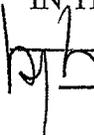


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SUPREME COURT
STATE OF WASHINGTON

2008 NOV 21 A 10:05 NO. 81487-2

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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LAURA HOLDEN,
Plaintiff/Petitioner,

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/Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. INTRODUCTION

Laura Holden's insurance policy states that "loss to property will be settled at actual cash value." The policy defines "actual cash value" (ACV) as the "fair market value of the property at the time of the loss" but does not define "fair market value" (FMV) and does not state whether or not sales tax will be included in computing ACV or FMV.

One of the methods Farmers uses to determine FMV is replacement cost less depreciation. Replacement cost includes sales tax.¹ If Farmers wanted to exclude sales tax in its computation of ACV/FMV, it could have said so in the policy. It did not do so.

The trial court construed this ambiguity in favor of the insured, Ms. Holden, and held that sales tax must be included in personal property loss claims. The Court of Appeals reversed, holding that Ms. Holden was not entitled to recover sales tax because the policy language must be "viewed through the lens of indemnification," and viewed through that lens, "sales tax is reimbursable only when incurred by the insured." The Court of Appeals' decision rests on the false premise that Ms. Holden did not incur sales tax. She *did* incur sales tax when she bought the items that were destroyed in the fire, and she is entitled to be reimbursed for that

¹ CP 141 (30(b)(6) Deposition at p.74). Farmers concedes that "[r]eplacement cost does include sales tax, and reducing that amount by a depreciation percentage would still leave a portion of that sales tax in the computed ACV." *Brief for Appellants* at p.17.

loss. Because she has not been reimbursed for that loss, she is in a worse position than she would have been in had the fire not occurred, which is contrary to the “indemnity” principle of insurance – that a person be restored to the position they were in before the fire occurred.

II. ISSUES

Was the trial court correct that (a) the insurance policy’s definition of “actual cash value” as “fair market value” is ambiguous with respect to whether it includes sales tax, and (b) that ambiguity must be resolved in favor of the insured under established Washington insurance law?

Does the indemnity principle underlying property insurance require that insureds be reimbursed for sales tax they paid on destroyed property?

III. STATEMENT OF THE CASE

A. Ms. Holden’s property loss claim

On June 9, 2004, Laura Holden lost personal property, mostly common household items such as mattresses and kitchen supplies, in a fire at a home she was renting. CP 56, 394, 401-404. Ms. Holden paid applicable sales taxes on those items when she bought them.

Ms. Holden was insured by Farmers Insurance Company of Washington (Farmers) under a renter’s policy. CP 89. The policy states that “loss to property will be settled at actual cash value” (CP 99), which

the policy defines as the “fair market value of the property at the time of the loss.” CP 93. But the policy does not define “fair market value” (FMV), state what method will be used to determine FMV, or state whether or not sales taxes will be included in calculating FMV:

Q. And where in the policy does it say that they’re not going to get their sales tax?

A. It doesn’t.

CP 143 (30(b)(6) Deposition at p.83); *see also* CP 159-160 (pp. 147-150).

Webster’s Collegiate Dictionary (10th ed. 1995) defines “actual cash value” as “money equal to the cost of replacing . . . damaged property after depreciation,”² and “fair market value” as “a price at which both buyers and sellers are willing to do business.”

As a practical matter there is no difference between FMV and ACV. A seller of goods, such as Costco, would have to include sales tax in the price of a television, and a buyer would have to pay sales tax to purchase the television. As Farmers acknowledges, sales tax is “part of the cost of purchasing” an item. CP 155 (30(b)(6) Dep. at pp. 130-131).

² *Black’s Law Dictionary* (6th ed.) defines ACV as: “The fair or reasonable cash price for which the property could be sold in the market in the ordinary course of business, and not at forced sale. . . . What property is worth in money, allowing for depreciation. Ordinarily, ‘actual cash value’, ‘fair market value’, and ‘market value’ are synonymous terms.”

Washington State sales tax is 6.5%. RCW 82.08.020. Local governments impose additional sales tax ranging from 1% to 2.5%, for a total sales tax of 7.5 to 9%.³

Ms. Holden submitted a claim for the loss of certain personal property. Farmers paid what it claimed was the ACV of her property but refused to reimburse the sales tax that she paid when she bought the items.

