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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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LAURA HOLDEN, *et al.*,
Plaintiffs/Respondents,

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurer; FARMERS INSURANCE EXCHANGE, a foreign insurer; and all affiliated Farmers Insurance Companies and/or entities

Defendants/Appellants.

Appeal from Superior Court of King County
Hon. John Erlick

PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONER

Plaintiff Laura Holden, individually and on behalf of all others similarly situated, petitions this Court for discretionary review of the Court of Appeals decision below.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its decision in this case on January 22, 2008. A copy of this decision is attached as Appendix A.

III. INTRODUCTION

Petitioner Laura Holden lost personal property in a fire at her apartment. Defendant Farmers Insurance Company of Washington (Farmers) insured her residence under a "Broad Form Renters Package Policy." This policy contains a clause stating that "[c]overed loss to property will be settled at actual cash value." The policy defines the words "actual cash value" (ACV) as meaning the "fair market value of the property at the time of the loss." But the policy does not define the meaning of "fair market value" (FMV) or what method should be used in determining FMV.

Several methods can be used in determining the FMV of personal property. One method is to determine the replacement cost of the personal property item and then depreciate it. Under this method, since the replacement cost of personal property assumes payment of sales tax in the

State of Washington, the FMV of the item in question would also include the sales tax that would be incurred in replacing the item. This is the method that Ms. Holden claims Farmers should have used in this case.

Another method of determining the FMV of personal property -- the one that Farmers claims applies -- is to measure the loss by the amount of money the insured could have sold the property for before the loss, less any remaining value in the property after the loss. Under this method, FMV is defined as the amount of money that a purchaser willing but not obligated to buy would pay for the item in question to a willing seller not obligated to sell.

Using this latter method, Farmers refused to pay Washington State sales tax on any portion of the ACV that it had assigned to Ms. Holden's personal property. Because Farmers refused to include sales tax in its ACV for her personal property, Ms. Holden filed this putative class action against Farmers. Both parties then brought summary judgment motions.

On summary judgment, Farmers argued that Washington law prohibits it from defining FMV as replacement cost less depreciation. In making this argument, Farmers relied specifically on *National Fire Insurance v. Solomon*, 96 Wn.2d 763, 770, 638 P.2d 1259 (1982), which held that "'actual cash value' within [the] statutory language of [a] fire policy ... does not mean replacement cost less depreciation." Ms. Holden

countered this argument by pointing out that this Court had expressly limited the application of *Solomon* to its facts in *Hess v. North Pacific Insurance Company*, 122 Wn.2d 180, 859 P.2d 586 (1993). Judge John Erlick agreed with Ms. Holden, finding that *Solomon* was "significantly limited," if not overruled *sub silentio*, by this Court in *Hess*.

Finding that *Solomon* does not apply, Judge Erlick then held that Farmers' definition of "actual cash value," as used in Farmers' insurance policies, is ambiguous as a matter of law because it relies on a definition of FMV that is capable of more than one reasonable interpretation or construction. Judge Erlick therefore construed the contractual provision against Farmers and interpreted it in a manner favorable to Ms. Holden as including Washington sales tax and granted Ms. Holden's Motion for Summary Judgment.

Following Judge Erlick's ruling, Farmers sought review in the Court of Appeals. The Court of Appeals reversed Judge Erlick. Even though Farmers relied heavily on *National Fire Insurance v. Solomon*, *supra*, in its summary judgment motion, the Court of Appeals found that neither *Solomon* nor *Hess* controls. The Court of Appeals also found no ambiguity in the Farmers policy despite the fact that the policy did not define FMV or the method for determining FMV. According to the Court of Appeals, the method of determining FMV under ACV coverage "begs

the question". *See the Court of Appeals Decision* at 6. Instead of defining FMV in Ms. Holden's favor as the law requires, the Court of Appeals opined that "the contract language must be viewed through the lens of indemnification" and indemnity does not include sales taxes unless incurred. *See Id.* at 7.

The Court of Appeals' opinion not only conflicts with this Court's opinion in *Hess v. North Pacific Insurance Company, supra*, but it also conflicts with this Court's opinions requiring any ambiguity in an insurance policy to be construed in favor of the insured. *See Vadheim v. Continental Ins. Co.*, 107 Wn.2d 836, 841, 734 P.2d 17 (1987); *Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 435, 545 P.2d 1193 (1976). Because of these conflicts, Ms. Holden now petitions this Court for review.

