

No. 81487-2

J.M. JOHNSON, J. (dissenting)—Laura Holden seeks reimbursement under her renter’s insurance policy for the “actual cash value” (ACV) of personal property damaged during a fire in her apartment. Holden’s insurance policy defines ACV as the “fair market value” (FMV) of the property at the time of loss. Because the majority erroneously holds that a (theoretical) sales tax should be added to the reimbursement based on its conclusion the term FMV is ambiguous, I respectfully dissent.

The majority concludes that the definition of ACV results in ambiguity because of the use of different methodologies to determine FMV in different contexts. Majority at 3-4, 10. In the majority’s view, this results in FMV having more than one reasonable interpretation, which renders it ambiguous. *Id.* at 5 (citing *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964

P.2d 1173 (1998)). However, the term FMV is capable of a single reasonable interpretation that unambiguously excludes sales tax in this context. *See Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005) (context and intent of parties are relevant considerations when interpreting contracts).

Reading FMV so as to exclude taxes—both in Holden’s insurance policy and elsewhere—captures the likely perceptions of “the average person purchasing insurance,” the perspective that we must assume when interpreting insurance contracts. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002) (quoting *Sears v. Grange Ins. Ass’n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)). Indeed, viewed from the perspective of ordinary insurance customers like Holden, it is the only reasonable interpretation of the term. To illustrate, consider the fact that it is customary to calculate taxes based on FMV or “market value,” not to calculate FMV inclusive of taxes. In calculating the FMV of various bonds for inheritance tax purposes, for example, this court specified that the term means “the amount of money which a purchaser willing, but not obligated, to buy would pay an owner willing, but not obligated to sell.” *In re Estate of*

Eggert, 82 Wn.2d 332, 335, 510 P.2d 645 (1973); *see also In re Estate of Toomey*, 75 Wn.2d 915, 919, 454 P.2d 420 (1969) (inheritance tax “must, therefore, be measured by what is called the fair market value”). Likewise, in commenting on property taxes based on “market value,” this court indicated that the term means “what a willing buyer under no obligation to buy would pay a willing seller under no obligation to sell.” *Wash. Beef, Inc. v. Yakima County*, 143 Wn. App. 165, 172, 177 P.3d 162 (2008); *see also Cascade Court Ltd. P’ship v. Noble*, 105 Wn. App. 563, 567, 20 P.3d 997 (2001) (giving the same definition).

Leaving aside the fact that a willing seller is unlikely to include sales tax in the amount that he would accept for an item, given that the State, not the seller, receives that tax, FMV in these two tax contexts are not calculated so as to include taxes; rather, taxes are derived from FMV. An average person buying insurance surely has paid property taxes during his or her lifetime and perhaps has dealt with inheritance taxes after the death of a loved one, and thus would be aware of this relationship. Accordingly, he or she would conclude that FMV does not include taxes such as sales tax.

This conclusion receives further support from definitions of “value”

used in other tax contexts.¹ For instance, we calculate the FMV of mineral properties by looking at “price” and “valuations for purposes of state and local taxation,” *Donaldson v. Greenwood*, 40 Wn.2d 238, 252, 242 P.2d 1038 (1952), figures that obviously do not include taxes. We similarly calculate capital gains taxes based on the FMV of investments, not the other way around. *Chatterton v. Bus. Valuation Research, Inc.*, 90 Wn. App. 150, 151-52, 951 P.2d 353 (1998). It thus appears axiomatic that FMV does not include *any* kind of tax, not just sales tax. Indeed, a contrary conclusion would trap us in an endless loop of calculating value: we would have to include taxes in “value,” but since taxes themselves are based on value, we would have to calculate taxes before ascertaining value, which would require knowing the relevant taxes, etc. We cannot calculate taxes using value *and* value using taxes; either the chicken or the egg must come first. An “average person purchasing insurance,” *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007) (quoting *Roller v. Stonewall Ins.*

¹ The majority is mistaken when it insists that the meaning of FMV under Holden’s insurance contract is the only meaning that matters in this case. Majority at 7. An average person purchasing insurance such as Holden does not consider an insurance contract in isolation, but rather approaches the policy with an understanding of FMV influenced by his or her encounters with the term in various other contexts; we should do the same.

Co., 115 Wn.2d 679, 682, 801 P.2d 207 (1990), *overruled on other grounds by Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004)), would avoid this dilemma by concluding that FMV does not include taxes of any kind. Any other interpretation of the term would be unreasonable in light of our customary definition of FMV in other contexts and the illogical results engendered by the opposite conclusion. There being only one reasonable interpretation of the term, neither FMV nor the ACV provision is ambiguous. In the absence of ambiguity, we interpret insurance contracts according to the plain, ordinary, and popular meaning of their terms. *Kitsap County*, 136 Wn.2d at 576. Thus, we look to the plain, ordinary, and popular meaning of FMV in order to understand the extent of Holden's ACV coverage. This analysis replicates much of the discussion of an "average person purchasing insurance" outlined above, since it seems indisputable that all but the most sophisticated of persons purchasing insurance give policy terms their plain, ordinary, and popular meanings. *Woo*, 161 Wn.2d at 52. The meaning of FMV thus necessarily incorporates our customary treatment of value, *see In re Estate of Eggert*, 82 Wn.2d at 335; *In re Estate of Toomey*, 75 Wn.2d at 919; *Donaldson*, 40 Wn.2d at 252; *Wash. Beef, Inc.*, 143 Wn. App. at 172;