B. Methods for determining FMV

Several methods can be used to determine the FMV of personal property. CP 156 (30(b)(6) Dep. at p.134). One way is to determine the replacement cost of the item and then depreciate it, which is the method used by Farmers in this case (CP 406):

Often, the nature of the item dictates the method used to arrive at its fair market value. For example, [Farmers] may use the “replacement cost, less depreciation” method to determine the fair market value of a used, 10-year-old toaster because a comparable item is not likely to be found in an on-line auction or other secondary marketplace. In contrast, the value of a 50-year-old collectible wrist-watch can probably be determined either by appraisal or on-line auction or other secondary mechanism. . . .

CP 368-369 (Robert Hower Decl.); CP 140-141 (CR 30(b)(6) Dep. at pp.71-72). Since the replacement cost of personal property includes sales tax, the FMV of an item would include sales tax under the replacement cost less depreciation approach.

³[Http://dor.wa.gov/Docs/forms/ExcsTx/LocSalUseTx/LocalSlsUseFlyer_Quarterly.pdf](http://dor.wa.gov/Docs/forms/ExcsTx/LocSalUseTx/LocalSlsUseFlyer_Quarterly.pdf).

Here, the items that Ms. Holden lost were common household items (CP 401-404), not collectible or sentimental items. Almost all of the items were new enough that Farmers did not depreciate them at all. CP 401-404.⁴ By Farmers' own admission, the "replacement cost, less depreciation" method is the proper method for valuing such items:

[Robert Hower, Farmers' CR 30(b)(6) representative] If it's a new toaster, you're going to give them the value of a new toaster. There is no obsolescence or depreciation if it's one day old.

...

[T]he settlement amount would be the value of that toaster that he paid for it the day before.

Q. And that would include the sales tax, would it not?

A. In that case, yes, because you're paying the replacement cost, because there is no age, condition or obsolescence involved.

CP 141 (p.74).⁵ Farmers in fact had Ms. Holden obtain the replacement costs for the items that she lost. CP 79 (pp. 118-119).

C. Judge Erlick's ruling

In the trial court, Farmers argued that *National Fire Insurance v. Solomon*, 96 Wn.2d 763, 770, 638 P.2d 1259 (1982), which stated that

⁴ For those items that require depreciation, the insured should be compensated for the sales tax that they paid at a depreciated rate. An insured who loses a 10-year-old blender that costs \$100 plus sales tax of 8% (\$8) and is depreciated at 40% should receive \$60 plus \$4.80.

⁵ See also *Appellants' Response to Petition for Review*, pp.7-8, fn. 28 ("Property (e.g., an old toaster) with intrinsic value but neither found in secondary markets nor susceptible of appraisal may be best valued by replacement cost less depreciation.").

“‘actual cash value’ within [the] statutory language of [a] fire policy ... does not mean replacement cost less depreciation,” prohibits it from defining ACV as replacement cost less depreciation. Judge Erlick rejected Farmers’ position:

The challenge here is to determine what a fair market value is, and . . . Farmers relies principally upon the case of *National Fire Insurance v. Solomon* . . . 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* [122 Wn.2d 180, 859 P.2d 586 (1993)], in this Court’s opinion, if not *sub silentio* overruling *Solomon*, at least significantly limits it. . . .

RP at 73-75.

Judge Erlick also noted that, despite its claim that *Solomon* precludes defining FMV as “replacement cost less depreciation,” Farmers uses that method -- which includes sales tax -- in determining FMV:

Secondly, 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

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. . . . [I]f 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 held that Farmers' definition of ACV as FMV is ambiguous because it is capable of more than one reasonable interpretation:⁶

. . . [F]rom a reasonable-expectation standpoint of the insured, it is reasonable for an insured to expect that as part of the . . . 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 78-79.

The Court of Appeals reversed, finding that neither *Solomon* nor *Hess* controls, and that there is no ambiguity in the policy, despite the fact

⁶ Ms. Holden testified as to why she felt the language was vague and ambiguous. CP 58 (pp. 34-36), CP 59 (pp. 38-39).

that the policy did not define FMV or the method for determining FMV or say anything about excluding sales tax.⁷ 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 that indemnity does not include sales taxes unless incurred.

