurance Company of Washington's (Farmers) motion for summary judgment, finding Farmers did not owe additional benefits to Lesure for fire damage to her home. The trial court concluded that as a matter of law, Lesure's policy did not cover the total cost of fire-loss house repairs that included, in part, costs for changed building code requirements. We agree and affirm.

FACTS

The facts are primarily undisputed. Lesure's Port Angeles home was partially damaged by fire. The home was insured by Farmers. Coverage A of the insurance policy covered the cost to repair or replace the insured's dwelling up to a policy limit of $112,000.00.[1] The policy, however,

[1] The policy states that under Coverage A:

excludes "direct or indirect loss" resulting from the "[e]nforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed by this policy."[2] Clerk's Papers (CP) at 129. Lesure purchased an optional endorsement for coverage of building code and ordinance upgrades with a liability limit of "10% of the total limit of insurance applying to the covered property."[3] CP at 144. The policy limit for the optional coverage was $11,200.00.

> We cover:
> 1. The dwelling, including attached structures, on the **residence premises** and used principally as a private residence.
> 2. Material and supplies on or adjacent to the **residence premises** for use in construction, alteration or repair of the dwelling or other structures on the **residence premises**.
> Wall-to-wall carpeting attached to the dwelling is part of the dwelling.

CP at 125.

[2] The policy states:

> We do *not* cover direct or indirect loss from:
> 1. Enforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed to this policy.

CP at 129.

[3] The endorsement states:

> Under **Section I — Property, Losses Not Insured** or **Losses Not Covered**, the following exclusion is deleted:
>
> Enforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed on this policy.
> Under **Section I — Property, Additional Coverages**, the following coverage is added:

Replacement costs for the partially fire-damaged home totaled $22,248.25 (less Lesure's $500 deductible). Because the home failed to comply with current building code requirements, the city of Port Angeles required that the home be rebuilt to construction code. Specifically, the home needed a foundation. Lesure estimates the cost to rebuild her home with the code required updates to be $125,397.12. Farmers tendered $21,748.25 for repairs related to the fire damage, plus $11,200.00 for repairs related to code compliance, which was the coverage limit.

Lesure rejected Farmers' offer and requested the full policy limit of $112,000.00 plus an additional 10 percent under the optional building ordinance or law endorsement, totaling $123,200.00 to demolish and rebuild her home to current code. Farmers denied her request.

Lesure filed a complaint for declaratory relief and damages. Lesure requested declaratory judgment arguing the efficient proximate cause (EPC) rule required Farmers to pay the full policy limit.

Farmers filed a motion for partial summary judgment, arguing it fulfilled its obligations under the policy by offering payment for the property damage plus an extra 10 percent of her maximum policy limit under her optional endorsement. The trial court granted Farmers' request for partial summary judgment, finding Farmers owed no additional benefits under the coverage

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> 1. Our limit of liability for this coverage will not be more than 10% of the total limit of insurance applying to the covered property under Coverage A—Dwelling or Coverage B—Separate Structures, shown in the declarations or premium notice, whichever is most recent at the time of loss. This endorsement applies to all coverages whether in the policy contract or subsequently added by endorsement.

CP at 144.

terms of the policy; denied Lesure's request for declaratory judgment; and dismissed with prejudice Lesure's action. Lesure appeals.[4]

ANALYSIS

A. STANDARD OF REVIEW

We review a superior court's order on summary judgment in a declaratory judgment action de novo. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010). Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c).

Interpretation of an insurance policy is a question of law we review de novo. *Woo v. Fireman's Fund Ins.* Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Because insurance policies are construed as contracts, the policy terms are interpreted according to contract principles. *Weyerhaeuser Co. v. Commercial Union Ins. Co*., 142 Wn.2d 654, 665, 15 P.3d 115 (2000). The policy is considered as a whole, and is given a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Id*. at 666 (quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998)). If the language is clear, the court must enforce the policy as written and may not create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co*., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). "[T]he expectations of the insured cannot override the plain language of the contract." *Id*. at 172.

[4] The parties stipulated to the dismissal of all other potential coverage claims and agreed the court's memorandum order was a final decision on the merits.

B. EFFICIENT PROXIMATE CAUSE RULE

Lesure first contends the trial court erred in failing to recognize and apply the EPC rule. The EPC rule is applied in Washington to determine first-party insurance policy coverage when a single loss occurs as the result of two or more perils acting together. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 519, 276 P.3d 300 (2012). "The efficient proximate cause rule applies *only* when two or more perils combine in sequence to cause a loss and a covered peril is the predominant or efficient cause of the loss." *Id.* (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 732, 837 P.2d 1000 (1992)) (emphasis added). "In such a situation, the efficient proximate cause rule mandates coverage, even if an excluded event appears in the chain of causation that ultimately produces the loss." *Vision One,* 174 Wn.2d at 519 (citing *Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 628, 773 P.2d 413 (1989)).

