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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

No. 289541

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REX and BRENDA ALLEMAND, husband and wife,

Plaintiffs/Respondents,

vs.

STATE FARM INSURANCE COMPANIES, also known as STATE  
FARM GENERAL INSURANCE COMPANY; and STATE FARM  
FIRE & CASUALTY COMPANY,

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

The trial court's Final Declaratory Judgment in favor of the plaintiffs should be reversed because it awards the plaintiffs an amount greater than which they are entitled to recover under the terms of their insurance coverage.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by failing to enforce the similar construction requirement in the Loss Settlement provision in the plaintiffs' State Farm homeowners insurance policy.

2. The trial court erred by failing to enforce the Building Ordinance or Law Coverage limitation in the plaintiffs' State Farm homeowners insurance policy.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the plaintiffs replace their house with similar construction? (Assignment of Error 1.)

2. Does similar construction include differences necessitated by enforcement of a building ordinance or law? (Assignment of Error 1.)

3. Was the cost to repair or rebuild the plaintiffs' house increased due to the enforcement of a building ordinance or law? (Assignment of Error 2.)

4. Does the plaintiffs' State Farm homeowners policy unambiguously limit the amount of coverage available for the increased cost to repair or rebuild the plaintiffs' house due to the enforcement of a building ordinance or law to the stated limits of \$8,986.60? (Assignment of Error 2.)

### **III. STATEMENT OF THE CASE**

On June 20, 2007, a house owned by plaintiffs Rex and Brenda Allemand in Kittitas, Washington, was partially damaged by a fire. CP 27. The Allemands' house was insured under a homeowners insurance policy issued by defendant State Farm Fire and Casualty Company. CP 27. The house was originally built in 1940. CP 44. When the fire occurred, the Allemands' house did not comply with applicable local building codes because, among other things, it did not have an appropriate foundation, crawl space or electrical system. CP 27-28.

The Allemands were advised by the City of Kittitas Building

Department that they would not be allowed to repair the damaged portion of their house and instead the entire house had to be removed and replaced with upgrades to comply with building code requirements. CP 45. The Allemands admit that but for the increased costs resulting from enforcement of the building code that the damaged part of their house could have been repaired for a cost of \$50,676.95. CP 28. However, due to the required code upgrades, it cost \$96,669.56 to demolish and replace the house. CP 96.

The Loss Settlement provision of the Allemands' State Farm policy provided coverage up to \$89,866.00 to repair or replace the damaged part of the house subject to an additional limit of \$8,986.60 (10%) for the increased costs resulting from enforcement of the building code. CP 27 and 29. State Farm paid the Allemands the \$50,676.95 it would have cost to repair the damaged portion of their house and the \$8,986.60 limit available for the increased costs to comply with the building code, for a total of \$59,663.55. CP 28 and 29.

The Allemands commenced this lawsuit alleging that the Loss Settlement provision did not limit the available coverage to

the amount paid by State Farm even though the Allemands replaced their house at a cost which was increased due to enforcement of the building code. CP 2. The Allemands alleged that they were entitled to recover the Dwelling coverage up to the \$89,866.00 limit and the Building Ordinance and Law coverage up to the \$8,986.60 limit. CP 2. Alternatively, the Allemands alleged that if their insurance coverage was limited to the \$59,663.55 paid by State Farm, then State Farm failed to adequately insure their house. CP 3.

The trial court agreed with the Allemands' interpretation of the policy that, despite the increased cost to replace the house caused by enforcement of the building code, their coverage was not limited to the \$59,663.55 paid by State Farm. CP 98. Even though the Allemands had originally alleged that it would cost over \$128,000 to replace their house, the trial court ultimately determined that the cost was actually \$96,669.56. CP 45 and 98. The trial court determined that the Allemands were entitled to insurance coverage for the \$96,669.56 cost to replace their house less the \$59,663.55 paid by State Farm, for a principle declaratory judgment amount of \$37,006.01 plus attorney fees and costs.

CP 98. Since the \$96,669.56 amount was within the combined limits of the Dwelling and Building Ordinance coverages of \$98,852.60, the trial court dismissed the Allemands' claim for inadequate insurance. CP 98.

#### IV. APPLICABLE INSURANCE POLICY PROVISIONS

##### SECTION I - LOSS SETTLEMENT

Only the Loss Settlement provisions shown in the **Declarations** apply. We will settle covered property losses according to the following.