IV. ISSUES PRESENTED FOR REVIEW

This petition raises two issues:

1. Should the Court grant review in this case because the decision of the Court of Appeals disregards, and therefore conflicts with, this Court's opinion in *Hess v. North Pacific Insurance Company*, 122 Wn.2d 180, 859 P.2d 586 (1993)?

2. Should the Court grant review in this case because the Court of Appeals' decision conflicts with this Court's line of cases holding

that ambiguous clauses in insurance policies must be construed in favor of the insured?

V. STATEMENT OF THE CASE

A. Ms. Holden's loss and settlement

The relevant facts are undisputed. On June 9, 2004, Laura Holden suffered personal property contents losses as a result of a fire in her apartment. CP 9; CP 56. At the time of the loss, Farmers insured Ms. Holden for such a loss by operation of an insurance policy issued to her by Farmers. CP 55. Following the fire at her apartment, Ms. Holden submitted a claim to Farmers for the total loss of certain personal property items destroyed in the fire. CP 55-58. Farmers paid money to Ms. Holden allegedly representing the actual cash value (ACV) of the covered portion of her personal property contents loss claim. CP 10; CP 64. However, Farmers refused to pay Washington State sales tax on any portion of Ms. Holden's personal property contents loss. CP 70.

The Farmers insurance policy issued to Ms. Holden defines ACV as the "fair market value of the property at the time of loss." CP 93. The words "sales tax" do not appear in the definition of ACV in Ms. Holden's insurance policy nor in any other Farmers insurance policy issued in the State of Washington, including, but not limited to, homeowners policies, condominium policies, or insurance policies that provide Farmers' insurance

protection from personal property contents losses. Similarly, nowhere in any Farmers insurance policy issued in the State of Washington are insureds provided any written description of how Farmers goes about determining the "fair market value of the property at the time of loss."

In fact, Farmers' authorized spokesperson, Robert Hower, testified at his deposition that one way to determine the fair market value of property at the time of loss (i.e., one way to determine ACV) is to take the replacement cost of an item and depreciate it. *See* CP 140-141. In further discussion of this issue, Mr. Hower admitted that Farmers' policies do not inform its insureds as to whether or not they will receive sales tax in an ACV settlement:

> Q: Where in the policy does it say that they're not going to get their sales tax [on an ACV settlement]?
>
> A: It doesn't.

CP 143-144.

Internal documents produced by Farmers in this litigation confirm Farmers' use of the "replacement cost less depreciation method" when determining actual cash value. These documents also reflect Farmers' internal dialogue as to whether sales tax should or should not be included in

an actual cash value settlement. *See* CP 192-220. These documents include admissions that "On ACV policies, we owe taxes up front"[1] and that

> The home office has written a memo to ensure we are applying sales tax to our claims settlements. They advised applicable state sales tax must always be included when determining the amount of the covered loss. They also state sales tax should be included on an ACV settlement if the policy does not include a replacement cost endorsement.

CP 205.

Even though Farmers employs the "replacement cost less depreciation method" of determining actual cash value payments, Farmers has no explanation as to why the exclusion or inclusion of the payment of sales tax on an actual cash value settlement is not addressed in Farmers' insurance policies:

> Q: . . . I just want to know what steps Farmers took in making the determination that it was not going to include sales tax in the definition [of actual cash value].
>
> A: I don't know.
>
> Q: Who would know?
>
> A: I don't know that either.

CP 126-127.

[1] CP 194 – 203.

B. Judge Erlick's ruling

On summary judgment, Judge Erlick rejected Farmers' argument that *National Fire Insurance v. Solomon*, 96 Wn.2d 763, 638 P.2d 1259 (1982) prohibited it from defining FMV as "replacement value minus depreciation":

> The challenge here is to determine what a fair market value is, and the -- Farmers relies principally upon the case of *National Fire Insurance v. Solomon* at 96 Wn. 2d 763, a 1982 case, which expressly rejects the definition of fair market value as "replacement minus depreciation." The Court has a couple of observations with respect to reliance upon this case.
>
> First of all, *Hess v. North Pacific Insurance Company*, in this Court's opinion, if not *sub silentio* overruling *Solomon*, at least significantly limits it. It is about as delicate of a limitation as I've ever seen, with great deference to Justice Dore, who was the writer of the *Solomon* opinion.

