93981-1

NO. 48045-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

LORETTA LESURE, a single woman,

Petitioner

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON,
A domestic corporation and a Washington State Stock Insurer,

Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Loretta Lesure ("Lesure") asks this Court to accept review of the Court of Appeals' published decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS' DECISION

Petitioner seeks review of the decision of the Court of Appeals (Division Two), filed November 23, 2016 (No. 48045-0-II). A Motion for Reconsideration was sought before the Court of Appeals on October 1, 2016. A copy of the published decision is found in the attached Appendix A. A copy of the Order Denying the Motion for Reconsideration is found at Appendix B.

C. ISSUES PRESENTED FOR REVIEW

No. 1: Under an all-risk homeowners' insurance policy, if the predominant cause of a loss is a covered peril, such as fire, does the efficient proximate cause rule still apply to extend coverage even though another event in the chain of causation (in this case, building ordinance or law enforcement) is clearly excluded from coverage?

Sub-Issue: If so, does the insurance policy's offer of optional coverage for the exclusion conflict with, or circumvent, the efficient proximate cause rule where the option coverage, if purchased by the

insured, operates to reduce the coverage that would have otherwise been available had the insured not purchased the optional coverage? (This is an issue of first impression before the Washington State Supreme Court.)

Sub-Issue: In light of the efficient proximate cause rule, does the insured's purchase of optional coverage for the exclusion render the policy illusory where the optional coverage operates to reduce the amount of coverage that would have otherwise been available to cover the loss had the insured not purchased the optional coverage?

No. 2: Is the relevant policy language ambiguous; that is, is it subject to more than one reasonable interpretation?

Sub-Issue: If so, does a fair and reasonable interpretation of Lesure's all-risk homeowners' policy establish that the optional code enforcement coverage (Option s7981A) applies only to the costs of the actual code upgrades themselves, and not as a second cap on the amount available under Coverage A to replace the dwelling?

No. 3: Is Building Code Enforcement, when listed as one excluded peril among many under an all-risk homeowner's policy, a peril, event or risk as a matter of law?*

*Credit is given to Douglas W. Nicholsen #24854, and Cone Gilreath Law Offices, who were the attorneys for Rex and Brenda Allemand, Petitioners in *Allemand v. State Farm*, Supreme Court Case No. 85856-0, review granted on July 12, 2011 at 171 Wn.2d 1028, 257 P.3d 662 (2011). In no small part, settlement was accomplished before oral argument due to their Petition for Review; this Petition for Review borrows heavily from that Brief.

D. STATEMENT OF THE CASE

Loretta Lesure owned a house in Port Angeles, Washington, that was severely damaged by an accidental fire on January 4, 2014. CP 32. Her house was insured under an all-risk homeowners' insurance policy issued by Farmers Insurance Company. CP 13, and Ex. 10, at CP 119-163. The house was originally built in 1940 without a foundation. CP 32. When the fire occurred, the Lesure house did not comply with current local building code requirements applicable to its foundation, crawl space, and electrical wiring among other things. CP 34-35. Due to those deficiencies, Mrs. Lesure could not obtain a building permit to repair the portions of her house that were damaged or destroyed by the fire; instead, she was required to raze the house, including the undamaged portions, and rebuild and replace it from scratch. CP 34, 106-112. The replacement cost of the house was $125,397.72. CP 32.

Mrs. Lesure's Farmers homeowners' policy provided a maximum of $112,000 under Coverage A to repair or replace her home. CP 119. Under the loss settlement provisions applicable to Coverage A (dwelling), the policy excluded "loss from enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, unless endorsed to this policy." CP 108. Optional Endorsement

s7981A "provided" additional coverage for an additional sum, equal to 10% of the policy maximum, or $11,200, for costs resulting from building code enforcement. CP 109. Mrs. Lesure was induced to purchase the "additional coverage" provided by Option s7981A by a Farmers agent, John Z. Miller. CP 144. Had Farmers intended that the Optional Endorsement s7981A actually reduce her coverage by eliminating her rights under the Efficient Proximate Rule, such inducement would have been fraudulent.

