No. 101892-4

SUPREME COURT
OF THE STATE OF WASHINGTON

THE GARDENS CONDOMINIUM,
a Washington non-profit corporation,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,
a California company,

Petitioner.

FARMERS' PETITION FOR REVIEW

Timothy W. Snider, WSBA #39808
Rita V. Latsinova, WSBA #24447
Jenna M. Poligo, WSBA #54466
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
206.624.0900

Attorneys for Petitioner Farmers
Insurance Exchange

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES

Page

Rules

TABLE OF AUTHORITIES

Page

Other Authorities

I. IDENTITY OF PETITIONER

The petitioner is Farmers Insurance Exchange ("Farmers").

II. COURT OF APPEALS' DECISION

Farmers seeks review of the published decision by the Court of Appeals, Division One, filed on December 19, 2022 and attached as Appendix A. The Court of Appeals denied Farmers' motion for reconsideration/clarification on March 15, 2023. This decision is also attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Whether Division One's published decision warrants review and reversal when it interpreted the resulting loss exception to the Faulty Workmanship Exclusion in Farmers' property insurance policy in a manner that renders the exclusion meaningless and is in conflict with:

(1) this Court's decisions in *Vision One, LLC v. Philadelphia Indemnity Insurance Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012), and *Hill & Stout, PLLC v. Mutual of Enumclaw*

Insurance Co., 200 Wn.2d 208, 515 P.3d 525 (2022), which upheld the validity and enforceability of similarly worded exclusions, and the Court of Appeals' recent published decision in *Windcrest Owners Ass'n v. Allstate Insurance Co.*, 524 P.3d 683 (Wash. Ct. App. 2022), which interpreted a similarly worded exclusion consistently with *Vision One* and *Hill & Stout*. RAP 13.4(b)(1) & (2).

(2) this Court's decision in *Sprague v. Safeco Insurance Co. of America*, 174 Wn.2d 524, 276 P.3d 1270 (2012) (and decisions by courts elsewhere), which held that a resulting loss exception applies only when there is loss to other property apart from the damage excluded under the Faulty Workmanship Exclusion. RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

Farmers issued a property insurance policy to The Gardens Condominium ("The Gardens") from October 15, 2002 to October 15, 2004. The policy excluded coverage when faulty or defective construction, design, or repairs "initiate[] a sequence of

events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence." Appendix B (Joint Stipulation) ¶ 3 (Exclusion 3.c, the "Faulty Workmanship Exclusion"). This Court has repeatedly upheld similarly worded coverage exclusions when damage occurs after a sequence of events initiated by an excluded occurrence. *See Hill & Stout*, 200 Wn.2d at 226-29; *accord Xia v. ProBuilders Specialty Ins. Co*., 188 Wn.2d 171, 183, 400 P.3d 1234 (2017) ("It is perfectly acceptable for insurers to write exclusions that deny coverage when an excluded occurrence initiates the causal chain and is itself either the sole proximate cause or the efficient proximate cause of the loss.").

The parties stipulated that The Gardens' roof assembly was designed and built (and later rebuilt) defectively and lacked proper ventilation. The lack of ventilation initiated a sequence of excess humidity and condensation that produced the decay and deterioration for which The Gardens sought coverage. The

parties stipulated that the Faulty Workmanship Exclusion in section 3.c applied. Appendix B (Joint Stipulation) ¶¶ 8-9. The parties disagreed, however, "as to the scope and application of the resulting-loss[1] *exception* to exclusion 3.c." *Id.* ¶ 9 (emphasis added). The exception to the Faulty Workmanship Exclusion reads, "[B]ut if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage." *Id.* ¶ 3.

Farmers read the exclusion and its exception together. It maintained that the exception did not resurrect the coverage for the excluded sequence "initiated by" faulty construction. *See Hill & Stout*, 200 Wn.2d at 228-29. Because the purpose of the exception is to "limit" the exclusion, *Sprague*, 174 Wn.2d at 529, the prevailing interpretation (adopted by this Court) is that a resulting loss exception applies only when there is damage to other property, *id.* at 530 ("If there had been losses other than to

[1] The terms "resulting" loss and "ensuing" loss are interchangeable. *Vision One*, 174 Wn.2d at 513 n.6.

the fin walls – an injury to a person hurt by the collapse or property damaged by the deck failure – coverage would have existed under the ensuing loss provisions of the policy."). Because, as in *Sprague*, there was no damage other than the excluded damage to the defectively built and poorly ventilated roof assembly, the resulting loss exception did not apply. *Id.*

In contrast, The Gardens read the exception in isolation and argued that it was entitled to coverage because "condensation" or "humidity" were not separately and expressly excluded perils. On cross-motions for summary judgment, the trial court recognized that Washington law requires an exclusion and its exception to be harmonized, without rendering either provision superfluous. The Gardens' theory admittedly failed this test:

> THE COURT: . . . [A]t the heart of this is [the] ["]initiates a sequence of events that results in loss or damage["] [exclusion] . . . can you give me a factual scenario where that language would then have meaning and where your interpretation . . . of

> the ensuing loss provision wouldn't essentially render it meaningless. . . ?
>
> Mr. Houser: Thank you, Your Honor. That's a great question. I tried to think of an example[,] and I couldn't think of one.