IV. ARGUMENT

A. The trial court properly found that the policy language is ambiguous and construed that ambiguity against Farmers.

Farmers claims that the established rule that ambiguous language in an insurance policy is construed against the insurer does not apply in this case because the language at issue was mandated by the Insurance Commissioner. While the Insurance Commissioner requires that certain provisions contained in the New York standard fire insurance policy be included in a fire insurance policy, including that property loss be paid based on ACV, the Commissioner allows alternative policy language as long as it is "not less favorable to the insured than the 'standard fire policy'".⁸ WAC 284-20-010(3).⁹ Further, the Commissioner never

⁷ The Court of Appeals acknowledged, however, that resolution of this ambiguity in favor of Ms. Holden "would result in payment of sales tax for ACV under all calculations of FMV." *Holden v. Farmers Ins. Co.*, 142 Wn. App. 745, 750, 175 P.3d 601 (2008).

⁸ A comparison of the property damage provisions in Farmers' policy (CP 93-100, 103-104, 107, 113-116, 117) to the New York Standard Fire policy

mandated that Farmers define ACV as FMV. Farmers states that it added that definition as an endorsement in response to *Solomon*,¹⁰ which was significantly limited by *Hess*. It was solely Farmers' decision to add that definition to its policy.

Over the years, Farmers' policy accumulated a number of endorsements, which required that insureds cross-reference the policy against each endorsement to determine how the original language had been modified. The Insurance Commissioner objected to Farmers' use of endorsements rather than revising the policy language itself, because the Commissioner felt that policyholders should not be subjected to "puzzle solving" to determine policy coverage and conditions. CP 376-378.

demonstrates that Farmers' policy, while similar in some respects, contains numerous exclusions, conditions, and other language not mandated by the Insurance Commissioner. (A copy of the New York standard fire policy is available on the Insurance Commissioner's website: www.insurance.wa.gov/industry/ratesformsdocs/NYStandardFirePolicy.pdf, and is attached as Appendix A.)

⁹ In contrast, in *Terra Industries, Inc. v. Commonwealth Ins. Co. of America*, 981 F. Supp. 581 (N.D. Iowa 1997), cited by Farmers for the proposition that the rule that the policy is construed against the insurer should not apply here, the applicable Iowa statute mandated fire insurance policy language and prohibited any deviation: "[i]t shall be unlawful for any insurance company to issue any policy of fire insurance . . . other or different from the standard form of fire insurance policy herein set forth." Iowa Code § 515.138(2) (now I.C. § 515.109).

¹⁰ *Farmers' Response to Petition for Review* at p.5 ("In response to *Solomon*, FICW endorsed all of its policy forms to adopt the *Solomon* definition: FMV."). The Court of Appeals characterized the language in *Solomon* that Farmers relies on as dicta. *Holden*, 142 Wn. App. at 603-604.

While the Insurance Commissioner required that Farmers put the language in its endorsements into the policy itself, the Commissioner did not mandate the language in the endorsement defining ACV as FMV. That language was chosen by Farmers. CP 381. Farmers could have defined ACV as “fair market value, exclusive of sales tax,” but it did not do so. *Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990) (“The [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions.”). There is no evidence that Farmers ever approached the Insurance Commissioner about excluding sales tax on ACV settlements. CP 128 (p.30).

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). 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 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*, 113 Wn.2d at 877. To determine the meaning of an undefined term, courts look to a standard 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 v. Allstate*, 136 Wn.2d at 576. Extrinsic evidence may be relied upon to resolve ambiguity in an insurance policy. Here, Farmers' own practices demonstrate at a minimum that the policy is ambiguous because Farmers uses "replacement cost less depreciation" to determine FMV, and replacement cost includes sales tax. "Any ambiguity remaining after examination of the applicable extrinsic evidence is resolved against the insurer and in favor of the insured." *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 172, 110 P.3d 733 (2005); *see also Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 82-83, 882 P.3d 703 (1994).

Farmers' policy states as follows:

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 the limit of insurance applying to the property, whichever is less.

CP 99 (emphasis added). The italicized language would suggest to an average person that payment for lost property could equal the amount necessary to replace the property, such as in the case of a brand new

television destroyed by fire. The “amount necessary to replace” a destroyed television would include sales tax.

The term “fair market value” in Farmers’ policy is undefined. Farmers admits that it uses “replacement costs less depreciation” as a means of determining FMV. CP 142; RP 75-76. As Farmers’ own practices demonstrate, the undefined term “fair market value” is susceptible to more than one reasonable interpretation. RP 78; *Kitsap County*, 136 Wn.2d at 576. Judge Erlick did not err in finding the language ambiguous and applying the interpretation favoring the insured as required by Washington law.