Here, the facts in *Allemand v. State Farm Insurance Companies*, 160 Wn. App. 365, 248 P.3d 111 (2011), are very similar to our facts. In *Allemand*, fire damaged the Allemands' home. The Allemands' policy with State Farm covered damage due to fire plus an optional endorsement for coverage of "increased costs resulting from enforcement of any ordinance or law." 160 Wn. App. at 367. The optional coverage provided an additional sum equal to 10 percent of the policy maximum. *Id.* After a fire damaged their home, the Allemands learned their home would have to meet building codes. Specifically, their home needed a foundation, crawl space, and updated electrical wiring. *Id.* They requested the full policy limit plus an extra 10 percent for these repairs. State Farm rejected their demand, and the Allemands filed a complaint for declaratory judgment. The court held that "Coverage A is to provide 'similar construction' in rebuilding the home . . . [and] does not include paying for required code upgrades." *Id.* at 373. The court further held that

the sole source of coverage for bringing the remodeled home up to code was the optional coverage and that coverage had a policy limit of 10 percent of the Coverage A policy limit. *Id.* In a footnote, the court noted, "[T]he Allemands' argument that the policy conflicts with [the EPC] rule is without merit." *Id*. at 372 n.2.

Similarly here, Lesure's EPC rule argument is without merit. The rule "applies only when two or more perils combine in sequence to cause a loss and a *covered peril* is the predominant or efficient cause of the loss." *Vision One*, 174 Wn.2d at 519. "When . . . the evidence shows the loss was in fact occasioned by only a single cause, . . . the efficient proximate cause analysis has no application." *Kish v. Ins. Co. of N. Am.*, 25 Wn.2d 164, 170, 883 P.2d 308 (1994) (quoting *Chadwick v. Fire Ins. Exch*., 17 Cal. App. 4th 1112, 1117, 21 Cal. Rptr. 2d 871 (1993)). The *Kish* court elaborated, "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." (quoting *Chadwick*, 17 Cal. App. 4th at 1117).

There is no uncovered peril here. Fire is the only cause of loss. Non-compliance with a city's building code is not a peril. There is no chain of events. Thus, the EPC rule does not trigger coverage for additional repair costs due to building code violations other than what is allowed under the building ordinance or law endorsement.[5]

[5] The United States District Court for the Western District of Washington recently held likewise in an unpublished opinion. *Certain Underwriters at Lloyds, London v. Allen*, 2015 WL 4094350, at *4 (W.D. Wash. July 7, 2015). Farmers cites this case in its response brief. Washington's former General Rule 14.1(b) permits parties to cite unpublished decisions from non-Washington jurisdictions if that jurisdiction permits citation to the decision. Federal courts permit citation to unpublished decisions issued on or after January 1, 2007. FRAP 32.1. But, former GR 14.1(b) required the party citing an unpublished decision to "file and serve a copy of the opinion with the

Next, Lesure contends the insurance policy effectively circumvents the EPC rule because the entire fire loss would be covered if Lesure did not purchase optional coverage, making the optional building ordinance or law endorsement coverage illusory. We disagree because the EPC rule simply does not apply in this case. There is no chain of covered and uncovered peril to warrant further discussion or speculation of the EPC rule on an optional endorsement.

C. DECLARATORY JUDGMENT

Lesure next contends the trial court erred by dismissing her action because the policy language for the building ordinance or law endorsement is ambiguous. She contends the term "Additional Coverages" can be interpreted as meaning additional to the maximum policy limit (including code upgrade costs) or additional solely to the repair costs (excluding code upgrade costs). CP at 109. Lesure urges this court to interpret the policy as permitting recovery of the building ordinance or law endorsement limit of $11,200.00 in addition to the $112,000.00 policy limit, for a total of $123,200.00. We disagree.

A similar policy was discussed at length in *Allemand*, where the court addressed "nine decades" of Washington law involving comparable policies. 160 Wn. App. at 366. The *Allemand* court held that replacement costs for like construction and use of a structure do not include costs of upgrading a structure to meet building codes that it did not previously meet. 160 Wn. App. at 372; *see also Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 259, 928 P.2d 1127 (1996) (holding that coverage for "equivalent construction" did not include building code

brief or other paper in which the opinion is cited." Farmers failed to include the required copy; therefore, this opinion does not address *Allen*. As a side note, amendments to GR 14.1 took effect September 1, 2016, but the changes have no impact on this opinion.

upgrades), *review denied*, 131 Wn.2d 1018 (1997); *Roberts v. Allied Grp. Ins. Co.*, 79 Wn. App. 323, 325, 901 P.2d 317 (1995) (holding that coverage for "like construction" did not include building code upgrades). For Lesure to reach the Coverage A maximum, the code upgrade costs would have to be covered under Coverage A. They are not.