Appendix C (CP 596-97; Tr. 7:23-8:15). The trial court granted Farmers' motion and entered judgment in its favor. *Id.* (CP 629; Tr. 40:3-11) ("[I]t's hard for me to follow the Plaintiff's interpretation, [and] not essentially render [the 'initiates a sequence of events'] provision superfluous."). The Gardens appealed.

Unlike the trial court, the Court of Appeals did not give meaning to the "initiates the sequence of events" language in the exclusion and did not attempt to harmonize the exclusion with the resulting loss exception. In fact, it barely mentioned the exclusion at all. *See The Gardens Condo. v. Farmers Ins. Exch.*, 521 P.3d 957, 961 n.5 (Wash. Ct. App. 2022). Focusing almost entirely on the exception in isolation from the exclusion, it ruled that because the parties had stipulated that condensation was part

of the chain of events initiated by faulty construction and was not separately excluded, "the plain language of the policy mandates coverage if condensation is a covered peril." *Id.* at 962 & n.8; *see also id.* at 960. It reversed the summary judgment in Farmers' favor and remanded the case for trial. *Id.* at 962.

Under the Court of Appeals' interpretation, even if the policy excludes a chain of events initiated by faulty workmanship (*e.g.*, increased humidity or condensation due to inadequate ventilation), the resulting loss exception requires every link in the already-excluded causal chain to be excluded *again*, by name. This renders the "initiates a sequence of events" exclusionary language meaningless, contrary to Washington law. This petition followed.

V. ARGUMENT

A. Washington Courts Interpret Insurance Policies as a Whole by Harmonizing Policy Provisions Without Rendering Any Language Meaningless

Washington courts construe insurance policies to "give effect to every clause in the policy." *Kitsap County v. Allstate*

Ins. Co., 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). Following this canon, when construing policies with Faulty Workmanship Exclusions that include resulting loss exceptions, courts have upheld the "overarching principle" that "the [resulting/ensuing loss] exception cannot be allowed to swallow the exclusion." *Rocky Mountain Prestress, LLC v. Liberty Mut. Fire Ins. Co*., 960 F.3d 1255, 1261-62 (10th Cir. 2020); *see also Vision One*, 174 Wn.2d at 514-15 ("[A]n ensuing loss provision might narrow the … exclusion" but "[t]he uncovered event … is never covered." (internal quotation marks and citation omitted)); *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 912-13, 48 P.3d 334 (2002) (The resulting loss exception cannot "swallow[] the exclusion.").

Structurally, it also is "improper" to interpret the resulting loss exception as a grant of coverage for defective construction "[g]iven the placement of the ensuing loss clause in … the defective construction and materials exclusion[.]" *McDonald v.*

State Farm Fire & Cas. Co., 119 Wn.2d 724, 734, 837 P.2d 1000 (1992); *see also Capelouto v. Valley Forge Ins. Co*., 98 Wn. App. 7, 16, 990 P.2d 414 (1999) ("Ensuing loss provisions are exceptions to policy exclusions and thus should not be interpreted to create coverage."); *accord Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 330, 516 P.3d 796 (2022) ("It would be an unreasonable interpretation to conclude that an internal cause of damage 'that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be classified' as an external cause." (citation omitted)).

Importantly, under Washington law, "[i]t is perfectly acceptable for insurers to write exclusions that deny coverage when an excluded occurrence initiates the causal chain and is itself either the sole proximate cause or the efficient proximate cause of the loss." *Xia*, 188 Wn.2d at 183; *see also Hill & Stout*, 200 Wn.2d at 228-29 ("[I]nsurers can contract to say that

coverage is excluded *for a causal chain* initiated by an excluded peril." (emphasis added)). Whether broad or narrow, when the Faulty Workmanship Exclusion contains a resulting loss exception, "the purpose of [that exception] . . . is to *limit* the scope of [a faulty workmanship] exclusion," not to "swallow" it whole or "create" coverage for an excluded event. *Sprague*, 174 Wn.2d at 529 (emphasis added); *Port of Seattle*, 111 Wn. App. at 912-13; *Capelouto*, 98 Wn. App. at 16.

