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Supreme Court No. _____
Court of Appeals No. 59024-3-I

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SUPREME COURT OF THE STATE OF WASHINGTON

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.

APPELLANTS' RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Laura Holden had a fire in her apartment, damaging some of her personal property. Had she replaced that property, her insurance would have covered the replacement cost, including any sales tax she paid. Because she didn't replace the property, she was entitled only to its "actual cash value." She does not question the value determined by Farmers Insurance Co. of Washington ("FICW"), except that FICW did not include any sales tax in that value. Of course, having purchased nothing, she paid no such tax. On summary judgment, the Superior Court held that FICW was obliged to add a payment for sales tax. The Court of Appeals granted discretionary review and (in a unanimous opinion by Appelwick, C.J.) reversed, reasoning that the insurance policy was one of indemnity, and that Holden had not sustained any loss with respect to sales tax she had not paid.

This Court should deny review because there is no conflict with any Washington decision and, in fact, the decision here properly follows principles established by prior Washington cases. Contrary cases from other states rely on principles that have not been adopted in Washington.

II. STATEMENT OF THE CASE

A. The Policy

Holden's lawsuit is based upon a claim for a fire loss to personal

property (contents) after a fire in her home.¹ Holden is insured by FICW under a Broad Form Renters Package Policy (“Policy”).² The Policy contains the following provision on Loss Settlement:

Covered loss to property will be settled at *actual cash value*. Payments will not exceed the amount necessary to repair or replace the damaged property, or of the limit of insurance applying to the property, whichever is less. [Emphasis added.]³

A definition states: “**Actual Cash Value** means the fair market value of the property at the time of loss.”⁴

Holden also purchased a Contents Replacement Cost Coverage endorsement, which states:

**CONTENTS REPLACEMENT COST COVERAGE
PERSONAL PROPERTY**

For an additional premium, insurance ... is extended to include the full cost of repair or replacement without deduction for depreciation:

* * *

Definition: “replacement cost” means the cost, at the time of loss, of a new article identical to the one damaged, destroyed or stolen. When the identical article is no longer manufactured or is not available,

¹ CP 9:9-10;

² CP 9:11-16; CP 15:12-18; CP 89-118. FICW is an affiliate of Farmers Insurance Exchange, which is also named as a defendant. For purposes of this appeal, the involvement of Farmers Insurance Exchange has no impact, so the fact statement and argument will speak only of FICW.

³ CP 99.

⁴ CP 93.

replacement cost shall mean the cost of a new article similar to that damaged or destroyed and which is of comparable quality and usefulness.

* * *

The Company will not be liable for any loss under this endorsement unless and until actual repair or replacement is completed. The named insured may elect to disregard replacement cost in making claim hereunder but such election shall not prejudice the named insured's right to make further claim under this replacement cost provision within 180 days after the loss.⁵

B. Washington's Regulation Of Fire Insurance Policies

Holden's policy insured her personal property against fire, among other perils.⁶ Washington strictly regulates the terms of fire insurance policies. RCW 48.18.120(1) authorizes the Insurance Commissioner to promulgate regulations "to define and effect reasonable uniformity in all basic contracts of fire insurance." The Commissioner exercised that authority by promulgating WAC 284-20-010. This governs "all policies which include coverage against loss or damage by fire." *Id.*, subd. (2). It requires use of the 1943 New York Standard Fire Insurance Policy, to be known as the "standard fire policy." *Id.*, subd. (3). But insurers may also use "a form written in clear, understandable language, which provides terms, conditions and coverages not less favorable to the insured than the

⁵ CP 118.

⁶ CP 96.

‘standard fire policy.’” *Id.*, subd. (3)(c). “Such alternative form may be incorporated in or integrated within a form providing other or additional coverages, as, for example, a homeowners policy.” *Id.*

The standard fire policy provides coverage for the “actual cash value” of the insured property.⁷ It provides only indemnity for the actual amount of the insured’s loss. *DePhelps v. Safeco Ins. Co. of Am.*, 116 Wn. App. 441, 454, 65 P.3d 1234, 1240 (2003). Replacement cost coverage is an optional, extra cost coverage, providing benefits only payable if the insured actually replaces. *Hess v. N. Pac. Ins. Co.*, 122 Wn.2d 180, 189-90, 859 P.2d 586 (1993), *following Higgins v. Ins. Co. of N. Am.*, 256 Or. 151, 162-67, 469 P.2d 766, 772-74 (Or. 1970).

