No. 1018118

(Court of Appeals No. 82836-3)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WINDCREST OWNERS ASSOCIATION

Plaintiff/Appellant

v.

STATE FARM AND CASUALTY COMPANY and
ALLSTATE INSURANCE COMPLANY

Defendants/Respondents.

RESPONDENT ALLSTATE INSURANCE COMPANY'S ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

The Petition here involves Division I's opinion resolving this matter on December 12, 2022. *See Windcrest v. Allstate et al.*, No. 82836-3-I (Wash. Ct. App. December 12, 2022). Respondent in this matter is defendant Allstate Insurance Company ("Allstate).

Unlike the Statement of the Case in Windcrest's petition, the recitation of the facts in Division I's opinion is a fair and accurate description of the relevant, supported evidence and policy language at issue.

At issue before Division I was the trial court's summary judgment in favor of Allstate regarding the dismissal of property damage claims made by Windcrest Owner's Association ("Windcrest"). Windcrest's primary argument on appeal was that the collapse provisions of the policies applied because "building components have collapsed and are no longer taking up or filling the space they were intended for," and "were no longer able to support their intended purpose." Windcrest Op. at 6. Allstate argued that the slow deterioration

of parts of the building does not fit within the policy definition of "collapse." *Id.*

Division I applied the rules from *Vision One, LLC v. Philadelphia Indem. Ins. Co*., 174 Wn.2d 501, 513, 276 P.3d 300 (2012), and *Overton v. Consolidated Ins. Co*., 145 Wn.2d 417, 428, 38 P.3d 322 (2002), to the interpretation of policy provisions defining "collapse." The Court held that the controlling definition for collapse was the one provided by the insurance policy, not the definition urged by Windcrest's expert, and that Windcrest's expert's testimony regarding collapse and suddenness did not establish the requisite suddenness, or the requisite evidence that the building or parts of the building fell down, fell to pieces or caved in, and did not create a question of material fact as to whether the damage at issue meets the policy criteria for coverage. Op. at 6-10. The Court concluded that because the evidence shows no abrupt or sudden falling down of any part of a building such that it could not be occupied for its intended purpose, the coverage for collapse did not apply. Op. at 17.

The second issue before Division I was Windcrest's alternative argument for coverage. Windcrest argued that because the Allstate policy was an "all-risk" policy, damage allegedly caused by "weather" or "wind-driven rain" was an insured peril because these perils were not specifically excluded. Op. at 10, 13.

Division I, analyzed and applied the controlling authority set forth in *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 513, 276 P.3d 300 (2012) and the recent opinion in *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 226, 515 P.3d 525, 535 (2022), which featured the same initiating cause lead-in language present in the Allstate policy, which provides no coverage when "an excluded peril initiates an unbroken causal chain." Op. at 11. Division I concluded that since evidence from both Allstate and Windcrest demonstrated that the loss in this matter was initiated by an excluded cause of loss (inadequate construction and maintenance), there was no factual question as to the sequence of events that caused the loss, and therefore no coverage. Op. at

11, 15. Although Windcrest later tried to rebut its own expert's prior conclusions with a declaration from that same expert- the declaration contradicted the expert's earlier testimony and was accompanied by no evidence or explanation. Op. at 8. Applying controlling Washington law, Division I concluded that to the extent this declaration contradicted his deposition testimony, it cannot create a material issue of fact to defeat summary judgment. Op. at 8.

The last issue presented by Windcrest to Division I was Windcrest's argument that the "ensuing" loss language which follows the exclusions in one of the Allstate policies for wear and tear, rust, corrosion, rot, decay, deterioration and infestation- permits coverage, if one of these causes results in a "collapse," and therefore, because Windcrest believes there was a "collapse" it believes there should be coverage. (App Brief, p. 17, 25-26). However, in its opinion, Division I explained that as Windcrest had not demonstrated any "collapse" meeting the criteria set forth in the policy - that the ensuing loss provision does not apply to establish coverage for collapse.

Windcrest now seeks to have further review by this Court. Plaintiff's primary argument as to why its Petition should be accepted, is that there are allegedly "conflicting and inconsistent decisions between State and Federal Courts and among State Courts regarding issues germane to this matter." Windcrest does not actually explain how any of these decisions create a conflict in the law or how they conflict with Division I's opinion in this matter.

Further, the only new *state court* opinion cited by Windcrest is *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co*., 200 Wn.2d 208, 226, 515 P.3d 525, 535 (2022), which was applied by Division I and which is entirely consistent with Division I's opinion. And, each and every one of the "new" federal district court opinions listed, address a specific ambiguity resulting from a Washington Changes policy endorsement, which is not present in the Allstate policies. As the Allstate policies do not have the specific language that creates an issue in each of these cases, these opinions are not

applicable to this matter and do not create any conflict with Division I's opinion or Washington law.

II. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Windcrest Fails to Explain how any State or Federal Court Opinions Conflicts with Division I's Opinion.

Windcrest's Petition lacks all indicia of a serious effort to seek Supreme Court review. Windcrest alleges very generally and without any explanation or support, that there are "conflicting and inconsistent decisions between State and Federal Courts and among State Courts regarding issues germane to this matter." Pet. at 6. Windcrest's petition asserts that there are "[a]t least eight different decisions from State and Federal Courts have come out since Windcrest filed its complaint, all discussing various aspects of wind-driven rain coverage" which "often provide conflicting reasoning or are interpreted differently by insurers and insureds." Pet. at 6. However, Windcrest fails to explain how any of the opinions cited actually conflict with Division I's opinion in this matter. Not a single one of the cases cited by Windcrest apply the law

differently or inconsistently from Division I's opinion in this matter.

1. Division I Correctly Applied Washington Precedent and Found No Coverage When the Only Independent Cause for Damage Was Excluded by the Policy.

Windcrest argues without support that Division I allegedly did not "follow the principles set forth by this Court in *Vision One* and *Hill & Stout*" and that "Review is necessary to clarify and further establish the standard for these claims." Pet. at 15. However, Windcrest does not actually provide any explanation or basis as to why or how Division I's conflicts with any Washington opinion. Nor has Windcrest identified a single case of this Court or the Court of Appeals suggesting that Division I erred.

Windcrest argues inaccurately that Division I's conclusion is "inconsistent with the guidance provided in *Vision One*" because "wind-driven rain is a separate and distinct peril" and it is "evident that the property at Windcrest was damaged by weather-related water intrusion." Therefore, damage caused by "inadequate construction and poor

maintenance," was "not an "unbroken chain" "just like in Vision One." Pet. at 14. This argument is nonsensical and ignores Vision One's opinion that expressly states that notwithstanding the efficient proximate cause rule, an insurer may nevertheless draft policy language to exclude coverage when "an excluded peril initiates an unbroken causal chain." Vision One, 174 Wn.2d at 519.

Division I's opinion is in entirely consistent with *Vision One* as well as *Hill & Stout*, this Court's opinion which addresses identical policy language and which Division I relies upon heavily in its opinion. As set forth in the opinion, Division I walks through the efficient proximate cause rule, but then addresses the impact of the specific policy language at issue:

> On the other hand, "'When an excluded peril sets in motion a causal chain that includes covered perils, the efficient proximate cause rule does not mandate exclusion of the loss.' " *Hill & Stout*, 200 Wn.2d at 226 (quoting *Vision One*, 174 Wn.2d at 519) (emphasis in original). But an insurer may draft policy language to exclude coverage when "an excluded peril initiates an unbroken causal chain." *Vision One*, 174 Wn.2d at 519.

Op. at 11.

As noted by the Court of Appeals in this matter, the Allstate policy language at issue is identical to the language in the policy at issue in *Hill & Stout*, which excludes coverage when an excluded peril is the initiating cause of the loss:

> We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event:
>
> a. Directly and solely results in loss or damage; or
> b. Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.

Op at 12, Policy language at CP 557, 562.

Division I acknowledges that "[t]ypically, the determination of the efficient proximate cause of loss is a question of fact for the fact finder. However, when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion … it may be a question of law for the court." Op. at 13, citing *Hill & Stout*, 200 Wn.2d at 227. In this matter, Division I determined that "evidence from both Allstate and Windcrest demonstrates that defective construction and maintenance initiated the chain of

causation resulting in the loss. Even assuming losses resulting from wind-driven rain are covered, the evidence creates no factual questions as to the sequence of events that caused the loss: the faulty construction and maintenance created a pathway for water to enter." Op. at 13.

The Court held in relevant part: "Windcrest does not allege that wind-driven rain independently initiated or caused the loss. Windcrest's own expert agreed that had the building been properly constructed and maintained, there would be no damage from water intrusion. Thus, the loss was excluded from coverage as the defective construction and maintenance were excluded and were the only independent cause for the water damage." Op. at 15.

Windcrest's petition also asserts that the trial court's summary judgment, and Division I's affirmation of the same, was improper based on conflicting expert opinions on causation, and therefore Division I's failure to find questions of fact, fails to "follow the standards and methodology set by this Court." Pet at 11. For example, Windcrest claims that Allstate's

expert opined that inadequate construction and maintenance "caused" the loss but did not specifically opine that they "initiated a sequence of events", or address "water as a causal factor" and therefore the expert's opinion doesn't support the "sequence of events" language in the policy. Pet. at 16-17.

