NO. 101182-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KELLY GODWIN, an Individual,

Petitioner,

vs.

STATE FARM FIRE & CASUALTY COMPANY, an Illinois Corporation doing business in Washington,

Respondent.

APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Kevin D. Hull, Judge

ANSWER TO PETITION FOR REVIEW

REED McCLURE
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I. NATURE OF THE CASE

Petitioner/plaintiff's roof was at the end of its life. Plaintiff claimed wind blew shingles off the roof. Respondent State Farm Fire and Casualty Company ("State Farm") agreed to replace the shingles on the slope that lost shingles. However, plaintiff insists that State Farm pay to replace the entire roof. Although comparable replacement shingles were available, plaintiff claims the new shingles would not "match" because the worn-out shingles looked, well, worn-out. The insurance policy excludes coverage for loss caused by wear, tear, or deterioration. It does not require that State Farm pay to replace the whole roof.

The Court of Appeals, Division I, unanimously affirmed the superior court's summary judgment of dismissal.

II. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

State Farm insured plaintiff's house in Port Orchard. (CP 103) The house was built in 1934. (CP 44) Plaintiff bought the house in August 2015. (CP 42-43) Plaintiff claims that on

December 14, 2018, she discovered that wind had blown shingles off her roof. (CP 4, ¶ 8; CP 45) She reported the damage to State Farm in March 2019. (CP 47)

Only shingles on the front slope and ridge were missing. There were no shingles missing from the slope facing the rear of the house. (CP 56-57)

Plaintiff hired Patriot Roofing to replace the roof. (CP 48) She told Keith Delgado, the estimator, that she was planning to sell the house and she thought she needed a new roof. (CP 55) Mr. Delgado told plaintiff that the roof was at the end of its life and needed to be replaced. (CP 59-60, 75)

Mr. Delgado testified that the new architectural shingles used in the replacement were comparable to what plaintiff had before. (CP 61-62) The old shingles could not be "matched" because they were old and faded. (CP 158) They were old and brittle. (CP 64)

Mr. Delgado testified that he knows of no code requirement that new shingles match the appearance of old shingles. (CP 64)

State Farm paid to replace all of the shingles on the front slope and the ridge. (*See* Petition for Review at 5) Plaintiff complains that the new shingles do not match the rear slope due to age and fading of the existing shingles. (*See* CP 158, ¶ 4) Plaintiff claims that State Farm must pay to replace the whole roof, including the back slope which did not lose any shingles.

B. INSURANCE POLICY LANGUAGE.

Plaintiffs' Homeowners Policy provided the following Coverage A – Dwelling: "We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I – LOSSES NOT INSURED". (CP 118) (boldface omitted).

Section I—Losses Not Insured provided in part:

1. We do not insure for any loss to the property described in Coverage A which is caused by one or more of the items below, regardless of whether the loss occurs suddenly or gradually, involves

isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

. . .

f. wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown;

. . .

However, we do insure for any resulting loss from items a. through l. unless the resulting loss is itself a Loss Not Insured by this Section.

(CP 120)

The policy provided under "Loss Settlement":

COVERAGE A--DWELLING

1. A1 – Replacement Cost Loss Settlement – Similar Construction.

a. We will pay the cost to repair or replace with similar construction and for the same use on the premises shown in the **Declarations**, the damaged part of the property covered under **SECTION I—COVERAGES, COVERAGE A—DWELLING**, except for wood fences, subject to the following:

(1) until actual repair or replacement is completed, we will pay only the actual cash value at the time of the loss of the damaged part of the property, up to the applicable limit of liability shown in the **Declarations**,

not to exceed the cost to repair or replace the damaged part of the property;

(2) when the repair or replacement is actually completed, we will pay the covered additional amount you actually and necessarily spend to repair or replace the damaged part of the property, or an amount up to the applicable limit of liability shown in the **Declarations**, whichever is less;

. . .