RP at 73-75.

Judge Erlick also noted that even Farmers itself uses the "replacement minus depreciation" method -- which includes sales tax -- in determining what FMV is:

> Secondly, Farmers itself -- and this is perhaps more significant -- Farmers itself appears to use the repair/replacement-minus-depreciation approach as one of multiple methodologies employed by Farmers in determining what fair market value is. And Mr. Hower, in his deposition, indicates that the ACV, which is determined by fair market value, includes an analysis of the cost of a new item depreciated for age, obsolescence, etc.; surveying

> secondary markets such as eBay; appraisal by a professional appraiser; agreeing with the insured; and then other methods might depend upon the particular item involved.
>
> Farmers acknowledges that when one uses a replacement value minus depreciation that that would include sales tax.
>
> ....
>
> [T]he Court finds Farmers' explanation of why it pays sales tax when it's actually incurred, when the policy definition doesn't change, in terms of Farmers obligation to pay actual cash value, to be somewhat inconsistent and incongruent. In other words, the definition of fair market value should be the definition of fair market value. If it requires a payment of sales -- if it doesn't require the payment of sales tax, then it is inexplicable why Farmers is paying sales tax under that same definition when it's actually incurred by the insured.

RP at 75-76, 78.

Judge Erlick then granted Ms. Holden's Motion for Summary Judgment and denied Farmers' Motion for Summary Judgment. In so ruling, Judge Erlick found that Farmers' definition of "actual cash value" is ambiguous as a matter of law because it relies on a definition of FMV that is capable of more than one reasonable interpretation:

> I understand that there's a redefining what the loss is; but certainly, from a reasonable-expectation standpoint of the insured, it is reasonable for an insured to expect that as part of the replacement of its policy, minus the depreciation, sales tax -- I'm sorry -- replacement of its lost item, minus depreciation -- that that would include sales tax.

> The Court finds that the definition of actual cash value, as defined by fair market value, is ambiguous with respect to whether it does or does not include sales tax; that a reasonable interpretation would include compensation for sales tax, and that the ambiguity must be construed in favor of the insured.

RP 76-79.

C. Farmers appeal to the Court of Appeals.

Following Judge Erlick's ruling, Farmers sought review in the Court of Appeals. The Court of Appeals then reversed Judge Erlick finding that no ambiguity in the subject Farmers insurance policy under the principles of indemnification. Because the Court of Appeals' decision disregards this Court's opinion in *Hess v. North Pacific Insurance Co.* and conflicts with a long line of cases requiring ambiguous insurance contracts to be construed in favor of the insured, Ms. Holden seeks review of the Court of Appeals' decision in this Court.

IV. WHY THE COURT SHOULD ACCEPT REVIEW

A. This Court should accept review of this case because the Court of Appeals' decision disregards this Court's opinion in *Hess v. North Pacific Insurance Co.*

Farmers' principal argument through out this case has been that FMV cannot be defined as "replacement value minus depreciation" under *National Fire Insurance v. Solomon*, 96 Wn.2d 763, 638 P.2d 1259

(1982). In both the trial court and the Court of Appeals, Ms. Holden and Farmers argued that this case turned on the issue of whether or not *National Fire Insurance v. Solomon*, 96 Wn.2d 763, 638 P.2d 1259 (1982) was still applicable after this Court's subsequent limitation of *Solomon's* replacement cost analysis in *Hess v. North Pacific Insurance Co.*, 122 Wn.2d 180, 859 P.2d 586 (1993). In *Hess*, this Court made it clear that "[t]he facts in *National Fire Insurance v. Solomon*, 96 Wn.2d 763, 638 P.2d 1259 (1982) mandate limiting ***whatever its holdings may be*** to those facts and the policy involved." *Hess* at 191 (emphasis added).