This Court construed the standard fire policy term “actual cash value” in *National Fire Insurance Company v. Solomon*, 96 Wn.2d 763, 770, 638 P.2d 1259 (1982). The policy provided replacement cost coverage, but the insurer sought to condition payment on actual repair or replacement. *Solomon* held that the condition was not authorized by the policy language. But it also held that the insured would have been entitled to the policy limit, even under the statutory minimum ACV coverage. The

⁷ The Washington Department of Insurance posts a copy of the New York Standard Fire Policy on its website, at http://www.insurance.wa.gov/insurers/rates_forms/documents/NYStandardFirePolicy.pdf. The fact that it insures only the actual cash value of the insured property is stated in the first textual paragraph.

court adopted a California court's holding, construing a similar standard fire policy, "that 'actual cash value' within statutory language of fire policy is synonymous with 'fair market value.'"⁸ *Id.*

Prior to 1983, FICW's homeowners policies defined ACV as "replacement cost of the property at the time of loss, less depreciation."⁹ In response to *Solomon*, FICW endorsed all of its policy forms to adopt the *Solomon* definition: FMV.¹⁰

Around 1985, the Washington Department of Insurance (the "DOI") demanded that FICW incorporate this and other amendments contained in the endorsement in the policies themselves.¹¹ FICW complied with the DOI's demand, and began issuing Washington-specific homeowner-type policies that define ACV as "fair market value at the time of loss" directly in the affected policies.¹² Holden's policy and all other current policies so provide.¹³

C. Holden's Claim

A fire occurred at Holden's apartment on June 9, 2004.¹⁴ She submitted a claim for certain personal property items destroyed in the fire.

⁸ Holden contends that *Hess* overruled *Solomon* on this point; the court of appeals found it unnecessary to decide that issue. Its opinion ("Op.") is Appendix A to the Petition, and addresses this point at 6.

⁹ CP 368:3-4.

¹⁰ CP 368:5-9.

¹¹ CP 368:10-12.

¹² CP 368:2-15.

¹³ *Id.*

¹⁴ CP 9:9-10; CP 28: 9-10.

FICW paid her \$1,174.41 as the ACV of those items.¹⁵ Holden was twice advised by letter that, if she replaced the damaged items, she could make a further claim for replacement cost (less the payment already made) and that the replacement cost payment would include sales tax.¹⁶ She was invited to submit receipts reflecting her cost of replacement.¹⁷ She never did, and the time for doing so has expired.¹⁸ So, she is entitled only to ACV. She does not dispute FICW's determination of the ACV of her property, except for the failure to include any allowance for sales tax in the payment.¹⁹

Before filing suit, Holden complained to the Washington Insurance Department, writing at least three letters to Ethel Smith of the Insurance Commissioner's office.²⁰ Ms. Smith forwarded each letter to FICW, asking it to respond.²¹ FICW did so, specifically stating that sales tax was not payable unless and until actually incurred, at which time the replacement cost coverage would be applicable.²² The DOI never took exception to FICW's position on this.²³

¹⁵ CP 10 1-3; CP 16:1-2.

¹⁶ CP 370:1-17; CP 392-406.

¹⁷ *Id.*

¹⁸ CP 370:18-20.

¹⁹ CP 10:4-14

²⁰ CP 304:23 to 306:8; CP 309-19; CP 325-55; CP 362-63.

²¹ CP 304:23 to 306:8; CP 308; CP 324; CP 361.

²² CP 304:23 to 306:8; CP 321-23; CP 358-59; CP 365-66.

²³ CP 306:9-10.

D. Procedural History

In this putative class action, Holden seeks a declaration that payment of the sales tax she demands should have been included in the ACV settlement of her claim, as well as similar relief for all those similarly situated.²⁴ After discovery, FICW and Holden filed cross motions for summary judgment.²⁵ The sole issue on both motions was whether the ACV computation of losses under Holden's insurance policy should include sales tax.

The Summary Judgment Order granted Holden's motion and denied FICW's.²⁶ The court found that *Solomon* did not bind it: "*Hess v. North Pacific Insurance Company*, in this Court's opinion, if not *sub silentio* overruling *Solomon*, at least significantly limits it."²⁷ FICW itself used multiple methodologies, including replacement cost less depreciation, to estimate FMV.²⁸ In the court's mind, that meant that

²⁴ CP 12:4-12.

²⁵ CP 19-43; CP 407-23.

²⁶ CP 586:2-5.