(CP 122)

C. STATEMENT OF PROCEDURE.

On November 2, 2020, the trial court granted State Farm's motion for summary judgment. The court ruled that the policy language is not ambiguous; that no statute or ordinance requires full roof replacement; and that matching color with the existing worn-out roof is not covered under the policy. (CP 191-92)

The court also granted State Farm's motion to strike portions of the Declaration of Keith Edward Delgado. (CP 192) The court struck paragraphs 3, 7, 9, 10, and 12, and Exhibits D and E, from the Delgado declaration. (*See* CP 179-81)

On December 14, 2020, the court denied plaintiff's motion for reconsideration. (CP 238-39) The court also clarified that the action was dismissed with prejudice after plaintiff's counsel conceded that if there was no coverage, no claims remained for trial. (CP 239; 12/11/20 RP 2-3)

Plaintiff filed a Notice of Appeal. On May 16, 2022, the Court of Appeals, Division I, unanimously affirmed the superior court's summary judgment of dismissal.

III. ARGUMENT

Discretionary review is allowed only under the limited circumstances described in RAP 13.4(b), which provides:

> (b) **Considerations Governing Acceptance of Review.** A petition for review will be accepted . . . only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Plaintiff seeks review under RAP 13.4(b)(1) and (4). The Petition for Review should be denied because petitioner has not and cannot demonstrate that this case satisfies any of the requirements of RAP 13.4(b).

A. PLAINTIFF DOES NOT IDENTIFY ANY DECISION OF THIS COURT IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS.

Plaintiff relies upon RAP 13.4(b)(1). This rule provides a very narrow basis for review, permitting review only if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Plaintiff fails to identify any decision of this Court in conflict with the decision of the Court of Appeals. This Court has never ruled on the coverage issue identified by plaintiff: whether "part of the property" means "the entire roof, and not an undefined lesser part of the roof". (Petition for Review at 1)

Instead of identifying a conflicting decision of this Court, plaintiff asserts generally that the decision of the Court of Appeals "conflicts with established rules of insurance policy

interpretation". (Petition for Review at 7) But plaintiff's disagreement with the outcome of the Court of Appeals' analysis fails to satisfy her burden to show a conflict with a decision of this Court.

The Court of Appeals accurately stated rules of insurance policy interpretation established by this court, citing two of this court's decisions, *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 375 P.3d 596 (2016) and *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012). (Slip Op. at 4) Plaintiff does not assert that the rules of insurance policy interpretation as recited by the Court of Appeals are incorrect.

Plaintiff has failed to identify any decision of this Court that considered the issue raised by plaintiff for review, much less identify any conflicting decision of this Court. This Court should therefore deny the Petition for Review.

B. PLAINTIFF FAILS TO SHOW THAT THE PETITION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Plaintiff relies upon RAP 13.4(b)(4). However, she has failed to meet her burden to show that the Petition involves an

issue of substantial public interest that should be determined by this Court.

Plaintiff identifies one issue in her petition that she wants reviewed: whether "part of the property" means "the entire roof, and not an undefined lesser part of the roof". (Petition for Review at 1) Plaintiff fails to indicate why this issue is of such substantial public interest that it should be determined by this Court.

Plaintiff makes no attempt to distinguish this issue of insurance policy interpretation from any other insurance coverage issue. Surely not every issue of insurance coverage interpretation is of substantial public interest.

For an issue to be of substantial public interest, it should at a minimum have significant ramifications beyond the parties and the particular facts of the case. For example, this Court has found an issue to be of public interest where the decision had the potential to affect every sentencing proceeding in the county; could invite unnecessary litigation; created confusion; and could

chill future policy actions by attorneys and judges. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

Plaintiff has failed to make any showing that the coverage issue here has significant ramification beyond the parties and the particular facts of the case. Plaintiff has not shown how often claims with this issue arise, nor has plaintiff identified any other litigation in Washington where the issue was raised. This particular factual scenario, where an insured with a roof that was already worn-out before the loss wants her insurer to pay for a new roof, would not appear to be common.

Moreover, the amount in controversy is small. The cost to replace the roof was less than $21,000. (CP 83) State Farm paid to replace the shingles on the slope and ridge that were damaged, leaving a balance of less than $20,000. (Petition for Review at 5) It would be difficult to conclude that this amount implicates a substantial public interest.

Plaintiff has failed to show that the Petition involves an issue of substantial public interest that should be determined by this Court. The Court should therefore deny the Petition.

C. THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

The Court of Appeals properly applied settled rules of insurance policy construction. The Court of Appeals gave the policy language a fair, reasonable, and sensible construction, giving the language its common, ordinary meaning. The policy language at issue is not ambiguous. The Court of Appeals decision was correct, and there would be no substantial public interest in reviewing it.

1. Rules of Insurance Policy Construction.

Insurance policy construction is a question of law for decision by the court. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990). Insurance policies are contracts and are construed as such. *Washington Public Utility Districts' Utilities System v. Public Utility Dist. No. 1*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989).

Courts interpret insurance contracts as an average insurance purchaser would, giving policy terms a fair, reasonable, and sensible construction. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). A policy must be given a practical and reasonable interpretation, not a strained or forced construction that leads to an absurd conclusion or renders the policy nonsensical or ineffective. *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988).

Where a term is undefined, it is assigned its ordinary meaning. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). To determine the ordinary meaning of an undefined term, courts look to standard English language dictionaries. *Id*.

If the policy language is clear and unambiguous, the court must enforce it as written. *Washington Public Utility Districts' Utilities System v. Public Util. Dist. No. 1*, 112 Wn.2d at 10.

Policy language is ambiguous only if, on the face of the contract, two reasonable and fair interpretations are possible. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 484, 687 P.2d 1139 (1984). Ambiguities are construed against the drafter. *Vision One*, 174 Wn.2d at 512.

The court will not create an ambiguity where none exists. *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Util. Sys.*, 111 Wn.2d at 456. Nor will the court modify clear and unambiguous language under the guise of construing it. *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985). The court will "'not invoke public policy to override an otherwise proper contract even though its terms may be harsh and its necessity doubtful.'" *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 432, 932 P.2d 1244 (1997).

2. The Policy Only Pays to Repair the Damaged Part of the Property, Regardless of How Broadly One Defines "Part of the Property".

Plaintiff assumes that if you define "part of the property" broadly enough to include the entire roof, then the policy requires

that State Farm pay to replace the entire roof. However, the policy does not require replacement. The policy only requires that State Farm pay to repair the damage. Plaintiff is focusing on the wrong language.

Coverage A—Dwelling provides that State Farm will "pay the cost to repair or replace with similar construction and for the same use on the premises shown in the Declarations, the damaged part of the property". Payment is limited to the "amount you actually and necessarily spend to repair or replace the damaged part of the property". (CP 122) (underline emphasis added; boldface omitted). Thus, the policy does not require replacement of the damaged part of the property if it can be repaired.

Whether the damaged part of the property is the roof or a shingle that blew off is immaterial. The policy permits repair of the damaged property. "Repair" means "to restore by replacing a part or putting together what is torn or broken: Fix, Mend". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1923

(2002). Replacement is not required unless the damage cannot be repaired.

Whether one defines "part of the property" to be a shingle that blew off or the entire roof, the policy only requires that State Farm pay to fix or mend the damage. State Farm is not required to replace the whole roof.

Plaintiff's semantics argument must be rejected. Replacing a shingle and repairing a roof can be the same thing. Either way, one is repairing the damaged part of the property.

3. Expanding "Damaged Part of the Property" to Include Undamaged Parts Is Not Reasonable.

Plaintiff's position that the "damaged part of the property" includes the undamaged rear slope must be rejected. Under plaintiff's logic, an insured could elect to expand the scope of the "damaged part of the property" as much as needed and then require replacement of materials in areas that were not damaged by the covered loss. Every insured could get a remodel paid for by their property insurer. Premiums would skyrocket.

Plaintiff argues in essence that any part of the property containing damage is the "damaged part of the property". This is not reasonable. Expanding an area to include both damaged parts and undamaged parts does not make the entire area damaged. Logically, the adjective "damaged" is a limitation, which requires reducing the area to include only the part that is damaged. As the Court of Appeals stated, nothing in the policy requires the insurer to treat the roof as an indivisible part of the covered property. (Slip op. at 5)

Moreover, this language cannot be read in isolation. The policy limits payment to the "amount you actually and necessarily spend to repair or replace the damaged part of the property". (CP 122) Amounts spent to replace undamaged parts of the property are not necessarily spent to repair or replace the damaged part of the property.