##### 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:

...

- (4) we will not pay for increased costs resulting from enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, except as provided under Option OL - Building Ordinance or Law Coverage.

...

**Option OL - Building Ordinance or Law.**

**1. Coverage Provided.**

The total limit of insurance provided by this Building Ordinance or Law provision will not exceed an amount equal to the Option OL percentage shown in the Declarations of the Coverage A limit shown in the Declarations at the time of the loss, as adjusted by the inflation coverage provisions of the policy. This is an additional amount of insurance and applies only to the dwelling.

**2. Damaged Portions of Dwelling.**

When the dwelling covered under COVERAGE A - DWELLING is damaged by a Loss Insured we will pay for the increased cost to repair or rebuild the physically damaged portion of the dwelling caused by the enforcement of a building, zoning or land use ordinance or law if the enforcement is directly caused by the same Loss Insured and the requirement is in effect at the time the Loss Insured occurs.

**3. Undamaged Portions of Damaged Dwelling.**

When the dwelling covered under COVERAGE A - DWELLING is damaged by a Loss Insured we will also pay for:

- a. the cost to demolish and clear the site of the undamaged portions of the dwelling caused by the enforcement of a building, zoning or land use ordinance or law if the enforcement is directly caused by the same Loss Insured and the requirement is in effect at the time the Loss Insured occurs; and
- b. loss to the undamaged portion of the dwelling caused by enforcement of any ordinance or law if:

- (1) the enforcement is directly caused by the same Loss Insured;
  - (2) the enforcement requires the demolition of portions of the same dwelling not damaged by the same Loss Insured;
  - (3) the ordinance or law regulates the construction or repair of the dwelling, or establishes zoning or land use requirements at the described premises; and
  - (4) the ordinance or law is in force at the time of the occurrence of the same Loss Insured; or
- c. the legally required changes to the undamaged portion of the dwelling caused by the enforcement of a building, zoning or land use ordinance or law if the enforcement is directly caused by the same Loss Insured and the requirement is in effect at the time the Loss Insured occurs.

CP 23-24.

## V. ARGUMENT

1. The standard of review is de novo.

Interpretation of an insurance policy is a question of law that is reviewed de novo. *McIlwain v. State Farm Mutual Auto Ins. Co.*, 133 Wn. App. 439, 443, 136 P.3d 135 (2006). Declaratory judgments are also reviewed de novo. *Id.* at 443.

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2. The facts admitted by the Allemands are conclusively established.

Any factual matters admitted in response to a request for admission are conclusively established unless the court on motion permits withdrawal or amendment of the admission. *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722 (1990), citing CR 36(b).

The Allemands admit that without the enforcement of the building code upgrades their house could have been repaired for a cost of \$50,676.95 and that State Farm paid the Allemands that amount. The Allemands admit that after the fire enforcement of the building code required their entire house to be upgraded so that it had a proper foundation, a sufficient electrical system and other requirements which the house did not have at the time of the fire. The Allemands admit that the applicable limit in their State Farm policy for building code and ordinance upgrades was \$8,986.60 and that State Farm also paid them that amount.

3. The general principles of insurance policy interpretation apply.

The following general principles of insurance policy

interpretation are applicable:

The interpretation of insurance policies is a question of law. In construing the language of an insurance policy, the entire contract must be construed together so as to give force and effect to each clause. If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity when none exists.

. . .

Complexity or the necessity to interrelate policy provisions does not alone render the policy ambiguous.

*Hess v. North Pacific Ins. Co.*, 122 Wn.2d 180, 186, 859 P.2d 586 (1993).

4. The State Farm policy should be enforced as written.

*Hess*, like the case at hand, involved analysis of the limits of coverage contained within the Loss Settlement provision of a homeowners policy. In *Hess*, the insureds' summer cabin was completely destroyed by fire. The insureds and their insurer, North Pacific, agreed that the actual cash value of the cabin was \$20,000 and the replacement cost for the cabin was \$43,182.10. However, the insureds did not replace the cabin, nor did they intend to do so. The Loss Settlement provision stated that North Pacific would pay no more than the actual cash value of the

damage unless there was actual repair or replacement. Although North Pacific paid the agreed-upon actual cash value, the insureds nonetheless commenced suit for \$22,182.10 representing the difference between the full replacement cost and the paid actual cash value.