"Such clauses ensure 'that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered. *The uncovered event itself, however, is never covered*.'" *Vision One*, 174 Wn.2d at 515 (emphasis added; citation omitted); *see also* 11 Steven Plitt et al., *Couch on Insurance* § 153:2 n.8, Westlaw (3d ed. database updated Nov. 2022) ("Ensuing loss clauses ensure that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the property

insurance policy will remain covered; *the uncovered event itself . . . is never covered*." (emphasis added)). As this Court has held, under policies with "initiates a sequence of events" language, like Farmers' policy, the "uncovered" event includes "*causal chain[s]*" initiated by faulty construction. *See Hill & Stout*, 200 Wn.2d at 228-29 (emphasis added).

Applying these principles, this Court in *Sprague* described the limits of a resulting loss exception to a Faulty Workmanship Exclusion. In *Sprague*, the homeowner sought coverage for the deteriorated deck supports ("fin walls") encased in stucco. As here, the damage to the fin walls was caused by the faulty lack of ventilation. There was no other damage. "The question presented … [was] whether the advanced decay of the fin walls was a separate, ensuing loss that was covered under the policy despite the exclusions for rot and building defects." *Sprague*, 174 Wn.2d at 528 (footnote omitted).

The Court concluded that it was not, because only the defectively built deck system suffered damage:

> If there had been losses other than to the fin walls – an injury to a person hurt by the collapse or property damaged by the deck failure – coverage would have existed under the ensuing loss provisions of the policy. . . . [T]hat was not the case here. The only loss was to the deck system itself. That loss resulted from rot caused by construction defects.

Id. at 530-31; *cf. Vision One*, 174 Wn.2d at 506, 515-16 (where faulty shoring collapsed, causing damage to the "framing, rebar, and newly poured [first floor] concrete," coverage of the defective shoring work was excluded by the Faulty Workmanship Exclusion, but the "other" damage—the destruction of the newly poured floor—was a covered "ensuing loss").

Under *Sprague*, "the [resulting loss] clause breaks the causal chain between the excluded risk and losses caused by the excluded peril in order to provide coverage for the *subsequent* losses." 174 Wn.2d at 529 (emphasis added); *see also Eagle W. Ins. Co. v. SAT, 2400, LLC*, 187 F. Supp. 3d 1231, 1237 (W.D.

Wash. 2016) ("Unlike in *Vision One*, where collapse resulted in damage to other property, the loss in *Sprague* was only to the deck itself. Had the deck actually collapsed and damaged other property, the policy's ensuing loss clause would have applied and allowed recovery; without the collapse and ensuing damage, no recovery was allowed."). To further illustrate, when defectively designed transformers overheated and suffered damage, "'[a]n ensuing loss would be one which occurred subsequent to the overheating of the transformers, for example, fire destruction of the building which housed the transformers.' . . . If the damage to the transformers is considered an ensuing loss, then the exception swallows the exclusion." *Port of Seattle,* 111 Wn. App. at 912 (quoting *Vt. Elec. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F. Supp. 2d 441, 445 (D. Vt. 1999)).

This interpretation harmonizes the resulting loss exception with the Faulty Workmanship Exclusion without rendering either

provision meaningless. Courts across the country, including in New York, Vermont, Massachusetts, Florida, California, Oregon, Colorado, Texas, Maryland, and Arizona, have adopted similar interpretations of the resulting loss exception. *See Montefiore Med. Ctr. v. Am. Prot. Ins. Co*., 226 F. Supp. 2d 470, 479 (S.D.N.Y. 2002) ("ensuing loss" exception "does not cover loss caused by the excluded peril, but rather covers loss caused to *other property* wholly separate from the defective property itself" (emphasis added)); *Vt. Elec. Power Co.*, 72 F. Supp. 2d at 445 ("Where a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk." (citation omitted)); *H.P. Hood LLC v. Allianz Glob. Risks U.S. Ins. Co.*, 39 N.E.3d 769, 774 (Mass. App. Ct. 2015) ("Whatever else can be said about the case before us, it is not one where an excluded occurrence involving initial

property damage led to other property damage of a different kind."); *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 139 F. Supp. 2d 1374, 1382 (S.D. Fla. 2001) ("This is not an instance where portions of the building (or the entire building itself) collapsed and injured other property, or even other portions of the building itself. If so, the result may have been different. . . . To find otherwise would be to eviscerate the exclusion and render meaningless the terms of the exclusion . . . ."), *aff'd*, 331 F.3d 844 (11th Cir. 2003); *Sapiro v. Encompass Ins*., 221 F.R.D. 513, 522 (N.D. Cal. 2004) (applying California law); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV–01–1362–ST, 2002 WL 31495830, at *19 (D. Or. June 18, 2002) ("In other words, an ensuing loss provision does not cover loss caused by the excluded peril, but rather covers loss caused to *other property* wholly separate from the defective property itself." (internal quotation marks and citation omitted) (emphasis in original)); *12W RPO, LLC v. Affiliated FM Ins. Co.*, 353 F. Supp. 3d 1039