Moreover, in *Vision One*, our Supreme Court held that an extraexpense endorsement (additional coverage for soft costs including loan interest, property taxes, and accounting and legal fees) was limited to the endorsement amount and was not "designed to provide an additional $1 million for the specified . . . losses in the event the $12.5 million [policy] limit was exhausted." 174 Wn.2d at 522.

Based on the above authority, the policy language is clear and unambiguous. Farmers' original obligation under Coverage A is to provide similar construction in rebuilding the partially damaged home. This does not include paying for required code upgrades. Instead, the policy provides for necessary code upgrades by the optional endorsement. The endorsement is the sole source of the obligation to pay for bringing the remodeled home up to code. The coverage, however, is limited to 10 percent of Coverage A that Lesure purchased. The necessary upgrades required more than that figure and Farmers, accordingly, properly tendered its limits under that coverage. Farmers was not required to pay the full policy limits plus an extra 10 percent as alleged by Lesure.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Bjorgen, C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LORETTA LESURE,

Appellant,

v.

FARMERS INSURANCE COMPANY OF WA,

No. 48045-0-II

ORDER DENYING MOTION FOR RECONSIDERATION

Respondent moves for reconsideration of the Court's **October 10, 2016** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Lee, Johanson, Bjorgen

DATED this 23rd day of November, 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

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APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

December 21, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LORETTA LESURE, a single woman, Appellant, v. FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic corporation and a Washington State Stock Insurer, Respondent.	No. 48045-0-II ORDER GRANTING MOTION TO PUBLISH

Respondent, Farmers Insurance Company of Washington, moved this court to publish its opinion filed on September 20, 2016. After review, it is hereby

ORDERED that the final paragraph which reads "A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED that the opinion will now be published.

DATED this 21st day of December, 2016.

PANEL: Bjorgen, C.J.; Johanson, J.; Lee, J.

Lee, J.

Filed
Washington State
Court of Appeals
Division Two

September 20, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LORETTA LESURE, a single woman, Appellant, v. FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic corporation and a Washington State Stock Insurer, Respondent.	No. 48045-0-II UNPUBLISHED OPINION

LEE, J. — Loretta Lesure appeals the trial court's order granting Farmers Insurance Company of Washington's (Farmers) motion for summary judgment, finding Farmers did not owe additional benefits to Lesure for fire damage to her home. The trial court concluded that as a matter of law, Lesure's policy did not cover the total cost of fire-loss house repairs that included, in part, costs for changed building code requirements. We agree and affirm.

FACTS

The facts are primarily undisputed. Lesure's Port Angeles home was partially damaged by fire. The home was insured by Farmers. Coverage A of the insurance policy covered the cost to repair or replace the insured's dwelling up to a policy limit of $112,000.00.[1] The policy, however,

[1] The policy states that under Coverage A:

excludes "direct or indirect loss" resulting from the "[e]nforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed by this policy."[2] Clerk's Papers (CP) at 129. Lesure purchased an optional endorsement for coverage of building code and ordinance upgrades with a liability limit of "10% of the total limit of insurance applying to the covered property."[3] CP at 144. The policy limit for the optional coverage was $11,200.00.

> We cover:
> 1. The dwelling, including attached structures, on the **residence premises** and used principally as a private residence.
> 2. Material and supplies on or adjacent to the **residence premises** for use in construction, alteration or repair of the dwelling or other structures on the **residence premises**.
> Wall-to-wall carpeting attached to the dwelling is part of the dwelling.

CP at 125.

[2] The policy states:

> We do *not* cover direct or indirect loss from:
> 1. Enforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed to this policy.

CP at 129.

[3] The endorsement states:

> Under **Section I — Property, Losses Not Insured** or **Losses Not Covered**, the following exclusion is deleted:
>
> Enforcement of any ordinance or law regulating construction, repair or demolition of a building or other structure, unless endorsed on this policy.
> Under **Section I — Property, Additional Coverages**, the following coverage is added:

Replacement costs for the partially fire-damaged home totaled $22,248.25 (less Lesure's $500 deductible). Because the home failed to comply with current building code requirements, the city of Port Angeles required that the home be rebuilt to construction code. Specifically, the home needed a foundation. Lesure estimates the cost to rebuild her home with the code required updates to be $125,397.12. Farmers tendered $21,748.25 for repairs related to the fire damage, plus $11,200.00 for repairs related to code compliance, which was the coverage limit.

