No. 97170-6

(Court of Appeals No. 77303-8-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FEENIX PARKSIDE LLC,

Plaintiff/Appellant,

v.

BERKLEY NORTH PACIFIC and CONTINENTAL WESTERN INSURANCE COMPANY,

Defendants/Respondents.

PLAINTIFF/APPELLANT FEENIX PARKSIDE LLC'S ANSWER TO PETITION FOR REVIEW OF DEFENDANTS/RESPONDENTS BERKLEY NORTH PACIFIC AND CONTINENTAL WESTERN INSURANCE COMPANY

George S. Treperinas, WSBA No. 15434
Thomas D. Adams, WSBA No. 18470
J. Dino Vasquez, WSBA No. 25533
Andrew W. Durland, WSBA No. 49747
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, Washington 98104
(206) 223-1313
Attorneys for Plaintiff/Appellant Feenix Parkside LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES

I. INTRODUCTION

Plaintiff/Appellant Feenix Parkside LLC ("Feenix") submits this Answer to the Petition for Review of Defendants/Respondents Berkley North Pacific and Continental Western Insurance Company (collectively, "Berkley") pursuant to RAP 13.4(d). This Court should deny Berkley's Petition for Review of the Court of Appeals' decision in *Feenix Parkside LLC v. Berkley North Pacific, et al.*, No. 77303-8-I, __Wn. App. 3d __, 438 P.3d 597 (Wash. Ct. App. 2019) (the "Decision"). Berkley fails to satisfy its burden under RAP 13.4(b)(4) to show that its Petition involves an issue of substantial public importance that should be determined by the Supreme Court, or that the Decision conflicts with either a decision of this Court or a published decision of the Court of Appeals pursuant to RAP 13.4(b)(1) and (2). In fact, the Decision correctly interprets and applies established Washington law on insurance policy construction and does so in a manner that aligns fully with courts in other jurisdictions considering the identical issue presented here. Accordingly, further review by this Court is unwarranted.

II. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals correctly held that the undefined term "decay" in Berkley's insurance policy can reasonably be interpreted to mean "a gradual decline in strength, soundness, or prosperity or in degree of excellence or performance" consistent with common dictionary definitions and as the average purchaser of insurance would understand it.

III. STATEMENT OF THE CASE

Feenix adopts the Decision's "Facts" and "The Policy" sections as its Statement of the Case.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Petition Does Not Raise an Issue of Substantial Public Importance That the Supreme Court Should Decide Pursuant to RAP 13.4(b)(4).

Berkley asks this Court to accept review pursuant to RAP 13.4(b)(4), arguing that the Decision is of general interest or importance. (Petition at 6–7). Berkley's argument is unconvincing. The standard established by RAP 13.4(b)(4) requires *substantial* public importance, not general interest. Berkley argues further that the Decision is particularly important to property insurers writing policies in Washington who may need to set premiums differently for collapse risks in commercial policies in light of the dictionary-based definition of "decay" endorsed by the Court of Appeals. Ironically, Berkley

characterizes the Court of Appeals' definition as "nebulous" without acknowledging that this case arose precisely because of the ambiguity latent in the term "decay," language Berkley chose to include in the policy without definition.

Indeed, the clarity Berkley now seeks from this Court could have been provided by Berkley itself if it desired a special definition other than the reasonable, common-sense, dictionary-based definition adopted by the Court of Appeals. As noted in the Decision: "[B]ecause Berkley did not define 'decay' in the policy, the term must be interpreted in a way the average purchaser of insurance would understand it, and any ambiguity is construed against the insurer and in favor of the insured....The broader definition of 'decay,' a gradual decline in strength or soundness, is the more reasonable manner to construe the term." Decision at 14, 438 P.3d at 605 (citing *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012)). The consequences of Berkley's policy drafting choices do not transform this case into a matter of substantial public importance under RAP 13.4(b)(4).

B. The Decision is Not in Conflict With Decisions of this Court or Published Decisions of the Court of Appeals Within the Meaning of RAP 13.4(b)(1) and (2).

Berkley argues that the Petition should be granted because the Decision conflicts with a decision of this Court and a published decision by the Court of Appeals pursuant to RAP 13.4(b)(1) and (2), respectively. (Petition at 8–17). Berkley does not cite a single Court of Appeals decision, published or otherwise, that it contends is in conflict with the Decision. Accordingly, Berkley's reliance on RAP 13.4(b)(2) is misplaced.

For the reasons that follow, Berkley also is mistaken in arguing that the Decision conflicts with decisions of this Court for purposes of RAP 13.4(b)(1).