Farmers paid Mrs. Lesure the total amount of $17,384.47 for repairs estimates to pre-loss condition, plus $11,200 for building upgrade under Option s7981A. CP 144. This amount consisted of the estimated amount to repair only the damaged portion of Lesure's house under Coverage A (without considering the fact that the entire house, including the undamaged portion, had to be completely demolished and replaced to comply with current building code requirements), plus the $11,200 limit available for code upgrades, instead of covering the loss up to the policy limits pursuant to the efficient proximate cause rule under Coverage A.

Farmers and Mrs. Lesure then filed an action in Clallam County Superior Court for declaratory judgment and, on Mrs. Lesure's part for damages and arguing that Farmers was required to pay the maximum

under both Coverage A and Option s7981A. CP 199. The trial court disagreed with Mrs. Lesure's interpretation of the policy, issuing an Order on Summary Judgment dismissing Lesure's complaint. CP 09.

In doing so, the trial court held that the homeowners' insurance policy is unambiguous (App. A, 8); that Farmers' obligation under Coverage A is limited to pay the actual cash value of the damage to the property (CP 12); that the policy excludes coverage for required code upgrades; instead, holding that the policy provides for necessary upgrades under Option s7981A, which is "limited by the policy she purchased to 10% of the policy limits," and, perhaps most surprisingly, that the efficient proximate cause rule didn't trigger coverage under the insurance policy because the building code upgrade requirements did not constitute an event in a chain of events. CP 14, Appendix A, 7.

In short, the trial court held that she paid for an endorsement option which gutted her rights she otherwise would have had under the efficient proximate cause rule.

E. SUMMARY OF ARGUMENT

The efficient proximate cause of the damage to Mrs. Lesure's home was an accidental fire, a covered peril under Coverage A of their all-risk homeowners' policy. The policy's loss settlement provisions

applicable to Coverage A exclude increased costs caused by the enforcement of any ordinance or law regulating the construction or repair of the house, unless the insured pays an additional premium to acquire such coverage under Option s7981A. If the policy merely contained a blanket exclusion for the increased costs caused by building ordinance or law enforcement, the efficient proximate cause rule would apply in this case to extend coverage for the entire fire loss. The same result would hold if Mrs. Lesure *had not* paid extra to make Option s7981A part of her policy. By doing so, Mrs. Lesure paid more for this ostensible "additional coverage," but in fact unwittingly penalized herself with less coverage for her additional payment. As such, the purported additional coverage extended under Option s7981A is illusory and circumvents the efficient proximate cause rule.

The Court of Appeals went further and ruled as a matter of law, without citation to authority, that "non-compliance with a city's building code is not a peril." Appendix A, 6. However, this is not a simple matter of code non-compliance; rather, this is a matter of a home built to code originally, but then rendered unrepairable not solely from the primary cause of a fire, but instead due to building code changes made over the years. Furthermore, Farmers itself views building code upgrades as perils

or events causing loss, specifically ones they denominated as such and for which it excluded from coverage under the insurance policy.

Furthermore, Mrs. Lesure's Farmers policy is ambiguous. A fair and reasonable interpretation of the relevant provisions of the policy is that Option s7981A is a separate coverage provision, which provides "additional insurance" to pay for legally required code upgrades. As such, Option s7981A's coverage limit operates only as a cap on the amount Farmers' will pay for the actual costs of the code upgrades themselves; it does not otherwise limit the coverage available for the dwelling under Coverage A of the policy, or circumvent the efficient proximate cause rule.[1] Any other interpretation means that Mrs. Lesure receives less coverage while paying more for, what Farmers claims, is additional coverage.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Case Meets the Requirements for Review.