The *Hess* court applied the general principles of insurance policy interpretation and rejected the insured's argument that the policy was ambiguous. The court read together and gave meaning to each clause containing the definitions of the potential coverage limits and concluded that North Pacific had correctly determined that it only had to pay the actual cash value. *Id.* at 186-87.

The *Hess* court specifically emphasized that the policy's replacement cost paragraph contained the phrase, "subject to the following," and that one of the following paragraphs stated when the actual cash value limits applied. *Id.* at 187. "In other words, the very paragraph upon which the insureds rely makes itself subject to the limitations of" actual cash value unless repair or replacement is complete. *Id.* at 187.

Similarly, in the case at hand, the Loss Settlement provision in the Allemands' homeowners policy pertaining to State Farm's

payment for the cost to repair or replace contains the phrase, "subject to the following". One of the following subparagraphs limits the payment for the increased cost resulting from enforcement of building codes to the percentage amount shown in the Declarations Page which the Allemands admit is \$8,986.60.

5. "Similar construction" does not include differences in the new house necessitated by the building code.

The Loss Settlement provision in the Allemands' State Farm policy specifically states that State Farm will pay the cost to repair or replace the damaged part of the dwelling with "similar construction" subject to the Building Ordinance or Law coverage. In *Roberts v. Allied Group Ins.*, 79 Wn. App. 323, 325, 901 P.2d 317 (1995), it was held that a loss settlement provision which used the terms "like kind and quality" and "like construction" did not include the cost to build a new house with differences necessitated by building code requirements.

The *Roberts* holding was followed in *Dombrosky v. Farmers Ins.*, 84 Wn. App. 245, 928 P.2d 1127 (1996), to interpret a loss settlement provision in a homeowners policy which provided coverage for replacement costs of that part of the building

damaged for "equivalent construction." Following a fire to their home, the Dombroskys claimed that they were entitled to recover the additional costs mandated by building codes enacted after they moved into their house. The court rejected that argument and held that "equivalent construction" has the same effect as "like, kind and quality" as interpreted in *Roberts* "and the expenses related to the new building code are not covered under the policy." *Id.* at 259.

Consistent with *Roberts* and *Dombrosky*, the term "similar construction" in the Allemands' policy has the same effect as "like kind and quality", "like construction" and "equivalent construction" and does not extend recovery to the increased costs attributable to updated building codes greater than the \$8,986.60 limit provided under Option OL - Building Ordinance or Law Coverage.

The *Roberts* and *Dombrosky* courts each distinguished the prior decision in *Starczewski v. Unigard Ins.*, 61 Wn. App. 267, 810 P.2d 58 (1991). *Roberts* and *Dombrosky* recognized that *Starczewski* stated in dicta that the average person would believe that the amount necessary to repair or replace the damaged

property would include the amount necessary to comply with mandatory building codes. *Roberts* at 325 and *Dombrosky* at 258. However, *Roberts* and *Dombrosky* did not follow *Starczewski* because the loss settlement provision in the Starczewskis' insurance policy did not include language of "like, kind and quality" and "like construction" and "equivalent construction." *Roberts* at 325 and *Dombrosky* at 259.

For the same reason, *Starczewski* should not be followed in this case because the State Farm Loss Settlement provision contains the language "similar construction" not contained in *Starczewski*.

6. The Building Ordinance or Law Provision is valid and enforceable.

It is important to note that the State Farm Option OL - Building Ordinance or Law Coverage incorporated into the Loss Settlement provision provides rather than excludes coverage when the insured incurs increased costs necessitated by building code upgrades.

In *DePhelps v. Safeco Ins.*, 116 Wn. App. 441, 65 P.3d 1234 (2003), the court held that the building ordinance or law

provision in a Safeco homeowners policy covered residential and commercial code upgrades. Although Safeco issued a homeowners policy to the DePhelps covering their residence, the residence was also used by the DePhelps as a bed and breakfast and occasionally for social events. The residence was damaged by accumulations of snow and ice and subsequently water and mold after a temporary repair. Kittitas County required that any further repairs comply with the commercial building code.

The DePhelps argued that the increased commercial repair costs should be covered under their homeowners policy. Safeco argued that the policy should be construed to only cover residential code upgrades and not commercial code upgrades because the structure was used principally as a residence. The court agreed with the DePhelps and held that since the policy covered the cost of compliance with building codes without a limitation to residential code upgrades, the commercial code upgrades were covered. *Id.* at 449.