First, Berkley states that the *Webster's Ninth New Collegiate Dictionary* definition of "decay" adopted by the Court of Appeals ("a gradual decline in strength, soundness, or prosperity or in degree of excellence or performance") does not apply to a loss of strength in wooden roof trusses. According to Berkley, applying that definition leads to a strained or forced interpretation contrary to policy interpretation principles established by decisions of this Court. (Petition at 8–9). Without explanation or authority, Berkley asserts that the Webster's Dictionary

definition of "decay" approved by the Court of Appeals actually should be limited to contexts such as societal decay or other contexts outside the realm of property damage insurance. (Petition at 9). Despite Berkley's views, Webster's Dictionary recognizes no such contextual limitations on the definition of "decay."

Moreover, the definition adopted by the Court of Appeals aligns closely with broad definitions of "decay" approved by courts in other jurisdictions. Decision at 10-12 (discussing *Joy Tabernacle-The New Testament Church v. State Farm Fire & Cas. Co.*, 616 Fed. Appx. 802, 808 (6th Cir. 2015) (decay encompasses both organic rot and general decline or degeneration over time); *Stamm Theaters, Inc. v. Hartford Cas. Ins. Co.*, 93 Cal. App. 4th 531, 537–38, 542–43, 113 Cal Rptr. 2d 300 (2001) (adopting a definition of "decay" that includes "the gradual loss of strength"); and *Easthampton Cong. Church v. Church Mut. Ins. Co.*, 322 F. Supp. 3d 230 (D. Mass. 2018) *aff'd*, 916 F.3d 86 (1st Cir. 2019). Notably, the *Easthampton* court held:

> The most reasonable reading of the word 'decay' as it is used in the Policy is that it refers to the broader concept of the word. This is because the Policy elsewhere uses the term 'rot' in an exclusion for 'Fungus, Wet Rot, Dry Rot and Bacteria.' If Church Mutual wanted to limit coverage for collapse to collapse caused or contributed to by 'rot' as opposed to 'decay,' it could have done so. It did not, and the only reasonable implication is that the plain and

> ordinary meaning of 'decay' as used in the Policy encompasses decay in the broader sense of a gradual deterioration or decline in strength or soundness."

Decision at 11–12 (citing *Easthampton*, 322 F. Supp. 3d at 237). As the Court of Appeals noted, the policy issued by Berkley "is nearly identical to the policy in *Easthampton*." Decision at 12.

Second, Berkley argues that the Court of Appeals' definition of "decay" essentially allows Feenix to avoid contractual exclusions by affixing a label or different characterization on the cause of loss. In particular, Berkley complains that by attributing the collapse to "decay" instead of extreme temperatures and repeated seepage or leakage of water (both excluded causes), the Court of Appeals allowed Feenix to circumvent the intent of the policy and trigger the limited collapse coverage. (Petition at 9–12). Berkley contends this approach is contrary to *Kish v. Insurance Co. of N. America*, 125 Wn.2d 164, 883 P.2d 308 (1994), but Berkley is mistaken. *Kish* focused on the concept of "efficient proximate cause" which "permits coverage when an insured peril sets other excluded perils into motion which in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought." *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983). Berkley did not believe there

was an "efficient proximate cause" issue because it relied on extreme temperature as the sole cause of collapse. The Court of Appeals, in utilizing well-established principles of contract interpretation, determined "decay" was ambiguous. The Court of Appeals correctly defined "decay" using its ordinary dictionary definition, which is how a reasonable insured would interpret an ambiguous term. Whether "decay" was the cause of loss or an excluded peril is an issue of fact which the Court of Appeals properly identified. Long-standing principles of policy interpretation required the Court of Appeals to strictly and narrowly construe exclusions and to resolve ambiguity in undefined terms in favor of the insured. These principles were recognized and applied by the Court of Appeals in adopting a broad definition of "decay" in favor of coverage. Decision at 12–14 (citing *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.2d 859 (2009) (policy exclusions are strictly and narrowly construed); *W. Nat'l Assurance Co. v. Shelcon Constr. Grp., LLC*, 182 Wn. App 256, 261, 332 P.3d 986 (2014) (insurance policies are liberally construed to provide coverage where possible); and *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012) (undefined policy terms are interpreted in a way the average purchaser of insurance would understand it, and any ambiguity is construed against the insurer and in

favor of the insured)). Unlike *Kish*, this case does not present an issue of "efficient proximate cause" per se but rather the scope of coverage for collapse caused by "decay." Berkley's citation of *Kish* is an attempt to create an issue where there is none. Moreover, as the Court of Appeals noted in rejecting this argument, "if Berkley wanted to limit coverage for collapse to collapse caused or contributed to by 'rot,' as opposed to 'decay,' it could have done so. It did not." Decision at 12.