(D. Or. 2018) (applying Oregon law); *Rocky Mountain Prestress, LLC*, 960 F.3d at 1260-64 (applying Colorado law); *Aetna Cas. & Sur. Co. v. Yates*, 344 F.2d 939 (5th Cir. 1965) (applying Texas law); *Jowite Ltd. P'ship v. Fed. Ins. Co.*, No. DLB-18-2413, 2020 WL 4748544, at *9 (D. Md. Aug. 17, 2020) (applying Maryland law), *aff'd*, No. 20-1937, 2021 WL 5122173 (4th Cir. Nov. 4, 2021); *Cooper v. Am. Fam. Mut. Ins. Co*., 184 F. Supp. 2d 960, 964-65 (D. Ariz. 2002) (applying Arizona law).

Other courts have adopted a similar approach to ensure that the resulting loss exception does not swallow the Faulty Workmanship Exclusion. In *TMW Enterprises, Inc. v. Federal Insurance Co*., 619 F.3d 574 (6th Cir. 2010), the Sixth Circuit held that the resulting loss exception applies when the first, excluded cause results in a separate, unforeseeable covered cause that causes damage in an unforeseeable way, such as when a water leak caused by defective construction shorts an electrical socket and causes a fire. Under *TMW*, the resulting loss

exception prevents the insurer from "avoid[ing] coverage for losses remotely traceable to an excluded cause," but does not cause insurers to cover foreseeable results of the excluded cause. *Id.* at 579. *TMW* is widely followed.[2]

While this Court has not adopted *TMW*, it has repeatedly cited its rationale with approval. *Vision One*, 174 Wn.2d at 516;

---

[2] *See Friedberg v. Chubb & Son, Inc.*, 691 F.3d 948, 952-53 (8th Cir. 2012) (no "ensuing loss" for a "foreseeable and natural consequence" of faulty work); *Taja Invs. LLC v. Peerless Ins. Co.*, 717 F. App'x 190, 192 (4th Cir. 2017) (unpublished) ("[C]ourts generally agree … that … an ensuing loss clause applies only when there is significant attenuation between the direct result of a workmanship defect and the ultimate loss for which coverage is sought, usually due to an independent or fortuitous intervening cause. In other words, an ensuing loss provision 'excludes from coverage the normal results of defective construction, and applies only to distinct, separable, and ensuing losses.'" (quoting *Friedberg*, 691 F.3d at 953)); *Russell v. NGM Ins. Co.*, 176 A.3d 196, 206 (N.H. 2017) ("We agree with the Sixth Circuit Court of Appeals that, when there is an exclusion for loss caused by faulty workmanship, 'it should come as no surprise that the botched construction will permit ... water ... to enter the structure and inside of the building and eventually cause damage to both.' This is particularly so in the instant case when, according to the homeowners, the faulty workmanship consists of 'ventilation and insulation construction defects.'" (alterations in original) (citation omitted)).

Sprague, 174 Wn.2d at 529; *Seattle Tunnel Partners*, 200 Wn.2d at 330. Specifically, this Court agreed that if the resulting loss exception is construed as any "but for" consequence of the excluded peril, it would be "limited only by the imagination of the reader" and render the exclusion meaningless:

> "What if faulty construction allows humid summer air to enter the building, which rusts metal fixtures? But for the exposure to the summer air, no damage to the fixtures would have occurred. Yet the contract does not exclude damages caused by 'air.' Coverage? What if a poorly constructed ceiling beam falls, smashing the floor below? But for the force of gravity, no damage to the floor would have occurred. Yet the contract does not exclude damages caused by 'gravity.' Coverage?"

Vision One, 174 Wn.2d at 516 (quoting *TMW*, 619 F.3d at 576-77).