If *Solomon* still applies then FMV cannot be defined as replacement cost less appreciation as a matter of law. If *Hess* overruled or limited *Solomon* then FMV may include the replacement cost less depreciation method of determining ACV. Under this latter scenario, the definition of ACV in the subject Farmers' policy is ambiguous because it is susceptible to two different but reasonable interpretations of how FMV may be determined. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

Despite the fact that both parties and the trial judge all agreed that this case turns on the applicability of the *Solomon* case after *Hess*, the Court of Appeals misunderstood the significance of both *Solomon* and *Hess* in this case. According to the Court of Appeals, "[n]either case

resolves the ambiguity Holden alleges in the meaning of ACV." *Ibid.* But the issue is not whether *Solomon* or *Hess* resolves the ambiguity in the subject policy. Rather, the issue is whether or not the policy's definition of ACV is ambiguous in the first place, particularly when there is more than one method of determining FMV and the policy does not define the meaning of FMV or the method or methods to be used in determining FMV.

As Judge Erlick noted:

> This Court does not conclude that the definition of fair market value means "repair or replacement costs less depreciation." This Court concludes that that is one of the many definitions that must be applied. And if that is one of the definitions, and if that would require the payment of sales tax, then that is a reasonable interpretation of fair market value.

RP 78.

The Court of Appeals' decision erroneously disregards this Court's opinion in *Hess v. North Pacific Insurance Co., supra.* Following *Hess*, the FMV of an item may be determined by several methods, including the replacement cost less deprecation method. The insurance policy that Farmers issued to Ms. Holden defines ACV as the FMV of the property at the time of the property's loss. But the policy does not define FMV or state what method Farmers will use in determining FMV. Because FMV may be determined by several methods, the definition of ACV in the

subject Farmers policy is ambiguous following *Hess*. The Court of Appeals erred when it disregarded this Court's opinion in *Hess* and overlooked the ambiguity in the Farmers policy. Based on this error, review should be granted in this case because the decision of the Court of Appeals conflicts with this Court's opinion in *Hess*.

B. This Court should accept review of this case because the Court of Appeals' decision conflicts with this Court's line of cases holding that ambiguous insurance clauses must be construed in favor of the insured.

The interpretation of the meaning of an insurance policy is a question of law. *Country Mut. Ins. Co. v. McCauley*, 95 Wn. App. 306, 308, 974 P.2d 1288 (1999). In construing an insurance policy, the policy should be given a fair, reasonable, and sensible construction consistent with the understanding of an average person purchasing insurance. *Daley v. Allstate Ins. Co.*, 135 Wn.2d 777, 784, 958 P.2d 990 (1998). If terms are defined in a policy, the terms should be interpreted in accordance with that policy definition. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). If terms are undefined, however, they must be given their "plain, ordinary, and popular" meaning. *Boeing v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). To determine the meaning of an undefined term, courts look to a standard English language dictionary. *Ibid.* If words have both a legal, technical meaning and a

plain, ordinary meaning, the ordinary meaning will prevail unless it is clear that both parties intended the legal, technical meaning to apply. *Id.* at 882.

A term is ambiguous if it is susceptible to two different but reasonable interpretations. *Kitsap County*, 136 Wn.2d at 576. Whether an insurance policy contains an ambiguity is a question of law to be resolved by the court. *Baehmer v. Viking Ins. Co. of Wisconsin,* 65 Wn. App. 301, 303-04, 827 P.2d 1113 (1992). "Ambiguous clauses must be construed in favor of the insured, even though the insurer may have intended another meaning." *State Farm Mut. Auto. Ins. v. Johnson,* 72 Wn. App. 580, 589, 871 P.2d 1066 (1994) (citing *Vadheim v. Continental Ins. Co.,* 107 Wn.2d 836, 840-841, 734 P.2d 17 (1987)).

In *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 82, 882 P.3d 703 (1994), this Court held that the term "sudden" in an insurance policy was ambiguous because there was more than one reasonable interpretation of the term. Because the term was ambiguous, the court resolved the ambiguity against the insurer and in favor of the insured in accord with a reasonable interpretation of the term. *Id.* at 83. Furthermore, the court noted that "[w]hen the issue is how to interpret an ambiguous policy provision, if the interpretation proposed by the insured came from the mouth of the drafter of the provision, ordinarily this would

be some evidence that the proposed interpretation is reasonable." *Id.* at 85.