B. The Court of Appeals misconstrued the concept of “indemnity.”

The Court of Appeals based its decision on the concept of “indemnification,”¹¹ but it badly misconstrued what it means to “indemnify” an insured in a case such as this. Property insurance is based on the concept of indemnity (*Hess v. North Pacific Ins. Co.*, 122 Wn.2d 180, 182, 859 P.2d 586 (1993)), which requires that the insured be reimbursed for the loss she has sustained – in other words, placing the insured in the same financial condition she would have been in had there been no fire. Lee R. Russ & Thomas F. Segalla, 12 *Couch on Insurance* §

¹¹ *Holden*, 142 Wn. App. at 752.

175:5 (3rd ed. 2005). *Black's Law Dictionary* (6th ed.) defines "indemnity" as "reimbursement," and "indemnify" as "to restore the victim of a loss, in whole or in part, by payment, repair, or replacement. . . . To make good; to compensate; to make reimbursement to one of a loss already incurred by him." Compensating an insured for sales tax that she paid on destroyed property does not give the insured a windfall. It simply reimburses the insured for an actual loss that has been sustained, consistent with the indemnity principle of insurance. Ms. Holden is not asking for the replacement value of older items that are appropriately depreciated; she is simply asking to be indemnified for the actual losses that she sustained, including for the sales tax that she paid on the items she lost. It does not make Ms. Holden better off than before the loss to reimburse her for sales tax that she paid on the destroyed property.

The Court of Appeals based its decision on the false premise that Ms. Holden did not pay sales tax and therefore does not deserve to be reimbursed for sales tax. As discussed above, state and local sales taxes in Washington range from 7.5% to 9%. If someone buys a plasma television for \$2,000 plus 8% sales tax, for a total of \$2,160, and a day later the television is destroyed in a fire, "indemnity" requires that the person be reimbursed for the full amount of the loss -- \$2,160, not \$2,000. Paying the insured \$2,000, as Farmers would have it (CP 143, p.81), would not

place the insured in the same financial condition she would have been in had the fire not occurred and therefore would violate the concept of indemnity. The insured lost property that costs \$2,160 on the market, not \$2,000.

Farmers says that its policy is that “sales tax is owed once it’s incurred,” but it does not reimburse its insureds for sales tax that they incurred on destroyed property when they purchased the property. CP 144 (p.85). The Court of Appeals likewise stated that “sales tax is reimbursable only when incurred by the insured.” *Holden*, 142 Wn. App. at 752. Under Farmers’ and the Court of Appeals’ interpretation, insureds suffering personal property loss will never be restored to the same financial position they were in before the loss if their personal property loss claim is resolved on an ACV basis. Failure to compensate them for the sales tax that they paid on destroyed property means that their recovery will always be 7.5 to 9% short of full compensation when the claim is resolved on an ACV basis.

It makes no sense to say that the insured only “incurs” the \$160 sales tax if they replace the television after the loss. The insured incurred the \$160 sales tax when the television was purchased and suffered a loss of that \$160 when it was destroyed. As Ms. Holden asked, “Why do you

have to pay [sales tax] twice? You pay it when you buy it” CP 79 (p. 120), CP 80 (pp. 122-123).

In many cases, including this one, it may not be feasible for an insured who has suffered a fire loss to replace all of their lost property. Ms. Holden is a single mother with three kids at home who was making just over \$15 an hour at the time of the loss and was in the process of trying to buy a home for her family. As she put it, “How could I possibly just go out and purchase all these things? There’s no way.” CP 61 (pp. 46-47). It took time and sacrifice for her to replace the items she lost:

[Ms. Holden] Like I told Farmers, the money that they gave me I had to go out and get certain things. . . . I got the things that I most needed with the money that they gave me.

There were certain things to this day – and this is kind of embarrassing, but I don’t have a full pots and pans set because they cost so much money. I can’t go out and get it. So how can I give them a receipt when I have to buy a piece at a time over a long period of time?

CP 82 (p.130); *see also* CP 61 (p. 47). In order to obtain the replacement cost of her property, Farmers required that Ms. Holden replace her property within 180 days after the loss. CP 118. Like many insureds, she could not afford to do that and was therefore left with an ACV settlement being the only practical indemnification available to her for her loss.

C. This Court should expressly overrule the statement in *Solomon* that FMV “does not mean replacement cost less depreciation.”