This petition involves issues of first impression for the Washington State Supreme Court, and only previously considered by the Court of

[1] The Trial court incorrectly found that, "the necessary upgrades required more than 10% of the limit of Coverage A and Farmers' thus properly tendered its limits under that coverage." Nothing in the record supports this finding, as no evidence was presented as to what the actual code upgrades themselves cost. Moreover, irrespective of the code upgrades, Lesure's entire house, including the *undamaged portions*, had to be razed. Thus, under the trial court's ruling, Lesure was not compensated for the loss to the undamaged portion of her home, even though the fire was the efficient proximate cause of that loss.

Appeals, Division III, in *Allemand v. State Farm Insurance Co.*, 160 Wn. App. 365, 248 P.3d 111 (2011). This Court accepted review, *Allemand v. State Farm*, Supreme Court Case No. 85856-0, all briefs were filed, and oral argument was set. The day before oral argument, State Farm settled the case for policy limits and attorneys fees, and the issue was delayed for another day. Today is that day. The Court of Appeals declared, "Here, the facts in *Allemand v. State Farm* are very similar to our facts." Appendix A, at 5. The issues presented are also very similar. This is a matter of substantial public interest that should be determined by this Court under RAP 13.4(b)(4).

Farmers' all-risk homeowners' policy is a standard form, adhesion contract that covers accidental fire loss, but excludes increased costs caused by building code enforcement, unless the insured pays an additional premium for optional code enforcement coverage. The policy limit for this optional coverage, however, is only 10% of the coverage limit available for the dwelling under Coverage A. The entire loss would have been covered under the efficient proximate cause rule had Mrs. Lesure declined to pay for the optional code upgrade coverage; thus, the optional coverage is illusory: Mrs. Lesure paid more, but in fact received less coverage under the Court of Appeals' construction of the policy.

Furthermore, this outcome has the effect of circumventing the efficient proximate cause rule in two ways: on the one hand, by allowing the optional coverage to invoke a limitation on otherwise full coverage; and on the other hand, by declaring the building code upgrades non-perils or non-events, something the insurance policy itself recognizes not to be the case. It also defeats the purpose of the efficient proximate cause rule and the very reason for purchasing an all-risk homeowners' policy.

The impact of this outcome affects all holders of Farmers' standard form all-risk homeowners' policy in this state, as well as the policy holders of similar insurance policies issued by other insurers in this state.

Moreover, the Court of Appeals' decision in this case is in conflict with the efficient proximate cause rule as articulated by this Court several times; therefore, review is also appropriate under RAP 13.4(b)(1). The court's decision is also in conflict, or at least difficult to reconcile, with Division One's decision in *Starczewski v. Unigard Insurance*, 61 Wn. App. 267, 810 P.2d 58 (1991), *review denied*, 117 Wn.2d 1017 (1991). Accordingly, review is also appropriate under RAP 13.4(b)(2).[2]

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[2] In attempting to distinguish *Starczewski*, relied on by Mrs. Lesure from *Roberts v. Allied Group Insurance Co.*, 79 Wn. App. 323, 901 P.2d 317 (1995) and *Dombrosky v. Farmers' Ins. Co.*, 84 Wn. App. 245, 928 P.2d 117 (1996), *review denied*, 131 Wn.2d 1018 (1997), relied on by Farmers', the Court of Appeals did not address the fact that the outcome in *Starczewski* turned upon the application of the efficient proximate cause rule, whereas neither the *Roberts* nor *Dombrosky* decisions addressed the rule, which, had it been raised and addressed, might have resulted in a different outcome.

This Court should take the opportunity to reaffirm its commitment to the efficient proximate cause rule and make clear that unambiguous policy exclusions or limitations on coverage, however worded, may not be permitted to override or undermine the rule, at least with respect to adhesion contracts in the all-risk homeowners' policy setting. In this context, absent extrinsic evidence of both the insured's and the insurer's intent, the efficient proximate cause rule should be applied predictably and uniformly. Finally, the Court of Appeals' venture into redefining building code changes and upgrades as non-events or non-perils cannot be left to stand.