Similarly, in *Greer v. Northwestern Nat. Ins. Co.*, 109 Wn.2d 191, 198-199, 743 P.2d 1244 (1987), the court found an insurance policy exclusion to be ambiguous when two reasonable contrasting interpretations of the exclusion existed. The court noted that the exclusion could have been unambiguously drafted to exclude coverage, but instead the insurer included language subject to more than one reasonable interpretation. *Id.* at 200. Consequently, the court held that because the insurance policy term was susceptible to two or more constructions, the meaning and construction most favorable to the insured must be applied, even if the insurer intended otherwise. *Id.* at 201.

In this case, Judge Erlick correctly applied the above principles in granting Ms. Holden's motion for summary judgment. Like the ambiguous terms in *Queen City Farms, Inc.* and *Greer*, the term "fair market value" in Farmers' insurance policy is ambiguous. Farmers itself admits that it uses the "repair or replacement costs less depreciation" interpretation of fair market value as a way to determine fair market value. CP 142; RP 75-76. As Farmers' own practices demonstrate, the undefined term "fair market value" is susceptible to more than one reasonable interpretation. Because the term "fair market value" is susceptible to more

than one reasonable interpretation, Judge Erlick did not err in applying the interpretation favoring the insured as required by Washington law.

Contrary to this Court's decisions above, the Court of Appeals decision construed the ambiguities in the Farmers policy in favor of Farmers, instead of Ms. Holden. Rather than interpreting the policy language in a manner consistent with the understanding of an average person purchasing insurance, as the law requires, the Court of Appeals viewed the contract language "through the lens of indemnification." *Court of Appeals Decision* at 7. In construing the policy in this fashion, the Court of Appeals ignored a long line of cases requiring courts to construe ambiguous insurance policies in favor of the insured. Because the Court of Appeals decision conflicts with this line of cases, this Court should accept review of this case.

C. The Court of Appeals decision ignores that courts from other jurisdictions and the Washington State Insurance Commissioner concur that actual cash value settlements should include sales tax.

In ruling upon the parties' summary judgment motions, Judge Erlick found the reasoning of *Ghoman v. New Hampshire Ins. Co.*, 159 F. Supp. 2d 928 (N.D. Tex. 2001), "well taken." RP 76. As in this case, the insurance policy in *Ghoman* reimbursed insureds for the actual cash value of their losses, but the policy did not define the term actual cash value.

The federal district judge noted that, under Texas law, the term actual cash value was synonymous with the "fair market value" and that FMV could be determined in one of three different ways:

> "Actual cash value" is not defined by the policy. Under Texas law, the term "actual cash value" is synonymous with "fair market value." "Fair market value" is the price a willing purchaser who is under no obligation to buy would pay to a willing owner who is under no obligation to sell.[2] This price can be quantified in one of three ways: (1) comparable sales; (2) the income capitalization approach; or (3) the cost of repair or replacement less depreciation.

Ghoman, 159 F. Supp. 2d at 934 (citations omitted).

The federal district judge in *Ghoman* also noted that the appraiser in that case had determined the plaintiff's loss by using the replacement cost less depreciation method:

> Not only do Texas courts recognize replacement cost less depreciation as an accepted method of calculating actual cash value, but the appraiser in this case determined plaintiff's loss using this method. (Def.App. at 86-87). *See also* Texas Dep't of Insurance, Commissioner's Bulletin No. B-0045-98 (June 12, 1998) ("The value of contractor's overhead and profit, as well as sales tax on building materials, has been included in the limit of liability for which the insured has paid premium.").

Ghoman, 159 F. Supp. 2d at 934, fn. 5.

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[2] Judge Erlick read this quotation aloud at the summary judgment hearing and noted that "this is in concordance with Washington law." RP 77.