Unlike the policy in *DePhelps*, the Allemands' State Farm policy specifically states that coverage for increased costs resulting from building code upgrade compliance will not exceed

the limit shown in the Declarations Page, which the Allemands admit is \$8,986.60. As in *DePhelps*, the Allemands' policy expressly covers the increased cost of compliance with building codes but, unlike *DePhelps*, there is a limit on the amount of that coverage. The State Farm policy provision setting forth the limit of that coverage is unambiguous and should be enforced as written. *Hess, supra* at 186.

A provision providing coverage for increased costs due to building code compliance was also addressed in *Commonwealth Ins. v. Grays Harbor Cty*, 120 Wn. App. 232, 84 P.3d 304 (2004). The insurance policy at issue did not state a specific amount for such coverage, but only that the coverage was "limited to the minimum requirements of such law or ordinance regulating the repair or reconstruction." *Id.* at 236. A dispute arose over the scope of code upgrade coverage available to Grays Harbor County when it planned to repair a courthouse damaged by an earthquake. In its coverage interpretation analysis the court pointed out that the insurer could have written clearer restrictions on coverage. *Id.* at 242. The court ultimately held that there was coverage for upgrades which met the minimum code requirements but remanded the case for a determination as to what upgrades were actually required. *Id.* at 246.

There is no such problem in the case at hand where it is undisputed that the increased costs due to enforcement of the building code exceeds the Allemands' available coverage limit of \$8,986.60.

No Washington case was found interpreting a specified limit for building ordinance or law coverage as contained in the Allemands' State Farm policy. However, a similar code upgrade limitation was part of the insurance policy at issue in *Everett v. State Farm*, 162 Cal.App.4th 649, 75 Cal.Rptr.3d 812 (2008). In that case, both parties agreed that the available amount of building ordinance and law coverage was \$9,230.00, but there was a dispute as to whether or not the insured presented proof of increased costs due to code upgrades which exceeded the coverage. The court held that the insured failed to meet her burden of proof on that issue and that the \$5,696.00 paid by State Farm for code upgrades was appropriate. *Id.* at 659. Importantly, there was no dispute about the applicability and validity of the limit of coverage for code upgrades but only whether the cost of the code upgrades met or exceeded that limit.

7. The efficient proximate cause rule does not void the Loss Settlement coverage limitations.

Under the efficient proximate cause rule, coverage is

afforded for a loss efficiently caused by a covered event even though other events within the chain of causation are excluded from coverage. *Northwest Bedding v. Nat'l Fire Ins.*, \_\_\_\_ Wn. App. \_\_\_\_, 225 P.3d 484 (2010). However, the case at hand does not involve an exclusion from coverage. Instead, the Loss Settlement provision states that State Farm will pay for repair or replacement with similar construction and in addition will pay for increased costs resulting from enforcement of any building ordinance or law up to the percentage amount (\$8,986.60) shown in the Declarations. The efficient proximate cause rule should not be applied to modify the Loss Settlement provision coverage limits for similar construction and increased costs resulting from enforcement of building codes.

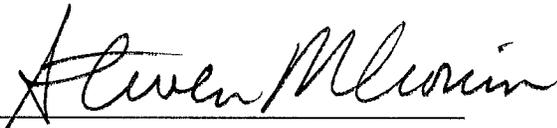
## VI. CONCLUSION

The Allemands are not entitled to recover any additional amounts under the Loss Settlement provision of their homeowners insurance policy beyond the \$59,663.55 already paid to them by State Farm. The trial court's Final Declaratory Judgment in favor of the Allemands should be reversed and remanded with instructions to enter a Final Declaratory Judgment in favor of State Farm that it does not owe any further insurance payment to the

Allemands and that the Allemands are not entitled to attorney fees  
or costs.

DATED this 10 day of May, 2010.

MULLIN, CRONIN, CASEY & BLAIR, P.S.

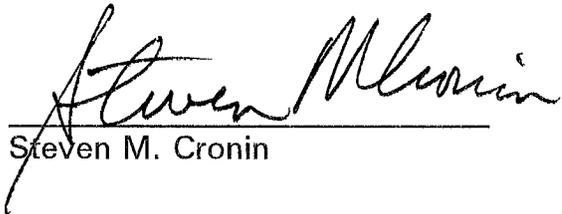
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of May, 2010, I caused to be served a true and correct copy of the foregoing BRIEF OF APPELLANT by the method indicated below, and addressed to the following:

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