2. The Efficient Proximate Cause Rule Applies to Extend Coverage if the Predominant Cause of the Loss is an Insured Peril, Even if Another Event in the Chain of Causation is a Specifically Excluded Peril.

This Court first adopted the efficient proximate cause rule in *Graham v. Pemco*, 98 Wn.2d 533, 656 P.2d 1077 (1983). Under the rule, "where an insured risk itself sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery." *Villella v. Pemco*, 106 Wn.2d 806, 815, 725 P.2d 957 (1986). This Court has expressly reaffirmed its commitment to the efficient proximate cause rule in each decision since *Graham* and *Villella*.

See, Safeco Insurance v. Hirschmann, 112 Wn.2d 621, 625-26, 773 P.2d 413 (1989).

This Court has also made clear that an insurer cannot defeat the application of the efficient proximate cause rule by drafting exclusionary language to circumvent it. *Hirschmann*, 112 Wn.2d at 627; *Key Tronic Corporation*, 124 Wn.2d at 626; *Findlay*, 129 Wn.2d at 375 ("insurer could not, by drafting a variation in exclusionary clause language, deny coverage when a *covered peril* sets in motion a causal chain the last link of which is an excluded peril") (citing *Hirschmann*, 112 Wn.2d at 626-27 (italics original)).

The efficient proximate cause rule, however, does not apply to extend coverage "[i]f the efficient proximate cause . . . is a specifically named, unambiguous excluded peril in the policy." *Findlay*, 129 Wn.2d at 380. "[I]n a chain of causation case, the efficient proximate cause rule is properly applied after (1) a determination of which single act or event is the efficient proximate cause of the loss, and (2) a determination that the efficient proximate cause of the loss is a covered peril." *Findlay*, 129 Wn.2d at 376 (citing *McDonald*, 119 Wn.2d at 732).

Where, as here, the efficient proximate cause of the loss is a covered peril, even a specific, unambiguous exclusion will not defeat

coverage for the entire loss, even if the excluded event contributed to or aggravated the loss. *Villella*, 106 Wn.2d at 819.

Here, Mrs. Lesure's Farmers Insurance Policy specifically excludes costs caused by the enforcement of a building ordinance or law, unless the insured pays an additional premium for the optional building ordinance or law coverage extended under Optional Endorsement s7981A of the policy. Even if the relevant language of the policy is found to be unambiguous. It should not defeat coverage for the entire loss in this case, since the efficient proximate cause of the loss was an accidental fire, a covered peril.

3. Mrs. Lesure's Farmers Homeowner's Policy Effectively Circumvents the Efficient Proximate Cause Rule, Because the Entire Fire Loss Would Have Been Covered Had Mrs. Lesure Not Paid Extra for the Optional Building Ordinance and Law Coverage.

Under the efficient proximate cause rule, "[i]f the initial event, the 'efficient proximate cause,' is a covered peril, then there is coverage under the policy regardless of whether subsequent events within the chain, which may be causes-in-fact of the loss, are excluded by the policy." *Hirschmann*, 112 Wn.2d at 628. "[T]he purpose of the efficient proximate cause rule is to provide a 'workable rule of coverage that provides a fair result within the reasonable expectations of both the insured and the insurer'". *Kish*, 125 Wn.2d at 172 (quoting *Garvey v. State Farm Fire &*

Cas. Co., 48 Cal.3d 395, 404, 770 P.2d 704, 257 Cal. Rptr. 292 (1989)); *Findlay*, 129 Wn.2d at 377.

Here, Farmers, which is in the business of insurance and drafting insurance policies, can be reasonably expected to be aware of the efficient proximate cause rule and its application in insurance policy construction. Mrs. Lesure, however, cannot be reasonably expected to be aware of the rule and its application. Farmers' all-risk homeowner's policy defeats the purpose of the efficient proximate cause rule, because it provides an *unfair result*: Mrs. Lesure paid more for Optional Endorsement s7981A, ostensibly to provide "additional coverage" for losses caused by building code enforcement, an otherwise excluded peril. In doing so, however, under the Court of Appeals' construction of the policy, Mrs. Lesure actually reduced the coverage available to them for the fire loss.