Third, Berkley argues that in adopting the dictionary-based definition of "decay," the Court of Appeals effectively expanded the scope of collapse coverage caused by "water damage." (Petition at 12–15). Berkley labors mightily to fit the defined term "water damage" into the Court of Appeals' analysis but does not clearly explain its relevance. Feenix's claim is simply that it is entitled to coverage for collapse caused by "decay." Berkley's definition of "water damage" and the scope of associated coverage has no bearing on the meaning of the term "decay," which Berkley chose to leave undefined. Conflating the terms serves no useful purpose and does not weigh in favor of this Court accepting review.

Fourth, Berkley's final argument in favor of review is that the Decision renders the policy's collapse coverage nonsensical or ineffective in contravention of the rule that all provisions of an insurance policy must

be construed together in order to give force and effect to each. *See Washington Pub. Utility Dists. Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). (Petition at 15–18). In essence, Berkley argues that defining "decay" as a gradual loss or decline in strength or soundness is overly broad and renders certain policy exclusions meaningless because nearly any loss can be attributed to a decline in strength. (Petition at 15–18).

The specter of unlimited coverage raised by Berkley is unfounded. The coverage sought by Feenix, and the analysis of the Court of Appeals, speak only to coverage for collapse caused by "decay." No other policy terms are implicated by the Decision. Moreover, even "decay" could have been limited had Berkley defined the term. As the Court of Appeals correctly held:

> We must strictly and narrowly construe exclusions, such as the exclusion for deterioration..... Insurance policies are liberally construed to provide coverage wherever possible.... And, because Berkley did not define 'decay' in the policy, the term must be interpreted in a way the average purchaser of insurance would understand it, and any ambiguity is construed against the insurer and in favor of the insured.... The broader definition of 'decay,' a gradual decline in strength or soundness, is the more reasonable manner to construe the term.

Decision at 13–14 (internal citations omitted).

V. CONCLUSION

The unanimous, published Decision of the Court of Appeals is well-grounded in established principles of insurance policy interpretation. The Decision does not present an issue of substantial public importance, nor does it contravene prior decisions of this Court or published decisions of the Court of Appeals. The Decision also aligns fully with decisions from other jurisdictions that have addressed the same issue raised here. For these reasons, Feenix submits that discretionary review is not warranted and Berkley's Petition should be denied.

Respectfully submitted this 6th day of June, 2019.

KARR TUTTLE CAMPBELL

By: */s/Thomas D. Adams*
George S. Treperinas, WSBA No. 15434
Thomas D. Adams, WSBA No. 18470
J. Dino Vasquez, WSBA No. 25533
Andrew W. Durland, WSBA No. 49747
Attorneys for Plaintiff/Appellant
Feenix Parkside LLC

CERTIFICATE OF SERVICE

The undersigned certifies that on Thursday, June 06, 2019, I caused to be served the foregoing document to:

Jeffrey S. Tindal, WSBA No. 29286 BETTS PATTERSON & MINES, PS One Convention Place 701 Pike Street, Suite 1400 Seattle, Washington 98101 jtindal@bpmlaw.com (206) 292-9988 *Attorneys for Defendants/Respondents*	☐ *via* hand delivery via ABC Legal Messengers. ☐ *via* first class mail, postage prepaid. ☒ *via* email. ☒ *via* electronic service through the Washington Appellate Courts' Secure Portal.

/s/Heather L. Hattrup
Heather L. Hattrup

KARR TUTTLE CAMPBELL

June 06, 2019 - 2:15 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97170-6
Appellate Court Case Title:	Feenix Parkside LLC v. Berkley North Pacific, et al.
Superior Court Case Number:	16-2-23076-8

The following documents have been uploaded:

- 971706_Answer_Reply_20190606141420SC776338_3921.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was feenix.pdf

A copy of the uploaded files will be sent to:

- adurland@karrtuttle.com
- dvasquez@karrtuttle.com
- gtreperinas@karrtuttle.com
- jtindal@bpmlaw.com
- klangridge@bpmlaw.com

Comments:

Sender Name: Jessica Smith - Email: jsmith@karrtuttle.com
Filing on Behalf of: Thomas Dean Adams - Email: tadams@karrtuttle.com (Alternate Email: hhattrup@karrtuttle.com)

Address:
701 5th Avenue
Ste. 3300
Seattle, WA, 98104
Phone: (206) 224-8296

Note: The Filing Id is 20190606141420SC776338