B. The Court of Appeals Interpreted the Resulting Loss Exception to Swallow the Faulty Workmanship Exclusion Contrary to Washington Law

The Court of Appeals ignored all these principles in interpreting the Faulty Workmanship Exclusion in Farmers' policy. It reduced the exclusion to a mere footnote, depriving it

of any meaning in conflict with *Vision One*, *id.* at 501, and *Hill & Stout*, 200 Wn.2d at 208. And it applied no limitation to the resulting loss exception in conflict with *Sprague*, 174 Wn.2d at 524, and the "overarching" principle that the exception cannot be allowed to swallow the exclusion, *Rocky Mountain Prestress*, 960 F.3d at 1261-62; *Port of Seattle*, 111 Wn. App. at 912. The Court of Appeals' resulting interpretation fails to "give effect to every clause in the policy," *Kitsap County*, 136 Wn.2d at 575, and warrants review and reversal to restore consistency with *Sprague*, *Vision One*, and *Hill & Stout*.

1. The Court of Appeals gave no meaning to the "initiates the sequence of events" language in the exclusion, contrary to this Court's settled precedent

The Court of Appeals' decision deprives the "initiates a sequence of events" language in Farmers' Faulty Workmanship Exclusion (and in other property policies with similar exclusions) of any substantive meaning. *The Gardens*, 521 P.3d at 961 n.5. This ruling is contrary to this Court's consistent

holdings that insurers in Washington can exclude coverage for damage "initiated" by an excluded occurrence. *See Vision One*, 174 Wn.2d at 520 ("We have left open the possibility that an insurer may draft policy language to deny coverage when an excluded peril initiates an unbroken causal chain."); *Xia*, 188 Wn.2d at 183 ("It is perfectly acceptable for insurers to write exclusions that deny coverage when an excluded occurrence initiates the causal chain and is itself either the sole proximate cause or the efficient proximate cause of the loss."); *Hill & Stout*, 200 Wn.2d at 229 ("[I]nsurers can contract to say that coverage is excluded *for a causal chain* initiated by an excluded peril.") (emphasis added)).

This Court has specifically recognized that the "initiates a sequence of events" language in the Faulty Workmanship Exclusion applies to the individual links in the causal chain without the need for separate exclusions for each separate link. In *Hill & Stout*, for example, the COVID-19 virus, an excluded

peril, initiated a sequence of events that led to the closure of plaintiff's dental practice. Even though the Governor's emergency proclamation, a covered peril, was part of the causal chain that led to the closure of the dental practice, the entire chain initiated by COVID-19 was excluded, including the emergency proclamation. *Hill & Stout*, 200 Wn.2d at 230 ("[W]e hold that … the causal chain leading to the alleged loss was initiated by an excluded peril, COVID-19, and the policy excludes *the causal chain* of losses initiated by an excluded peril." (emphasis added)).

Similarly, in a recent published decision, Division One of the Court of Appeals also recognized, citing *Hill & Stout*, that the "initiates the sequence of events" exclusionary language in a Faulty Workmanship Exclusion "excludes coverage for a causal chain initiated by an excluded peril." *Windcrest*, 524 P.3d at 690. In that case, the insured's condominium building was defectively constructed and maintained. *Id.* at 691. The defects created

pathways for the rain to intrude into the wall assemblies, causing decay and deterioration of the exterior wall components over time. *Id.* The Court of Appeals rejected the argument that weather conditions, like wind-driven rain, were not part of the excluded sequence initiated by faulty construction. *Id.* at 691-92 ("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. . . .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.").

Similarly to *Windcrest*, here, "condensation" inside The Gardens' roof assembly did not happen in a vacuum. The parties stipulated that the faulty design, repair, and redesign of the roof assembly failed to provide sufficient ventilation and initiated the

chain of increased humidity, buildup of moisture, and damage[3]—a chain of events so predictable that it hardly requires a stipulation. *See Yates*, 344 F.2d at 940 ("[T]he joists, sills and subflooring of [plaintiffs'] home were almost completely rotted away. The cause … was that the 'crawl space' under the house was inadequately supplied with vents. Contact between air trapped in the crawl space and the subfloors and sills, which had been chilled by air conditioning, produced condensation of moisture and consequent rotting." (Friendly, J.)).[4]

Under *Vision One* and *Hill & Stout*, the Faulty Workmanship Exclusion excluded the entire chain of events initiated by the faulty design, repair, and redesign of The Gardens' roof assembly. No additional exclusions for individual links in that excluded sequence are necessary. "[W]e hold that … the causal chain leading to the alleged loss was initiated by an

[3] Appendix B ¶ 8.

[4] Discussed with approval by *Port of Seattle*, 111 Wn.2d at 912.

excluded peril, COVID-19, and the policy excludes *the causal chain* of losses initiated by an excluded peril." *Hill & Stout*, 200 Wn.2d at 230 (emphasis added).