Under the efficient proximate cause rule, had Mrs. Lesure declined the optional coverage, the entire loss would have been covered. Since the fire was the efficient proximate cause that triggered the excluded risk (building code enforcement), the excluded risk would not have defeated coverage. *Villella*, 106 Wn.2d at 815.

4. The Building Ordinance or Law Exclusion is a Peril, Event or Risk As a Matter of Law.

The Court of Appeals found that the efficient proximate cause rule was not applicable in this case, however. Appendix A, 6.

> 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 efficient proximate cause 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.

With this, the Court of Appeals, without citation to any authority, tossed out the efficient proximate cause rule by defining the policy's "excluded peril" as no peril at all. This is a non-sequitur, because the policy itself specifically identifies building code enforcement as a risk, peril and event to be excluded from coverage. Here is the list of perils identified in the policy, in its original order, which are excluded from coverage, at CP 129, 130:(1) Building ordinance or law enforcement, (2) Earth movement, (3) Water damage, (4) Interruption of power, (5) Neglect of an Intentional acts of the insured, (6) War and (7) Nuclear hazard.

There appears to be no case in this state addressing similar policy language besides *Allemand*, supra. Even *Allemand,* however, seems to understand that building code enforcement is a recognized risk to be insured against. The Court of Appeals singled out building ordinance enforcement from the policy's eight-point list of excluded perils as not

really constituting either a peril, event or risk; though, Farmers itself did. Apparently, the Court of Appeals did this because it couldn't figure out any other way to reconcile the holding in *Allemand.* It is called an excluded peril, not a peril at all, thus eliminating a "chain of events."

5. As Construed by the Court of Appeals, the Optional Building Code Enforcement Coverage is Illusory, and There Was No Consideration for Her Payment.

The trial court and the Court of Appeals adopted wholesale the *Allemand* analysis, which ignores the Supreme Court's approach to the efficient proximate cause rule and Division I as set forth in *Starczewski, supra. Allemand* and the holding in the Court of Appeals decision should be overruled. "[T]he court will not give effect to interpretations that would render contract obligations illusory." *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997), *review denied*, 132 Wn.2d 1009 (1997). "An illusory contract is unenforceable because there is no consideration." *St. John Med. Ctr. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 51, 68, 38 P.2d 383 (2002), *review denied*, 146 Wn.2d 1023 (2002). Where possible, a contract is to be construed to avoid rendering it illusory. *Taylor*, 84 Wn. App. at 730.

Here, the Court of Appeals' construction of the relevant policy language renders it illusory. Mrs. Lesure paid extra to purchase the

optional building code enforcement coverage, but received less coverage for her additional payment. The appropriate way to reconcile the policy language, so that it is not illusory, is to construe it so that the optional building code coverage applies only where the code upgrades themselves are the efficient proximate cause of the loss.

The relevant policy language states that Farmers will not pay for "direct or indirect loss *from*" enforcement of any ordinance or law. CP 129. (italics added). "From" is the functional equivalent of loss "caused by". Equating "from" with "caused by" comports with the layman's understanding of these two phrases. "The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense." *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974).

"The *Graham* rule suggests that whenever the term 'cause' appears in an exclusionary clause it must be read as 'efficient proximate cause.' This interpretation is confirmed by *Villella*." *Hirschmann*, supra, 112 Wn.2d at 629. Restated accordingly, Farmers' conditional building code exclusionary clause should be read this way: "We will not pay for increased costs where the *efficient proximate cause* of the loss is the enforcement of any ordinance or law regulating the construction, repair or

demolition of a building or other structure, except as provided under Optional Endorsement s7981A." *Id.* This also comports with Washington case law as summarized in *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*, 158 Wn. App. 91, 104, 241 P.3rd 429 (2010), (rev'd on other grounds, at 171 Wn.2d 501 (2012)).