Plaintiff's examples prove too much. Plaintiff asserts the policy did not "allow" State Farm "to treat the roof, a wall, or the carpet in a home as an indivisible or divisible "'part of the

property'". (Petition for Review at 12) In other words, if a cigarette burns a hole in the carpet in the corner of a room, State Farm must pay to replace all of the carpet in the house. If one panel of wood siding has rot, State Farm must pay to replace all of the siding on that wall. But we cannot stop with one wall. Just as the roof has multiple slopes, the building envelope has multiple walls. Under plaintiff's logic, the damaged part of the property would be the building envelope. State Farm would have to pay to replace all of the wood siding on the house to remedy rot in one panel. This is nonsense.

4. The Policy Does Not Require State Farm to Pay to Match a Worn-Out Roof.

Plaintiff asserts that State Farm is required to pay to replace her entire worn-out roof so the new shingles will "match" the undamaged rear slope. However, the worn-out roof already had a poor appearance. The policy excludes coverage for damage caused by or consisting of wear, tear, or deterioration. The policy does not require State Farm to pay to replace the

whole roof so that the repaired slope will "match" an undamaged worn-out rear slope.

Plaintiff submitted no evidence of any reason the color of the new shingles could not be "matched", other than the fact the existing shingles had faded and were worn out. Plaintiff's roofer testified that the new architectural shingles were comparable to what Plaintiff had before. (CP 61-62) The difference in appearance was not caused by wind. It was caused by the excluded perils of wear, tear, and deterioration.

Plaintiff complains she would be left "with a checkerboard pattern over the entire roof". (Petition for Review at 13) No evidence supports this. State Farm paid to replace the entire slope and ridge that lost shingles.

Yet, this complaint illustrates that plaintiff's logic would require replacement of the roof even if only one shingle blew off. This extreme position would give every insured a new roof after even minimal damage, greatly increasing insurance premiums for everyone. But the policy must not be given a strained or

forced construction that leads to an absurd conclusion or renders the policy nonsensical or ineffective. *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility Sys.*, 111 Wn.2d at 457. Plaintiff's interpretation is not reasonable, and therefore cannot create an ambiguity.

5. Courts in Other Jurisdictions Have Rejected the Position Taken by Plaintiff.

Other courts have rejected plaintiff's position that "damaged part of the property" must be expanded to include undamaged parts of a roof. In *Eledge v. Farmers Mut. Home Ins. Co.*, 571 N.W.2d 105 (Neb. App. 1997), the court rejected an argument that loss of shingles from one slope in a storm required an insurer to replace the entire deteriorated roof.

> We do not agree that the "plain and ordinary meaning" of this policy provision compels replacing the entire roof in every instance where hail damages only a part of the roof. For example, where a single square of shingles is damaged and matching replacements can be found, and where the repair can be made without damage to the remainder of the roof, such interpretation would mean that an insured was nevertheless entitled to the cost of replacing the whole roof as a matter of law. We do not believe a reasonable person would place such an

> interpretation on this policy. A plain reading of the provision does not require the replacement of the whole when it is factually shown that the whole can be satisfactorily repaired by replacement of a "part," so long as the building is returned to "like construction and use" as a result. The policy language obligates Farmers to pay the reasonable cost to repair or replace, but no more than the replacement cost of that "part of the building damaged."

Eledge, 571 N.W.2d at 111–12.

The *Eledge* court noted that damage caused by deterioration was excluded. Therefore, the insurer did not have to pay to replace the roof.

> Farmers' adjuster Belcher attested that only one slope of the roof sustained minor hail damage, and Farmers' expert, Belina, testified that the roof was badly deteriorated due to its age. While we agree that under the policy the age and deteriorated condition of the Eledges' roof does not itself preclude replacing the whole roof, it does have a bearing on the issue of causation. In other words, while the policy clearly prohibits any "deduction for depreciation," the damage must result from a covered occurrence—here, the hail. Damage caused from normal wear and tear or depreciation is obviously not covered.