In this case, Farmers itself uses at least two of the methods mentioned in *Ghoman* in determining FMV -- comparable sales[3] and the cost of repair or replacement less depreciation.[4] As in *Ghoman*, Farmers' own spokesperson – Mr. Hower – acknowledges that cost of repair or replacement less depreciation is an acceptable method for determining the FMV of personal property losses. CP 140-141.[5]

Also as in *Ghoman*, the Washington State Insurance Commissioner issued Bulletin No. 89-3 regarding "Sales Tax and ACV Claims", which makes clear that settlements for ACV should include sales tax. CP 224. The Insurance Commissioner issued this Bulletin in response to an Insurance Law Report distributed by a Seattle law firm. The Law Report asserted that the Insurance Commissioner "supports the view that sales tax should not be paid in an ACV loss," except with respect to the settlement of first party automobile total losses. CP 224. Disagreeing with that view, the Insurance Commissioner issued the Bulletin, stating in part as follows:

> WAC 284-30-390 specifically requires the payment of all applicable taxes, license fees and other fees incident to transfer of evidence of ownership, in only first party, private passenger automobile total loss situations. ***It does not follow, however, that taxes need not be considered in***

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[3] Judge Erlick also commented that this "is one of the methodologies used by Farmers." RP 76.

[4] Judge Erlick noted that this "appears to be what Farmers argues *Solomon* rejected; but appears to be questioned by *Hess*; and also appears to be one of the methodologies acknowledged by Mr. Hower as used by Farmers." RP 77.

[5] Pages 71-75 of the Deposition of Robert Hower.

> ***other cases, whether the loss is total or partial or owed to a first or third party claimant.***
>
> . . .
>
> ***In Washington State, sales tax amounts to a similar and substantial sum in most settlements. Its importance cannot be ignored. An insurer must deal with taxes and license fees in good faith. If we find that this is not being done, additional rules will follow.***

CP 224 (emphasis added).

In addition to conflicting with the decisions of this Court, as set forth above, the Court of Appeals decision not only ignores these decision by courts from other jurisdictions, but its decision also ignores the conclusion of the Insurance Commissioner's Office that actual cash value settlements should include sales tax. As a matter of public policy, review should be granted so this Court can resolve whether FMV determinations should include Washington State sales taxes.

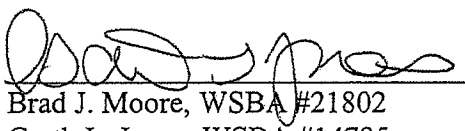
VI. CONCLUSION

Washington law requires courts to resolve any ambiguity in an insurance policy in favor of the insured. *State Farm Mut. Auto. Ins. v. Johnson,* 72 Wn. App. 580, 589, 871 P.2d 1066 (1994). As set forth above, the "fair market value" of personal property may be ascertained in several different ways, one of which includes the "replacement minus depreciation" method that includes a reimbursement for sales tax. Indeed,

Farmers itself uses this method to calculate the FMV of personal property in some instances.

Because Farmers' insurance policy fails to specify which method should be used in determining an item's FMV, it is ambiguous. Based on this ambiguity, the Court of Appeals should have affirmed Judge Erlick's ruling in favor. By failing to acknowledge this ambiguity, the Court of Appeals' decision not only conflicts with this Court's opinion in *Hess v. North Pacific Insurance Company*, *supra*, but also it also conflicts with this Court's opinions requiring any ambiguity in an insurance policy to be construed in favor of the insured. Because of these conflicts, review should be granted in this case.

Respectfully submitted this 21st day of February 2008.



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LAURA HOLDEN, Respondent, v. FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic insurer; FARMERS INSURANCE GROUP, a foreign insurer, FARMERS INSURANCE EXCHANGE, a foreign insurer; and all affiliated Farmers Insurance Companies and/or entities, Petitioners.	)	No. 59024-3-I DIVISION ONE PUBLISHED OPINION FILED: January 22, 2008

APPELWICK C.J. – This case presents a single question of law—does "actual cash value," defined as fair market value, include sales tax on all amounts claimed under a homeowner's insurance policy. The trial court determined that actual cash value includes sales tax and granted summary judgment in favor of Holden. Because an actual cash value clause acts only to indemnify the insured, we reverse and remand for entry of summary judgment for Farmers Insurance Company of Washington.