Cascade Court, 105 Wn. App. at 567; *Chatterton*, 90 Wn. App. at 151-52, and therefore excludes sales tax.²

Interpreting FMV so as to exclude sales tax also captures its legal, technical meaning, although, as the majority rightly observes, this meaning merely informs our analysis and does not control it. Majority at 6. To give an example, the Washington Pattern Jury Instructions define FMV in the context of eminent domain as:

the amount in cash that a well-informed buyer, willing but not obligated to buy the property, would pay, and that a well-informed seller, willing but not obligated to sell it, would accept

6A Washington Practice: Washington Pattern Jury Instructions: Civil 150.08, at 76 (5th ed. 2005); *see also State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) (courts must define “technical” terms used in jury instructions); *State v. Rowley*, 74 Wn.2d 328, 334, 444 P.2d 695 (1968).

This instruction does not mention sales tax, nor can it realistically be argued that the amount of cash that a well-informed seller would accept includes

² Confirming this conclusion, the *Merriam-Webster Dictionary* defines FMV as “a price at which buyers and sellers with a reasonable knowledge of pertinent facts and not acting under any compulsion are willing to do business.” Merriam-Webster Online Dictionary, <http://www.Merriam-Webster.com/dictionary/fairmarketvalue> (last visited Sept. 8, 2010). This does not include sales tax.

sales tax. *See supra* p. 3. Thus, in both technical and ordinary usage, and to an average person purchasing insurance, FMV in an insurance contract such as Holden's clearly means the market price exclusive of sales tax.

Even if FMV standing alone in Holden's ACV coverage is ambiguous, which for the foregoing reasons it is not, it emphatically is not ambiguous when one considers the term in relation to the entirety of Holden's insurance policy. Holden paid an additional premium to supplement her basic ACV coverage with a replacement cost endorsement (RCE), which promised to reimburse her for "the full cost of repair or replacement" if she repaired or replaced damaged or destroyed items. Clerk's Papers (CP) at 118. Presumably, Holden did so because she did not believe she had such coverage under the ACV provision. The parties agree that the RCE included reimbursement for any sales tax paid as a result of repair or replacement. Yet, according to the majority's reading of FMV, the ACV provision already covered the full cost of repair or replacement, inclusive of sales tax, regardless of whether Holden actually replaced the property or incurred the tax.

It is difficult to understand why an insured who is eligible to receive the full replacement cost of insured items without actually replacing them would

purchase a *second* insurance product reimbursing the full replacement cost only after replacement has occurred. But under the majority's interpretation of FMV, this is exactly what Holden did when she purchased the RCE to supplement her ACV coverage.³ The majority believes that the RCE and the ACV coverage give Holden virtually the same thing: a check for the replacement cost, including sales tax, the only difference being that the RCE *reimburses* Holden for the replacement cost of the property *after* replacement, whereas the ACV provision *pays up front* the amount needed to replace it regardless of whether replacement occurs. Thus, the majority gives Holden a choice between (i) replacing her property and being reimbursed for the cost, including sales tax, and (ii) receiving the cash value of that reimbursement in advance of replacement. If she chooses the second option, Holden need not even use the cash to replace the property in question; the

³ Judging from her ownership of not one but two types of insurance coverage for her rented home, Holden is an unusually prudent, sensible, and risk-averse consumer. In a nation where only 40 percent of renters even bother to purchase renters insurance at all, see Press Release, The Allstate Corporation, With Renters on the Rise, Americans Face Increasing Risk for Property Loss (July 22, 2008), *available at* <http://www.reuters.com/article/idUS132937+22-Jul-2008+PRN20080722> (last visited Sept. 8, 2010), Holden purchased two different insurance products to ensure full compensation for any loss suffered as a result of fire or other misfortunes, CP at 96. It is evident from these facts that Holden is an especially conscientious insured, and is even less likely than the average person purchasing insurance to pay for redundant coverage.

sum becomes a windfall, at least to the extent she is given money for taxes that she may never pay.⁴

We give insurance contracts a “‘practical and reasonable rather than literal interpretation’, and not a ‘strained and forced construction’ leading to absurd results.” *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (quoting *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 907, 726 P.2d 439 (1986)). It is neither practical nor reasonable to interpret FMV so as to result in essentially redundant coverage (and an average person buying insurance would not make this costly mistake),⁵ yet the majority’s interpretation of the term produces such a result. I would avoid this absurd result by interpreting FMV in relation to the whole of Holden’s policy—both the ACV provision and the RCE. Such a reading

⁴ The majority asserts that this is not a windfall but rather merely returns Holden to the same financial position that she enjoyed before the fire. Majority at 9-11. This is incorrect. Reimbursing Holden for both the value of her damaged property *and* the sales tax that she spent to acquire it returns her to the same financial position that she enjoyed *before purchasing the property*—that is, before she paid its purchase price (i.e., its value) and the associated sales tax. It does not return her to the same financial position that she enjoyed before the fire; there, she had possession of the property (i.e., its value) but not the sales tax, having already spent that sum to acquire the property.