Id. at 112. Similarly, Plaintiff's policy excludes coverage for loss caused by or consisting of "wear, tear, . . . deterioration".

(CP 120) The worn-out roof already required replacement due to an excluded peril before wind blew off shingles on one slope.

In *Greene v. United Services Auto. Ass'n*, 936 A.2d 1178 (Pa. Supp. 2007), the court rejected the argument that an insurer was required to replace undamaged slopes of the roof because the entire roof was the part of the building damaged.

> The policy clearly and unambiguously requires USAA to pay the replacement cost of the part of the building damaged. As noted above, Appellants contend that this policy language requires USAA to pay for the cost of replacing their entire roof because the roof was the "part of the building damaged." We find this interpretation of the policy language to be unreasonable and absurd. At most, the "part of the building damaged" in this case was one slope of Appellants' multi-sloped roof. The trial court succinctly highlighted the absurdity of Appellants' argument when the court stated, "To utilize [Appellants'] logic would necessitate replacing all siding when one piece of siding is damaged, or an entire door when a door knob is damaged. It defies common sense."

Greene, 936 A.2d at 1186 (footnote omitted).

Other courts have reached similar conclusions. *See Enwereji v. State Farm Fire & Cas. Co.*, 2011 WL 3240866 (E.D. Pa. 2011) (repair of "damaged part of the property" limited

to repair of damaged individual roof tiles; purpose of policy is to restore to pre-loss condition, not provide a windfall); *Mohr v. American Auto. Ins. Co.*, 2004 WL 533475 (N.D. Ill. 2004) (no coverage to replace undamaged parts of roof to make it aesthetically acceptable); *Padgett v. State Farm Fire & Cas. Co.*, 714 So.2d 302 (Ala. App. 1997) (policy language limiting coverage to "damaged part" pays to repair damaged portion of roof, not to replace entire roof). *See also Woods Apartments LLC, v. U.S. Fire Ins. Co.*, 2013 WL 3929706 (W.D. Ky. 2013) (policy requires payment to repair damaged area; replacement of all roof and siding to achieve cosmetic matching would result in windfall).

6. The Cases Cited by Plaintiff Do Not Support Her Position.

Plaintiff relies on three foreign cases. None support her position.

In *Erie Ins. Exchange v. Sams*, 20 N.E.3d 182 (Ind. App. 2014), the trial court made findings of fact that the roof "was a sound roof before the loss". It had 35-year shingles, but they had

only been on the roof for 14 years. After the loss, it was "an unsound roof", "with leaks [in] many places". *Sams*, 20 N.E.3d at 188-89. Based on these factual findings, the appellate court found it unnecessary to consider the insurer's argument that "part of the dwelling damaged" was limited to individual roof slopes. *Erie*, 20 N.E.3d at 191-92.

National Presbyterian Church, Inc. v. GuideOne Mutual Ins. Co., 82 F. Supp. 3d 55 (D. D.C. 2015) considered very different policy language. The loss payment provision had four subsections which referred to either "lost or damaged property" or the "property". *Id.* at 60. Since the policy did not refer to the "damaged part of the property", this case is not helpful in construing that language.

160 Lee Street Condo. Homeowners' Ass'n v. Mid-Century Ins. Co., 2018 WL 1994059 (W.D. Wash. 2018), considered a policy provision identical to the one considered in *National Presbyterian*. In fact, the court cited *National Presbyterian* as support for its decision. As with *National*

Presbyterian, since the policy under consideration did not refer to the "damaged part of the property", this case is not helpful in construing that language.

IV. CONCLUSION

This case has not met any of the criteria of RAP 13.4(b). The petition should be denied.

CERTIFICATE OF COMPLIANCE

I certify that the Answer to Petition for Review contains 4,094 words.

Dated this 12th day of September, 2022.

REED McCLURE

By 

Michael S. Rogers WSBA #16423
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2022, copies of the following document were served on counsel as follows via the Washington State Appellate Court's Electronic Filing Portal:

Answer to Petition for Review.

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

Dated this 12th day of September, 2022, at Orange Beach, Alabama.

s/Kate McBride
Kate McBride

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REED MCCLURE

September 12, 2022 - 10:42 AM

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