6. The Insurance Policy's Language is Ambiguous.

"It is Hornbook law that where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured must be applied, even though the insurer may have intended another meaning." *Dairyland*, 83 Wn.2d at 358. "A clause is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *American Nat'l Fire v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998). Here, the policy informs the insured that building code enforcement costs are excluded from coverage, unless they purchase the optional endorsement coverage. CP 129. The language of the loss settlement provisions applicable to Coverage A also promise the smallest of 1) policy limits, 2) replacement cost of that part of the building damaged for equivalent construction and use on the premises, or 3) the amount actually and necessarily spent to repair or replace the building. CP 131. For an all-risk policy, such as this

one, taken together, such language can be reasonably interpreted as informing the insured that the separately purchased option provides separate, additional coverage for costs caused by the enforcement of building codes.

As understood by the average purchaser of insurance, a fair and reasonable interpretation of the above policy language is that Farmers will pay up to the optional endorsement policy limit for the costs of the actual code upgrades themselves, *as additional insurance coverage* for the dwelling under Coverage A. However, it does not otherwise preclude the insured from receiving the full coverage available under Coverage A for damages to the dwelling that do not involve actual code upgrades, if the predominant cause of the damages is a covered peril. This, again, comports with our case law which states that, under an all-risk policy, any loss in part caused by any excluded peril is covered unless the excluded peril is the efficient proximate cause of the loss. *Vision One, LLC, supra* (citing the *Graham* rule).

This Court of Appeals' interpretation overlooks the fact that Mrs. Lesure had to tear down both the damaged and undamaged portions of her house. Farmers paid for only the estimated costs to repair the damaged portion of the house; it did not pay Mrs. Lesure anything for the

undamaged portions that had necessarily to be razed, even though they could have been replaced with similar construction. The code upgrades included the foundation, crawl space, and electrical wiring, *not the entire house*. CP 31, 32.

Moreover, under Farmers' all-risk "repair or replace" homeowners' policy, Mrs. Lesure would reasonably expect that, for the total loss of her home, she would end up with a habitable dwelling, or at least the policy limit available for the dwelling under Coverage A. If Farmers wanted the coverage limit of Optional Endorsement s7981A to apply to reduce the amount available under Coverage A, when code upgrades are necessary, it could have worded the coverage language differently. "The [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions." *Boeing v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990).

G. CONCLUSION

The efficient proximate cause of Mrs. Lesure's loss was an accidental fire, not the enforcement of any building ordinance or law. Had Mrs. Lesure not purchased the purported Optional Endorsement s7981A, her entire loss, up to the applicable policy limits, would have been covered as required by the efficient proximate cause rule. Unless the building

ordinance or law exclusion applicable to Coverage A is construed to apply only when building code enforcement is the efficient proximate cause of the loss, the optional coverage under Optional Endorsement s7981A is illusory, since the insured pays an additional premium, but in fact receives less coverage under the circumstances as presented here. As construed by the Court of Appeals, the policy language also circumvents the efficient proximate cause rule. Accordingly, this Court should reverse the Court of Appeals' decision and the Trial Court's decision in favor of Farmers.

The Court should find that exclusions, however worded, should not apply to trump the efficient proximate cause rule where the efficient proximate cause of a loss is an expressly covered peril. The Court should also state, as a matter of law, that building code changes constitute an insurable peril or risk that may constitute an event in a chain of events. A clear-cut application of the rule provides a workable, fair result.

DATED this 22nd day of December, 2016.

Respectfully submitted,

WOLFLEY LAW OFFICE, P.S.

By: _____
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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]

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[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

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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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COURT OF APPEALS
STATE OF WASHINGTON

Loretta Lesure Appellant, vs. Farmers Insurance Company of WA, Respondent.	**NO. 48045-0-II** **DECLARATION OF MAILING**

KM GERDTS declares under penalty of perjury of the laws of the State of Washington, that on this day she emailed Petition for Review to:

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DATED at Port Angeles, Washington, this 22 day Dec, 2016.

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