Lesure rejected Farmers' offer and requested the full policy limit of $112,000.00 plus an additional 10 percent under the optional building ordinance or law endorsement, totaling $123,200.00 to demolish and rebuild her home to current code. Farmers denied her request.

Lesure filed a complaint for declaratory relief and damages. Lesure requested declaratory judgment arguing the efficient proximate cause (EPC) rule required Farmers to pay the full policy limit.

Farmers filed a motion for partial summary judgment, arguing it fulfilled its obligations under the policy by offering payment for the property damage plus an extra 10 percent of her maximum policy limit under her optional endorsement. The trial court granted Farmers' request for partial summary judgment, finding Farmers owed no additional benefits under the coverage

---

> 1. Our limit of liability for this coverage will not be more than 10% of the total limit of insurance applying to the covered property under Coverage A—Dwelling or Coverage B—Separate Structures, shown in the declarations or premium notice, whichever is most recent at the time of loss. This endorsement applies to all coverages whether in the policy contract or subsequently added by endorsement.

CP at 144.

terms of the policy; denied Lesure's request for declaratory judgment; and dismissed with prejudice Lesure's action. Lesure appeals.[4]

ANALYSIS

A. STANDARD OF REVIEW

We review a superior court's order on summary judgment in a declaratory judgment action de novo. *Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 169 Wn.2d 687, 691, 238 P.3d 1163 (2010). Summary judgment is appropriate if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c).

Interpretation of an insurance policy is a question of law we review de novo. *Woo v. Fireman's Fund Ins.* Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Because insurance policies are construed as contracts, the policy terms are interpreted according to contract principles. *Weyerhaeuser Co. v. Commercial Union Ins. Co*., 142 Wn.2d 654, 665, 15 P.3d 115 (2000). The policy is considered as a whole, and is given a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Id*. at 666 (quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998)). If the language is clear, the court must enforce the policy as written and may not create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co*., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). "[T]he expectations of the insured cannot override the plain language of the contract." *Id*. at 172.

[4] The parties stipulated to the dismissal of all other potential coverage claims and agreed the court's memorandum order was a final decision on the merits.

B. EFFICIENT PROXIMATE CAUSE RULE

Lesure first contends the trial court erred in failing to recognize and apply the EPC rule. The EPC rule is applied in Washington to determine first-party insurance policy coverage when a single loss occurs as the result of two or more perils acting together. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 519, 276 P.3d 300 (2012). "The efficient proximate cause rule applies *only* when two or more perils combine in sequence to cause a loss and a covered peril is the predominant or efficient cause of the loss." *Id.* (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 732, 837 P.2d 1000 (1992)) (emphasis added). "In such a situation, the efficient proximate cause rule mandates coverage, even if an excluded event appears in the chain of causation that ultimately produces the loss." *Vision One,* 174 Wn.2d at 519 (citing *Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 628, 773 P.2d 413 (1989)).

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Similarly here, Lesure's EPC rule argument is without merit. The rule "applies only when two or more perils combine in sequence to cause a loss and a *covered peril* is the predominant or efficient cause of the loss." *Vision One*, 174 Wn.2d at 519. "When . . . the evidence shows the loss was in fact occasioned by only a single cause, . . . the efficient proximate cause analysis has no application." *Kish v. Ins. Co. of N. Am.*, 25 Wn.2d 164, 170, 883 P.2d 308 (1994) (quoting *Chadwick v. Fire Ins. Exch*., 17 Cal. App. 4th 1112, 1117, 21 Cal. Rptr. 2d 871 (1993)). The *Kish* court elaborated, "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." (quoting *Chadwick*, 17 Cal. App. 4th at 1117).

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Moreover, in *Vision One*, our Supreme Court held that an extraexpense endorsement (additional coverage for soft costs including loan interest, property taxes, and accounting and legal fees) was limited to the endorsement amount and was not "designed to provide an additional $1 million for the specified . . . losses in the event the $12.5 million [policy] limit was exhausted." 174 Wn.2d at 522.

Based on the above authority, the policy language is clear and unambiguous. Farmers' original obligation under Coverage A is to provide similar construction in rebuilding the partially damaged home. This does not include paying for required code upgrades. Instead, the policy provides for necessary code upgrades by the optional endorsement. The endorsement is the sole source of the obligation to pay for bringing the remodeled home up to code. The coverage, however, is limited to 10 percent of Coverage A that Lesure purchased. The necessary upgrades required more than that figure and Farmers, accordingly, properly tendered its limits under that coverage. Farmers was not required to pay the full policy limits plus an extra 10 percent as alleged by Lesure.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Bjorgen, C.J.