Farmers’ principal argument throughout this case has been that FMV cannot be defined as “replacement cost minus depreciation” because of *Solomon*, even though Farmers admits that it uses the replacement cost minus depreciation method of determining FMV.¹² In *Hess*, this Court stated 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*, 122 Wn.2d at 191. This Court should expressly overrule the statement in *Solomon* that FMV “does not mean replacement cost less depreciation” and end any remaining uncertainty.

D. Courts from other jurisdictions and the Insurance Commissioner concur that actual cash value settlements should include sales tax.

In *Lukes v. American Family Mut. Ins. Co.*, 455 F. Supp.2d 1010 (D. Ariz. 2006), the insurance policy provided for payment of the “actual cash value” of damaged property, defined as “the amount which it would cost to repair or replace covered property with materials of like kind and quality, less allowance for physical deterioration and depreciation”

¹² See *Brief for Appellants* at p.2 (stating the sole assignment of error as follows: “The superior court erred in disregarding the Supreme Court’s decision in *Solomon* and holding that an insurer must include an allowance for sales tax in determining the ‘actual cash value’ of damage to insured property.”).

Id. at 1014-1015. Because the policy referred to the amount that it “*would* cost” (not the amount it *did* cost) to replace damaged property and did not exclude sales tax, the court held that sales tax must be included. The court noted that its holding was “consistent with the fundamental purpose of a fire insurance policy which is to fully indemnify the insured.” *Id.* at 1016.

The insurance policy in *Ghoman v. New Hampshire Ins. Co.*, 159 F. Supp.2d 928 (N.D. Tex. 2001), reimbursed the insured for the ACV of their losses, but the policy did not define ACV. The court noted that, under Texas law, ACV was synonymous with FMV, which could be determined in one of three ways, including replacement cost less depreciation. *Ghoman*, 159 F. Supp.2d at 934. The court held that sales tax should be included in the “actual cash value” of the insured’s loss:

The court concludes that “actual cash value” under the policy means repair or replacement costs less depreciation. “[R]epair or replacement costs include any cost that an insured is reasonably likely to incur in repairing or replacing a covered loss.” *Salesin v. State Farm Fire & Casualty Co.*, 229 Mich. App. 346, 581 N.W.2d 781, 790 (1998) Contractor’s overhead and profit and sales tax clearly fit this definition. These amounts should be included in the actual cash value award.

Ghoman, 159 F. Supp.2d at 934; *see also State v. Gilbert*, 79 Wn. App. 383, 385, 902 P.2d 182 (1995) (holding that sales tax is properly included in calculating the value of damages for purposes of a malicious mischief case); *Mazourek v. Wal-Mart Stores, Inc.*, 831 So.2d 85 (Fla. 2002)

(holding that county assessor properly included sales taxes in calculating the FMV of personal property for purposes of assessing ad valorem taxes on personal property).

Egerer v. CSR West, LLC, 116 Wn. App. 645, 67 P.3d 1128 (2003), cited by Farmers, is easily distinguished. *Egerer* involved an action for breach of a contract to supply fill for a land development. The defendant agreed to provide fill at a certain price but breached the contract because it was more profitable to use the fill for other purposes. The plaintiff sought damages based on “hypothetical cover” and claimed that his damages should include the sales tax he would have paid had he actually covered and bought fill from another supplier. The Court of Appeals held that the plaintiff’s damages did not include the hypothetical sales tax that he would have paid had he covered and purchased fill from another supplier, because “his cover was hypothetical, not actual.” *Egerer*, 116 Wn. App. at 656-657. Here, in contrast, Ms. Holden paid applicable sales tax on the items that were destroyed in the fire when she bought them. There is nothing hypothetical about the sales tax that she paid; the sales tax she paid when she purchased the items was an actual expense that she paid and then lost when the items were destroyed in the fire.

Finally, the Insurance Commissioner issued Bulletin No. 89-3 in April 1989 regarding “Sales Tax and ACV Claims” in response to an Insurance Law Report that asserted that the 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.¹³ CP 224. The Bulletin stated, “As most insurers probably know, that view is not supported by the commissioner.” The Bulletin explained:

The actual cash value in the hands of a claimant will often include freight and handling costs with the purchase price of a replacement. *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 . . . in good faith.*

CP 224 (emphasis added).

V. CONCLUSION

As set forth above, the “fair market value” of personal property may be ascertained in several ways, one of which, “replacement minus depreciation,” includes sales tax. Farmers itself uses this method.