⁵ It is true that the RCE differs from the ACV provision in that the former does not account for depreciation in calculating the replacement cost, whereas the latter does. Majority at 10 n.5. This distinction has little to do with the issue at hand, however, which is whether the RCE and the ACV provision both account for *sales tax* in calculating the replacement cost.

leads to the conclusion that, even if FMV is ambiguous elsewhere, there can be no doubt that the term unambiguously does not include sales tax under Holden's ACV coverage.

As a final observation, the language of Holden's ACV coverage does not support the automatic award of sales tax to Holden, even if, despite the analysis above, sales tax is included in the compensation due under that provision, which reads:

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 at 99. Although the ACV clause includes the words "the amount necessary to repair or replace," one cannot in good faith rewrite the clause to read: "Covered loss to property will be settled at . . . the amount necessary to repair or replace the damaged property." The reference to the cost of repair or replacement merely sets an upper limit on compensation owed under the ACV provision, not an automatic level of compensation.⁶

⁶ Holden was made aware of this fact when she sought compensation for her damaged property. Indeed, Farmers twice reminded Holden by letter that, although she was not entitled to payment for this tax under the ACV provision, she would be reimbursed for all applicable sales taxes if she replaced the damaged items and submitted a claim under the RCE with receipts documenting the tax. CP at 370, 392. Nevertheless, Holden demanded

Thus, even if the amount owed under the ACV provision includes sales tax, which it does not, the language of that provision does not suggest to the average insurance consumer that his or her loss will always be covered at replacement cost and therefore will always include sales tax. *Contra* majority at 6-7. Rather, the provision suggests that the amount disbursed cannot *exceed* that cost; it sets a ceiling, not a floor.⁷ If automatic compensation for the replacement cost is not part of the ACV provision, it follows that automatic payment of prospective sales tax is also not part of that provision. Accordingly, even if FMV takes account of sales tax, Holden is not automatically entitled to a check from Farmers for the sales tax that she would have incurred had she replaced her property.⁸

compensation for the tax as part of her ACV coverage, not under the RCE, and wrote several letters to the Office of the Insurance Commissioner complaining of Farmers' failure to pay it. CP at 304-06, 309-19, 325-55, 362-63. The Office of the Insurance Commissioner forwarded the letters to Farmers, in response to which Farmers again maintained that its policies reimbursed sales tax only if the insured actually incurred it. CP at 304-06, 308, 321-24, 361, 365-66.

⁷ The majority mischaracterizes this argument as reliant on the conclusion that “*no reasonable policyholder* could believe that the sales tax incurred in replacing damaged property would be accounted for.” Majority at 7 n.3 (emphasis added). In fact, it relies on the conclusion that the *average* policyholder would not reach this conclusion, not that no reasonable policyholder ever could. Precedent requires us to use this “average person” standard when we interpret insurance contracts. See *Woo*, 161 Wn.2d at 52.

⁸ Complicating the matter further, sales tax varies by county, city, and state. Indeed, had Holden purchased replacement goods in Oregon, she ostensibly would need no reimbursement at all for sales taxes. This variance makes it impossible to determine the

Conclusion

I would hold that Holden’s ACV coverage cannot reasonably be interpreted so as to require payment of sales tax in addition to the market value of a loss. Indeed, Holden could not have understood the ACV provision in her policy to so require. The provision is neither susceptible to more than one reasonable interpretation nor ambiguous, and we therefore should not construe it in favor of the insured. This holding maintains consistency with the ordinary and technical meanings of the term “fair market value” (FMV), the definition of ACV under the policy, avoids redundancy in the two insurance products held by Holden, and comports with the language of the ACV policy provision itself. Because the majority dismisses these compelling considerations and erroneously concludes that Holden’s ACV coverage includes payment for (unpaid) sales tax, I dissent.

amount of sales tax that Holden actually would have incurred and that, under the majority’s interpretation of the ACV provision, Farmers must pay. Thus, even if we were to accept Holden’s reading, we would have no way of ascertaining the precise sum owed by Farmers. We do not recognize such imprecise claims. *Cf. United Pac. Ins. Co. v. Lundstrom*, 77 Wn.2d 162, 172-73, 459 P.2d 930 (1969) (holding that a claim could not be legally attached where, “[a]t the time of . . . attachment . . . [t]he value of [the] judgment could not be mathematically calculated with any degree of certainty before something else happened”). Here, the “something else” that must happen before the amount that Holden claims to be owed can be calculated is, first, the replacement of the damaged property, and second, the actual payment of sales tax, neither of which happened here.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Susan Owens

Justice Gerry L. Alexander