Yet the Court of Appeals gave no meaning to the Faulty Workmanship Exclusion that the parties stipulated applies to the loss or damage initiated by faulty workmanship through a causal chain. Appendix B ¶ 9. Under its interpretation, the links in the causal chain initiated by faulty construction (e.g., "humidity" or "condensation") must be additionally and separately excluded. This renders the "initiates a sequence of events" language meaningless and warrants review and reversal under RAP 13.4(b)(1).

2. The Court of Appeals applied no limitation to the resulting loss exception and allowed it to swallow the exclusion

The Court of Appeals misinterpreted the resulting loss exception. It ignored the "overarching principle," upheld by this Court and courts elsewhere, that the resulting loss exception cannot "swallow the exclusion." *Rocky Mountain Prestress*, 960

F.3d at 1261-62 (collecting cases); *Port of Seattle*, 111 Wn. App. at 912. Applying this principle means that "[t]he uncovered event … is never covered." *Vision One*, 174 Wn.2d at 515 (citation omitted); Plitt et al., *supra*, § 153:2 n.8 (same). To this end, the resulting loss exception applies only when the excluded damage caused by faulty construction results in damage to property other than the defectively built structure. *Compare Sprague*, 174 Wn.2d at 529 (no resulting loss when the only property damaged was the defectively built deck system), *with Vision One*, 174 Wn.2d at 506, 515-16 (where faulty shoring failed, the damage to the shoring was excluded but the "other" damage to newly poured floor was a covered "ensuing loss"); *see also Allianz Ins. Co. v. Impero*, 654 F. Supp. 16 (E.D. Wash. 1986) (the voids in defectively poured concrete were excluded faulty construction; absent "other" damage the ensuing loss did not apply), *cited by Vision One*, 174 Wn.2d at 515-16.

Because here the only damage is to the defectively built roof assembly, *Sprague* controls. The uncovered causal chain initiated by the defects in the roof assembly remains excluded. And because no other property was damaged, the ensuing loss exception does not apply. *Accord Port of Seattle*, 111 Wn. App. at 913 ("The Port . . . attempts to paint its losses as something other than an excluded loss. The only peril suffered by the Port, however, was the excluded inherent vice. For it to claim that its losses during testing and assessment constitute a separate, covered peril would render the inherent vice exclusion meaningless.").

The Court of Appeals disregarded *Sprague* and made the resulting loss exception virtually limitless, allowing it to swallow the Faulty Workmanship Exclusion. This Court should grant review to reaffirm the principle that the purpose of the resulting loss exception is to limit the exclusion without making it meaningless and to restore the "other" property limitation on the

interpretation of the ensuing loss exceptions that is consistent with *Sprague* and decisions by other courts. RAP 13.4(b)(1).

Compounding the error, the Court of Appeals dismissed an alternative limitation on the interpretation of the resulting loss exception adopted in *TMW* and cited by this Court with approval. *Vision One*, 174 Wn.2d at 516; *Sprague*, 174 Wn.2d at 529; *Seattle Tunnel Partners*, 200 Wn.2d at 330. Under *TMW*, because "water vapor" and "condensation" are foreseeable and expected links in the causal chain initiated by a faultily designed roof assembly that lacks ventilation, the resulting loss does not break the causal chain between the defective construction and the excluded damage:

> When a policy excludes "loss or damages ... caused by or resulting from ... faulty ... workmanship ... [or] construction" of a building, it should come as no surprise that the botched construction will permit the elements—water, air, dirt—to enter the structure and inside of the building and eventually cause damage to both. TMW's chain of reasoning—that water technically was the final causative agent of the damage, as opposed to the faulty construction, that "water damage" is not specifically excluded

> from the policy, that coverage accordingly applies—essentially undoes the exclusion.

TMW, 619 F.3d at 576 (alterations in original).

Similarly, it is no surprise that the faulty lack of ventilation in a closed space will be followed by condensation, increased humidity, and damage. *See Yates*, 344 F.2d at 940. In *Yates*, Judge Friendly rejected the argument that because damage to the unventilated crawl space "was caused by the condensation of moist air into water," and was not within another exclusionary clause, the ensuing loss exception permitted coverage. *Id.* at 941; *see also Port of Seattle*, 111 Wn. App. at 912 (discussing *Yates*). So construed, "a clause intended to narrow the exclusions … would very nearly destroy them." *Yates*, 344 F.2d at 941.