Because Farmers’ policy fails to specify which method it uses in determining FMV, it is ambiguous. The Court of Appeals failed to acknowledge this ambiguity and failed to follow this Court’s decisions

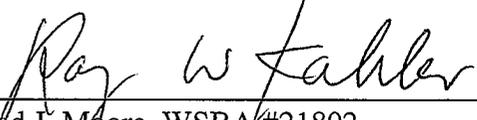
¹³ For settlement of automobile damage claims, the Commissioner requires that sales tax be included in ACV. WAC 284-30-3907(4).

requiring that ambiguity in an insurance policy be construed in favor of the insured.

Further, the principle of indemnity relied upon by the Court of Appeals requires that the insured be placed in the same position she was in prior to the property damage – not in a better or worse position. Because Ms. Holden paid sales tax when she bought the property that she lost in the fire, she must be reimbursed for that element of loss in order to be placed in the same position she was in prior to the fire. Failing to compensate Ms. Holden for the sales tax she paid puts her in a worse position than she was in before the fire.

For these reasons, this Court should reverse the Court of Appeals, reinstate the summary judgment, and remand this case for further proceedings.

Respectfully submitted this 20th day of November 2008.



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SUPREME COURT
STATE OF WASHINGTON

CERTIFICATION 2008 NOV 21 A 10:05

I hereby certify that on November 20, 2008, I delivered copy of the
document to which this certification is attached for delivery to all counsel
of record as follows:

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Tamron M. Clevenger

APPENDIX A

No.

[Space for insertion of name of company or companies issuing the policy and other matter permitted to be stated at the head of the policy.]

[Space for listing amounts of insurance, rates and premiums, location and name of insure for the basic coverages insured under the standard form of policy and for additional coverages or perils insured under endorsements attached.]

In Consideration of the Provisions and Stipulations herein or added hereto and of the premium above specified, this Company, for the term of years specified above and from the inception date shown above At 12:01 AM (Standard Time) at location of property of involved, does insure the named insured above and legal representatives, TO THE LESSER AMOUNT OF EITHER:

- 1. THE ACTUAL CASH VALUE OF THE PROPERTY AT THE TIME OF THE LOSS, OR
- 2. THE AMOUNT WHICH IT WOULD COST TO REPAIR OR REPLACE THE PROPERTY WITH MATERIAL OF LIKE KIND AND QUALITY WITHIN A REASONABLE TIME AFTER SUCH LOSS, WITHOUT ALLOWANCE FOR ANY INCREASED COST OF REPAIR OR RECONSTRUCTION BY REASON OF ANY ORDINANCE OR LAW REGULATING CONSTRUCTION OR REPAIR, AND WITHOUT COMPENSATION FOR LOSS RESULTING FROM INTERRUPTION OF BUSINESS OR MANUFACTURE, OR
- 3. TO AN AMOUNT NOT EXCEEDING THE AMOUNTS SPECIFIED ABOVE, BUT IN ANY EVENT FOR NO MORE THAN THE INTEREST OF THE INSURED, AGAINST ALL DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at _____.