FACTS

Laura Holden had a homeowner's insurance policy through Farmer's Insurance Company of Washington under a broad form renter's package policy. The policy stated that "covered loss to property will be settled at actual cash value." The policy defined actual cash value (ACV) as "fair market value of the property at the time of the loss." The policy does not include a definition of fair market value (FMV). Farmers uses a variety of means to determine FMV including, surveying online markets, hiring an appraiser, agreeing with the insured on the value, and depreciating the cost of a new item to reflect age, obsolescence and wear and tear. Holden's policy also included coverage for the replacement cost of property lost. The policy defines replacement cost as "the cost, at the time of loss, of a new article identical to the one damaged, destroyed or stolen."

Holden filed a claim with Farmers on this policy for property loss relating to a fire under the ACV provision. Holden never made a claim under the replacement coverage. Farmers reimbursed her for the ACV of the property, which had not been replaced. The reimbursement did not include an allowance for sales tax. Holden requested that her ACV payment include Washington sales tax. Farmers sent her two letters advising her that she could claim replacement cost, including sales tax, if she submitted receipts reflecting the cost of replacement. Holden sent at least three letters to Ethel Smith of the Washington State Insurance Commissioner's Office, complaining that Farmers was not paying the sales tax applicable to her loss. The insurance commissioner took no

action except to forward the letter to Farmers requesting a response. Farmers responded, stating that Holden could not receive allowance for sales tax unless and until she incurred the tax.

After receiving these responses from Farmers and the insurance commissioner, Holden filed a putative class action claim against Farmers. Holden and Farmers both filed motions for summary judgment. After a hearing, the trial court determined that Farmers' definition of ACV was ambiguous as a matter of law because FMV is capable of multiple interpretations. The trial court construed the provision against Farmers, as drafters of the policy, and interpreted the provision to include sales tax. The trial court granted summary judgment in favor of Holden. Farmers filed for discretionary review.

DISCUSSION

When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. Thompson v. Peninsula Sch. Dist. No. 401, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. Young v. Key Pharm. Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). All facts and inferences are considered in the light most favorable to the non-moving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 565 P.2d 1224 (1977).

Interpretation of an insurance policy is a matter of law. Kent Farms, Inc. v. Zurich Ins. Co., 140 Wn.2d 396, 399, 998 P.2d 292 (2000). "The policy is

construed as a whole, and 'should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" Grange Ins. Co. v. Brosseau, 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (quoting Sears v. Grange Ins. Ass'n, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)). If an insurance policy defines a term, the term is interpreted in accordance with that definition. Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). And, the trial court must enforce the policy as written if the language is clear and unambiguous. Transcon. Ins. Co. v. Wash. Pub. Util. Dist's Util. Sys., 111 Wn.2d 452, 456, 760 P.2d 337 (1988). "A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." Greer v. Northwestern Nat'l Ins. Co., 109 Wn.2d 191, 198, 743 P.2d 1244 (1987) (quoting Vadheim v. Continental Ins. Co., 107 Wn.2d 836, 840-41, 734 P.2d 17 (1987)). Ambiguity is construed in favor of the insured. Vadheim, 107 Wn.2d at 840-41.

Holden argues that Farmers' various methods of valuing FMV demonstrate ambiguity in the meaning of FMV, particularly as to whether sales tax is covered, and that any ambiguity should be construed against Farmers. Resolution of this ambiguity in favor of Holden would result in payment of sales tax for ACV under all calculations of FMV. Holden claims that Farmers admits that it pays sales tax when using replacement cost less depreciation to calculate FMV. Farmers acknowledges that it pays sales tax as part of the replacement cost minus depreciation method of calculating FMV, but only when the insured has a policy containing ACV coverage (no replacement provision) and actually

replaces the lost property subsequent to the loss. Farmer's notes this is distinct from Holden's claim because she both has a replacement clause in her policy and failed to replace her property.