This conclusion does not change because the insured elects to label the loss "water damage" or seeks to isolate "condensation" in the causal chain. As stated by Judge Friendly, "We do not think that a single phenomenon that is clearly an excluded risk under the policy was meant to become

compensable because in a philosophical sense it can also be classified as water damage; it would not be easy to find a case of rot or dampness of atmosphere not equally subject to that label and the exclusions would become practically meaningless. . . . [W]e do not think that any acceptable reading permits compensation for the loss that plaintiffs incurred as a result of the defective design of their home." *Id.*

By failing to follow *Sprague* and by rejecting the logic of *TMW*, the Court of Appeals endorsed a new, unlimited interpretation of the resulting loss exception where any link in the admittedly excluded chain (*e.g.*, condensation, drops of moisture, vapor) can be taken out of the chain and labelled a resulting loss. This is not the law. *See Seattle Tunnel Partners*, 200 Wn.2d at 330 ("It would be an unreasonable interpretation to conclude that an internal cause of damage 'that is clearly an excluded risk under the policy was meant to become

compensable because in a philosophical sense it can also be classified' as an external cause." (citation omitted)).

The Court of Appeals' decision warrants review and reversal.

VI. CONCLUSION

The Court of Appeals adopted an erroneous interpretation of the resulting loss exception that conflicts with the decisions of this Court and a published decision of the Court of Appeals. Review is warranted under RAP 13.4(b)(1) and (2).

The undersigned certifies that this brief is in 14-point Times New Roman font and contains 4,946 words, in compliance with the Rules of Appellate Procedure 18.17(b).

DATED: April 12, 2023

STOEL RIVES LLP

/s/ Rita Latsinova

Timothy Snider, WSBA No. 39808
Rita V. Latsinova, WSBA No. 24447
Jenna M. Poligo, WSBA No. 54466
Attorneys for Petitioner
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

THE GARDENS CONDOMINIUM,
a Washington non-profit corporation,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,
a California company,

Petitioner.

APPENDIX OF UNPUBLISHED OPINIONS CITED IN FARMERS' PETITION FOR REVIEW

Timothy W. Snider, WSBA #39808
Rita V. Latsinova, WSBA #24447
Jenna M. Poligo, WSBA #54466
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
206.624.0900

Attorneys for Petitioner Farmers
Insurance Exchange

Pursuant to GR 14.1(d), Petitioner Farmers Insurance Exchange submits the following unpublished opinion from a jurisdiction other than Washington cited in its Petition for Review:

1. *Taja Invs. LLC v. Peerless Ins. Co*., 717 F. App'x 190 (4th Cir. 2017) (unpublished).

1

717 Fed.Appx. 190
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of Appeals 4th Cir. Rule 32.1.
United States Court of Appeals, Fourth Circuit.

TAJA INVESTMENTS LLC; Taja
Construction & Rehab, Inc., a/k/a Taja
Construction LLC, Plaintiffs-Appellants,
v.
PEERLESS INSURANCE COMPANY, a/k/a Liberty
Mutual Insurance Company, Defendant-Appellee.

No. 16-1854
|
Argued: September 13, 2017
|
Decided: October 11, 2017

Synopsis

Background: Insured construction company commenced action in state court against insurer, alleging breach of all risk property insurance policy arising out of collapse of wall during renovation of row house. Insurer removed action on diversity grounds. The United States District Court for the Eastern District of Virginia, 196 F.Supp.3d 587, Gerald Bruce Lee, J., granted summary judgment for insurer, and construction company appealed.

Holdings: The Court of Appeals held that:

ensuing loss exception to all risk insurance policy's workmanship exclusion did not apply, and

earth movement exclusion in all risk insurance policy excluded coverage.

Affirmed.

Procedural Posture(s): On Appeal; Judgment; Motion for Summary Judgment.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (1:15-cv-01647-GBL-TCB)

Attorneys and Law Firms

ARGUED: C. Thomas Brown, SILVER & BROWN, Fairfax, Virginia, for Appellants. Roman Lifson, CHRISTIAN & BARTON, LLP, Richmond, Virginia, for Appellee. ON BRIEF: Erik B. Lawson, SILVER & BROWN, Fairfax, Virginia, for Appellants. E. Ford Stephens, CHRISTIAN & BARTON, LLP, Richmond, Virginia, for Appellee.

Before AGEE, KEENAN, and HARRIS, Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Taja Construction LLC was renovating a row house owned by affiliate Taja Investments LLC (together, "Taja") when the east wall of the property collapsed. Taja sought to recover the cost of repairs ***191** under its insurance policy, issued by Peerless Insurance Company. After an investigation, Peerless determined that the collapse was caused by Taja's failure to support the building's foundation properly while excavating the basement, and it denied Taja's claim under a policy exclusion for defects in construction or workmanship. Peerless also denied the claim under a separate exclusion, this one for damages resulting from movement of the earth's surface.