Secretary

President

Countersigned this ___ day of _____, 19__

AGENT

1 Concealment, This entire policy shall be void if, whether
2 fraud. before or after a loss, the insured has will-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof, or the interest of the insured therein, or in case
6 of any fraud or false swearing by the insured relating thereto.
7 Uninsurable This policy shall not cover accounts, bills,
8 and currency, deeds, evidences of debt, money or
9 excepted property. securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 Perils not This company shall not be liable for loss by
12 included. fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by mili-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack; (b) invasion; (c) insurrection; (d)
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy; (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this company be liable for loss by theft.
25 Other Insurance. Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto.
28 Conditions suspending or restricting insurance. Unless other-
29 wise provided in writing added hereto this company shall not
30 be liable for loss occurring
31 (a) while the hazard is increased by any means within the con-
32 trol or knowledge of the insured; or
33 (b) while a described building, whether intended for occupancy
34 by owner or tenant, is vacant or unoccupied beyond a period of
35 sixty consecutive days; or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 that event for loss by fire only.
38 Other perils Any other peril to be insured against or sub-
39 or subjects. ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 Added provisions. The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this company in case of loss, and any other provi-
45 sion or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no provi-
47 sion may be waived except such as by the terms of this policy
48 is subject to change.
49 Waiver No permission affecting this insurance shall
50 provisions. exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this company relating to appraisal or to any examination
55 provided for herein.
56 Cancellation This policy shall be cancelled at any time
57 of policy. at the request of the insured, in which case
58 this company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above
60 the customary short rates for the expired time. This policy
61 may be cancelled at any time by this company by giving
62 to the insured a five days' written notice of cancellation with
63 or without tender of the excess of paid premium above the pro
64 rata premium for the expired time, which excess, if not ten-
65 dered, shall be refunded on demand. Notice of cancellation shall
66 state that said excess premium (if not tendered) will be re-
67 funded on demand.
68 Mortgagee If loss hereunder is made payable, in whole
69 interests and or in part, to a designated mortgagee not
70 obligations. named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 cellation.
74 If the insured fails to render proof of loss such mortgagee, upon
75 notice, shall render proof of loss in the form herein specified
76 within sixty (60) days thereafter and shall be subject to the pro-
77 visions hereof relating to appraisal and time of payment and of
78 bringing suit. If this company shall claim that no liability ex-
79 isted as to the mortgagor or owner, it shall, to the extent of pay-
80 ment of loss to the mortgagee, be subrogated to all the mort-
81 gagee's rights of recovery, but without impairing mortgagee's
82 right to sue; or it may pay off the mortgage debt and require
83 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may
85 be added hereto by agreement in writing.
86 Pro rata liability. This company shall not be liable for a greater
87 proportion of any loss than the amount
88 hereby insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not.
90 Requirements in The insured shall give immediate written
91 case loss occurs. notice to this company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, put
94 it in the best possible order, furnish a complete inventory of
95 the destroyed, damaged and undamaged property, showing in
96 detail quantities, costs, actual cash value and amount of loss
97 claimed; and within sixty days after the loss, unless such time
98 is extended in writing by this company, the insured shall render
99 to this company a proof of loss, signed and sworn to by the
100 insured, stating the knowledge and belief of the insured as to
101 the following: the time and origin of the loss, the interest of the
102 insured and of all others in the property, the actual cash value of
103 each item thereof and the amount of loss thereto, all encum-
104 brances thereon, all other contracts of insurance, whether valid
105 or not, covering any of said property, any changes in the title,
106 use, occupation, location, possession or exposures of said prop-
107 erty since the issuing of this policy, by whom and for what
108 purpose any building herein described and the several parts
109 thereof were occupied at the time of loss and whether or not it
110 then stood on leased ground, and shall furnish a copy of all the
111 descriptions and schedules in all policies and, if required, verified
112 plans and specifications of any building, fixtures or machinery
113 destroyed or damaged. The insured, as often as may be reason-
114 ably required, shall exhibit to any person designated by this
115 company all that remains of any property herein described, and
116 submit to examinations under oath by any person named by this
117 company, and subscribe the same; and, as often as may be
118 reasonably required, shall produce for examination all books of
119 account, bills, invoices and other vouchers, or certified copies
120 thereof if originals be lost, at such reasonable time and place as
121 may be designated by this company or its representative, and
122 shall permit extracts and copies thereof to be made.
123 Appraisal. In case the insured and this company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then, on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire; and failing for fifteen days to agree upon
130 such umpire, then, on request of the insured or this company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized, of any two when filed with this company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.
141 Company's It shall be optional with this company to
142 options. take all, or any part, of the property at the
143 agreed or appraised value, and also to re-
144 pair, rebuild or replace the property destroyed or damaged with
145 other of like kind and quality within a reasonable time, on giv-
146 ing notice of its intention so to do within thirty days after the
147 receipt of the proof of loss herein required.
148 Abandonment. There can be no abandonment to this com-
149 pany of any property.
150 When loss The amount of loss for which this company
151 payable. may be liable shall be payable sixty days
152 after proof of loss, as herein provided, is
153 received by this company and ascertainment of the loss is made
154 either by agreement between the insured and this company ex-
155 pressed in writing or by the filing with this company of an
156 award as herein provided.
157 Suit. No suit or action on this policy for the recov-
158 ery of any claim shall be sustainable in any
159 court of law or equity unless all the requirements of this policy
160 shall have been complied with, and unless commenced within
161 twelve months next after inception of the loss.
162 Subrogation. This company may require from the insured
163 an assignment of all right of recovery against
164 any party for loss to the extent that payment therefor is made
165 by this company.