Nonetheless, Farmers contends that the Washington Supreme Court's decision in National Fire Ins. Co. v. Solomon, 96 Wn.2d 763, 770, 638 P.2d 1259 (1982), provides a definition for ACV and FMV that precludes the use of replacement cost less depreciation. In Solomon, the issue on appeal concerned whether the policy required actual replacement in order to recover under the replacement cost policy. Id. at 765. The Supreme Court held that the replacement cost clause did not require rebuilding as a condition precedent to reimbursement. Id at 770 (citing Reese v. Northern Ins. Co. of N.Y., 215 A.2d 266, 269 (1965)). As an additional holding, the court defined ACV. "'[A]ctual cash value' within statutory language of [a] fire policy is synonymous with 'fair market value' and does not mean replacement cost less depreciation." Solomon, 96 Wn.2d at 770 (citing Jefferson Ins. Co. of N.Y. v. Superior Court of Alameda County, 475 P.2d 880, 882 (1970)). Holden claims that Hess v. North Pacific Insurance Co., 122 Wn.2d 180, 859 P.2d 586 (1993), overruled Solomon. Hess stated that "[t]he facts in [Solomon], 96 Wn.2d 763 . . . mandate limiting whatever its holdings may be to those facts and the policy involved." Hess, 122 Wn.2d at 191. The trial court agreed with Holden, concluding that Hess significantly limited or sub silentio overruled the holding in Solomon.[1]

[1] The Washington Supreme Court does not overrule binding precedent sub silentio. See, State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999); Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 345, 160 P.3d 1089 (2007).

Whether the trial court was correct about Hess is of no consequence. Neither Hess nor Solomon controls here. At issue in both cases was the interpretation of replacement coverage language; ACV was not at issue and commentary on ACV is dicta in both cases. The Hess court specifically rejected Solomon's treatment of the replacement clause analysis. The opinion also sharply criticized Solomon's discussion of ACV. "Relying on a California statute, the court held that actual cash value meant fair market value without depreciation. Another state's statutory definition should not control our interpretation." Hess 122 Wn.2d at 191. As in Solomon, the treatment of ACV in Hess was unnecessary to the resolution of the issue on appeal in Hess. "Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed." Ass'n of Wash. Bus. v. Dep't of Revenue, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005). Either the ACV definition in Solomon has been rejected by Hess, or both discussions are to be disregarded as dicta. Neither case resolves the ambiguity Holden alleges in the meaning of ACV.

Holden asserts that FMV is ambiguous and all calculations of FMV must include sales tax because at least one method of valuing FMV—replacement value less depreciation—can include sales tax, though others do not. The assumption that sales tax is payable under any means of determining FMV under ACV coverage merely begs the question. ACV coverage only indemnifies the insured, "replacement cost considerations . . . do not, therefore, apply. Replacement value applies only if actual replacement is undertaken."

DePhelps v. Safeco Ins. Co. of Am., 116 Wn. App. 441, 452-53, 65 P.3d 1234 (2003) (citing Hess, 122 Wn.2d at 187). An ACV policy "does not entitle the insured to any more than indemnity for the actual loss sustained so as to place him or her in the same financial condition as he or she would have been in if there had been no fire." 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance, 3d. § 175:5 (2005).

The contract language must be viewed through the lens of indemnification. Viewed through this lens, sales tax is reimbursable only when incurred by the insured. The use of replacement value in calculating FMV under ACV coverage does not include sales tax if the item is not replaced, but does include sales tax if the tax is incurred. This differential treatment is not ambiguous; it is a consistent application of the principles of indemnification.

Either the legislature or the insurance commissioner could have required ACV coverage to include sales tax on the value of the loss, but neither has undertaken this task. The exclusion of sales tax from reimbursement under the ACV clause, absent replacement, fits with the indemnification purpose of an ACV provision and the interpretation of Holden's policy as a whole. Holden's insurance policy contained a separate replacement provision, which she paid an extra premium to maintain. Holden elected not to replace the items and not to use the replacement coverage; she chose to utilize her ACV coverage. ACV is an indemnity clause. "Like loss of use, actual cash value clauses provide

indemnity only." DePhelps, 116 Wn. App. at 452 (citing Hess, 122 Wn.2d at 182-83). This indemnity does not include sales tax not incurred.

We reverse and remand for entry of summary judgment for Farmers Insurance Company of Washington.

Appelwick, C.J.

WE CONCUR:

Dwyer, J.

Ellington, J.

Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that on February 28, 2008, I delivered a copy of Petition For Review to the Supreme Court to ABC Legal Services for service on:

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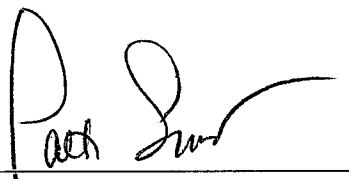

Patti Sims