²⁷ T 74:4-6. The court of appeals observed that "[t]he 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 Saberhagen Holdings, Inc.* 139 Wn. App. 334, 345, 160 P.3d 1089 (2007)." (Op. 5 n.1)

²⁸ T 75:16-20. There is no completely reliable way to determine the fair market value of used personal property. FICW uses a number of methods of estimating that value, including (1) surveying secondary markets, such as e-Bay, Craig's list, and classified ads; (2) hiring an appraiser; (3) agreeing with the insured on value; or (4) taking the cost of a comparable new item and depreciating for age, obsolescence, wear and tear, etc. CP 368:16-21. The method used depends on the type of property and whether it is readily found in a secondary market or susceptible to appraisal (e.g., a collectible watch). CP 368:22 to 369:3. Property (e.g., an old toaster) with intrinsic value but neither found in

FMV was ambiguous, that replacement cost less depreciation was one reasonable interpretation, and that the ambiguity should be construed in favor of the insured.²⁹

The Superior Court certified the Summary Judgment Order for immediate appeal pursuant to RAP 2.3(b)(4) and stayed all further proceedings pending any such appeal. The Court of Appeals granted discretionary review and reversed. It concluded that comments in both *Solomon* and *Hess* were dicta and, in any event, not critical to resolution of this case. In its view, the key point was that ACV coverage entitles the insured only to “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.”³⁰ Viewing the contract language “through the lens of indemnification,” it concluded that “sales tax is reimbursable only when incurred by the insured.”³¹ It reasoned:

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

secondary markets nor susceptible of appraisal may be best valued by replacement cost less depreciation. CP 368:22 to 369:3. Property with primarily personal value, such as family photos, may have to be valued by agreement. CP 368:22 to 369:3. Whenever FICW and the insured cannot agree on value, the standard fire policy provides for appointment of competent and disinterested appraisers, and Holden’s policy complies with that requirement. CP 246, ¶ 9; Standard Fire Policy, Lines 123-40.

²⁹ T 76:3-13; T 78:3-10.

³⁰ Op. 7.

³¹ *Id.*

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.” This indemnity does not include sales taxes not incurred.³²

III. ARGUMENT

A. There Is No Conflict Between the Decision Here and This Court’s Decision in *Hess*.

Holden’s primary argument for review by this Court is that “[t]he Court of Appeals’ decision erroneously disregards this Court’s opinion in *Hess*.”³³ But *Hess* says nothing about whether sales tax need be paid when it has not been incurred.

Hess does not even say anything about what “actual cash value” means. *Hess* merely noted that *Solomon* “[r]elying on a *California statute*, the court held that actual cash value meant fair market value *without depreciation*,” and commented that “[a]nother state’s statutory definition should not control our interpretation.” 122 Wn.2d at 191 (emphasis in original). In fact, California has no statutory definition. Rather, it has a statute mandating use of the same language that Washington mandates by regulation. The California court construed that identical, legally mandated policy language. While that cannot dictate this Court’s interpretation of the same language, *Solomon* simply found the California court’s

³² Op. 7-8, quoting *DePhelps v. Safeco Ins. Co.*, 116 Wn. App. at 452, citing *Hess*, 122 Wn.2d at 182-83.

³³ Petition, at 12.

construction persuasive authority and agreed with that construction.

Holden does not argue that *Hess* says anything about the issues in this case. Instead, she argues that *Hess* negates the effect of *Solomon* and leaves ACV undefined.³⁴ Because the court of appeals did not rely on *Solomon*, or on any other definition of ACV, it could not and did not conflict with anything this Court said or did in *Hess*.

B. Because the Policy Language Here Was Adopted by the Commissioner, Not Drafted by FICW, the Ambiguity Rule Holden Invokes Does Not Apply.

Holden argues that the supposedly undefined term “actual cash value” is ambiguous and must be construed in her favor; failure of the court of appeals to do this supposedly conflicts with cases mandating construction of ambiguous language in favor of the insured.³⁵ But that rule is based on the premise that the insurer was responsible for choosing the language and, accordingly, should bear the burden of any ambiguity.³⁶

The policy language here was not selected by FICW. Use of the term “actual cash value” is mandated by statutorily authorized regulation.

³⁴ Petition, at 12-13.

³⁵ Petition, at 14-16.

³⁶ See *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 82-83, 882 P.2d 703, 721 (1994) (policy language “was selected by the insurer and was not negotiated”; insureds had “no participation ... in the drafting”); RESTATEMENT (SECOND) OF CONTRACTS § 206, cmt. *a* (1981) (“Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.”).

The policy's definition of that term was initially adopted by this Court and then mandated by the DOI.