This argument is baseless. As referenced in Division I's opinion, the report from Allstate's expert VanDerostyne stated conclusively that "decay and deterioration occurred over an extended number of years due to 'defective original construction in combination with lack of repairs and/or maintenance.'… VanDerostyne definitively stated 'What caused this was the combination of inadequate construction and poor maintenance.'… In response to further questions, the export elaborated '…Like I said, the inadequate construction and maintenance allowed the water to get into the building.'" Op. at 13-14. Division I also provided a detailed discussion of the evidence provided by Windcrest's expert who had clearly and unambiguously testified that "if the building was properly

constructed, designed and maintained, the building should not have damage from water intrusion." Op. at 14.

Windcrest attempted to rebut this testimony later by providing a subsequent contradictory declaration. However, the Court of Appeals concluded that this declaration failed to raise issue of material fact, because it "consists merely of conclusions that contradict his unambiguous sworn testimony, and therefore, cannot raise an issue of material fact to defeat summary judgment." Op. at 14, citing *Behr v. Anderson*, 18 Wn. App. 2d 341, 364, 491 P.3d 189 (2021). Review is not merited. RAP 13.4(b).

2. The USDC Opinions Relied Upon by Windcrest Address Materially Different Policy Language Not Present in Allstate Policies.

Windcrest's petition states that it submitted to Division I "additional authorities consisting of *Franssen Condo. Ass'n of Apartment Owners, v. Country Mut. Ins. Company, et al*., Case No. 2:21-cv-00295-BJR, 2022 WL 10419015 (W.D. Wash. 2022)" which it believes "impacted the issues before Division I."

Windcrest does not explain how this opinion impacted any issue before Division I, or why this case serves to highlight any inconsistencies in the law. In fact, this case is entirely irrelevant. The district court in *Franssen Condo. Ass'n of Apartment Owners* concluded that due to the inclusion of a Washington Amendment endorsement that replaced the policy exclusion for "negligent work" (inadequate construction/maintenance) the policy at issue was "ambiguous" as to whether the exclusion could still be read as including the "initiates a sequence" language in the preamble amendment in the Washington Changes. Because ambiguity was found, the Court therefore read the "initiates a sequence" language out of the policy, which ultimately resulted in coverage pursuant to *Vision One*. This case, while interesting, is entirely irrelevant in this case because the Washington Amendment endorsement at issue in *Franssen Condo*, is not present in the Allstate policies.

Windcrest also includes in its petition a list of federal court district opinions that "were issued after Windcrest filed its

original action" including: *Ridge at Riverview Homeowner's Association v. Country Casualty Ins. Co*., 2023 WL 22678 (W.D. Wash.2023); *Westboro Condo Ass'n v. Country Casualty Ins. Co*., 2023 WL 157576 (W.D. Wash. 2023); *Gold Creek Condominium v. State Farm Fire & Casualty Co*., 2022 WL 2398395 (W.D. Wash. 2022); *Outlook West Condo. Ass'n v. RLI Ins. Co.*, 2021 WL 4775113 (W.D. Wash. 2021).

Windcrest once again makes no effort to explain how these cases conflict with Division I's opinion or create a conflict of law that is germane in this matter. A review of these opinions shows that these cases involve the same problematic policy endorsement addressed in *Franssen Condo. Ass'n.* Like the court in *Franssen,* these opinions involved the language of a Washington Changes endorsement which the courts each found ultimately resulted in the removal of the "initiates a sequence" language from the "negligent work" exclusion in the policies at issue. These cases are therefore entirely unavailing or relevant because the Allstate policies do not contain the endorsement language specifically at issue in each of these cases. These

cases therefore do not highlight or create any conflict in the law that is germane to this matter. Review is not merited. RAP 13.4(b).

VI. CONCLUSION

Division I's thoughtful opinion applied this Court's precedent and affirmed the Superior Court's dismissal of Windcrest's claims on summary judgment. Allstate respectfully requests that this Court DENY Windcrest's Petition for Review. RAP 13.4(b).

I certify this Brief of Respondent Allstate Insurance Company contains 2,497 words in compliance with RAP 18.17(b)

Respectfully submitted this 28th day of April, 2023.

s/ Sarah L. Eversole
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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed and served via the secure filing portal of the Washington Supreme Court a true and correct copy of the foregoing Answer of Respondent Allstate Insurance Company upon the following:

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DATED at Seattle, Washington this 28th day of April, 2021.

s/ Traci Jay
Traci Jay

WILSON SMITH COCHRAN DICKERSON

April 28, 2023 - 2:50 PM

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