In such cases, the RESTATEMENT (SECOND) OF CONTRACTS recognizes an exception to this rule: “[t]he rule that language is interpreted against the party who chose it has no direct application to cases where the language is prescribed by law, as is sometimes true with respect to insurance policies,”³⁷

Courts in other jurisdictions overwhelmingly apply this exception.³⁸ As one court has explained:

One might say that in such circumstances, the policy is one of “adhesion” as to *both* the insurer and the insured. Consequently, it makes little sense to indulge in the fiction that the insurer offered the insured a contract of adhesion, and therefore the insurer should bear the burden of unfavorable interpretation when a provision is ambiguous.³⁹

Accordingly, the mandated language must be construed to accomplish the intent of the mandate, rather than being construed against an insurer that did not draft or choose that language.⁴⁰

This case does not require a decision whether this Court would adopt that rule, though FICW believes that it would and should. On this

³⁷ RESTATEMENT (SECOND) OF CONTRACTS § 206, cmt. *b* (1981).

³⁸ *Terra Indus., Inc. v. Commonwealth Ins. Co.*, 981 F. Supp. 581, 590 (N.D. Iowa 1997) (and cases collected there and in ALLEN D. WINDT, *INSURANCE CLAIMS & DISPUTES*, § 6:2, at 6-80 n. 75 (5th ed. 2007).

³⁹ *Terra Indus.*, 981 F. Supp. at 591. (citations omitted, emphasis in original)

⁴⁰ *Id.*

petition for review, the point is simply that (even had the court of appeals failed to construe ambiguous language against FICW), there would have been no conflict with this Court's decisions, which have never addressed the proper approach to construing legally mandated language.

Holden's argument for review rests entirely on the supposed conflict with this Court's decisions calling for construction of ambiguous language against the drafter. Because the supposed conflict does not exist, review cannot be justified on that basis.

C. The Court of Appeals Properly Applied the Rule That an ACV Policy Is Limited to Indemnifying the Insured Against Actual Loss.

Insurance coverage for the ACV of the insured property provides only indemnity for the actual amount of the insured's loss.⁴¹ The value protected is the economic loss to the insured.⁴²

Egerer v. CSR West, LLC,⁴³ held that the economic value of property does not include sales tax. In *Egerer*, a seller failed to deliver goods, and the buyer, who had not covered by purchasing elsewhere, was permitted to recover the market price of such goods (so-called hypothetical cover). The buyer sought to recover the sales tax it would have paid had it purchased those goods, but the court denied any claim for

⁴¹ *DePhelps v. Safeco Ins. Co. of Am.*, 116 Wn. App. at 454.

⁴² This point supports *Solomon's* conclusion that ACV equals FMV, but does not depend on that conclusion.

⁴³ *Egerer v. CSR W., LLC*, 116 Wn. App. 645, 656-657, 67 P.3d 1128 (2003).

never-paid sales tax:

An award of damages may include an amount for sales tax actually incurred by the injured party. But Egerer did not actually incur any obligation to pay sales tax The sales tax is not an inherent part of the “market price.”⁴⁴

Had Egerer been permitted to recover sales tax that he had not paid to purchase replacement goods, the damage payment would actually have put him in a better position than had there been no breach (in which case Egerer would have paid the sales tax on the goods CSR would have delivered).

While sales tax is imposed in connection with a sale of property, it is not part of the value of the property, because the seller cannot retain the tax, but must remit it to the state. *Aaro Med. Supplies, Inc. v. State Dep't of Revenue*, 132 Wn. App. 709, 716, 132 P.3d 1143 (2006). Because sales tax was not part of the value of the property before the fire, it was not part of the loss for which Holden was required to be indemnified.

D. Cases From Other States, Mechanically Applying a Definition of ACV Never Adopted in Washington, Need Not Be Followed.

Holden cites cases from other states that rely on a definition of ACV as “replacement cost less depreciation.” But Washington has never adopted that definition, and, even if it had, those cases are no more controlling than the California case relied upon in *Solomon*. Those cases

⁴⁴ *Id.* (citations omitted)

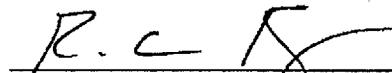
have simply applied their definition of ACV mechanically, without considering the implications of the rule that ACV is limited to indemnification of the insured. Any conflict with those cases does not warrant this Court's review.

IV. CONCLUSION

For the reasons stated above, this Court should deny the petition.

RESPECTFULLY SUBMITTED this 24th day of March, 2008.

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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.

Court of Appeals No. 59024-3-I; No Supreme Court Number

We represent Appellants in the referenced matter. Attached for filing please find APPELLANTS' RESPONSE TO PETITION FOR REVIEW. Thank you very much.

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