Taja filed suit against Peerless for breach of its insurance policy. The district court granted summary judgment to Peerless, holding that both the cited exclusions apply and that either would be a sufficient basis for denying coverage. For the reasons given below, we affirm the judgment of the district court.

Taja is a real estate development company that purchases and renovates properties for resale. As part of its renovation of 117 New York Avenue, a row house in Northwest Washington, D.C., Taja planned to deepen the basement to create a larger living space. The structural drawings required that the basement be excavated in sections, dug

one at a time, with concrete underpinning used to reinforce each section before proceeding to the next. J.A. 1144–45. But contrary to the plans, Taja's owner Michael Watson directed subcontractors to fully excavate the basement without intermittent underpinning.

Several people warned Watson against proceeding without the contemplated underpinning. In the weeks before the collapse, both the engineer responsible for the structural drawings and a project subcontractor informed Watson of the need for structural underpinning during excavation, with the subcontractor going so far as to insert into his agreement with Taja a provision stating that he was "not responsible for any collapse due to non[-]underpinning." J.A. 1180. And roughly two days before the collapse, the owner of a construction company that had renovated a neighboring property told Watson that he was "concerned about the stability of [the] below grade soil," and that if Taja failed to underpin the property, it was "going to collapse." J.A. 461–62.

By the third day of construction, the basement had been fully excavated without any underpinning. J.A. 159, 165. A few hours after workers left the site, the property's east wall collapsed.

Taja's property was insured under a builder's risk policy issued by Peerless Insurance Company. That policy—a broad "all risk" policy—covered all risks of direct physical loss, except for those expressly excluded under the policy's terms. Taja filed a claim of $400,000 for repair costs, and Peerless hired an engineering firm to investigate the cause of the collapse. Zachary Kates, lead engineer on the investigation, found that Taja's failure to periodically underpin during excavation left the soil beneath the load-bearing walls in an unstable condition, which caused the collapse of the east wall. Watson, Taja's owner, confirmed that assessment, conceding at his deposition that Taja's removal of bricks and dirt beneath the wall directly caused the collapse.

Peerless denied Taja's claim. First, relying on Kates's report, Peerless cited the policy's exclusion of losses resulting from defects in workmanship and construction (the "Workmanship Exclusion"). And second, as an independent and alternative ground for denying coverage, Peerless relied on the policy's "Earth Movement Exclusion," which excludes coverage for losses caused by "movement or vibration of the earth's surface." J.A. 127, 133. Taja disputed Peerless's denial of its claim, and filed suit for breach of insurance policy in Virginia state court. Peerless removed the ***192** claim to federal district court, invoking diversity jurisdiction, and both parties moved for summary judgment.

In a thorough and thoughtful opinion, the district court granted summary judgment to Peerless, holding that both exclusions apply and that each separately supports the denial of Taja's claim. *Taja Invs. LLC v. Peerless Ins. Co.*, 196 F.Supp.3d 587 (E.D. Va. 2016). We summarize the court's detailed opinion briefly here.

The court began with the Workmanship Exclusion, which provides that Peerless will "not pay for loss caused by an act, defect, error, or omission (negligent or not) relating to ... construction, workmanship ... [or] renovation." J.A. 135–36. Undisputed witness testimony attributed the collapse of the row house's east wall to Taja's failure to underpin the property while excavating. And Taja itself accepted and relied upon Kates's report concluding that Taja's faulty work sequence caused the collapse. The court thus found it beyond dispute that the Workmanship Exclusion applies – as Taja ultimately conceded before this court at oral argument.

Taja argued, however, that even assuming application of the Workmanship Exclusion, coverage is restored by the provision's "ensuing loss" clause. Ensuing loss clauses preserve coverage when a loss excluded under a policy—here, a loss caused by a defect in workmanship—results in a subsequent or "ensuing" loss that otherwise would be covered. *See TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 718 (E.D. Va. 2010), *aff'd*, 504 Fed.Appx. 251, 253 (4th Cir. 2013). Specifically, the ensuing loss clause in Taja's policy provides that while Peerless will not pay for loss or damage caused by a workmanship defect, "if loss by a covered peril results," then Peerless will pay for "the resulting loss." J.A. 135. And according to Taja, that entitles it to recover for losses that "result[ed]" from the collapse caused by its defective workmanship.

The district court rejected that argument, finding that damages associated with the collapse were the direct result of Taja's failure of workmanship rather than a separate "resulting loss," and thus remained excluded under the Workmanship Exclusion. *Taja Invs.*, 196 F.Supp.3d at 594. Although the Supreme Court of Virginia has not directly addressed the scope of ensuing loss clauses,[1] courts generally agree, as the district court explained, that when a workmanship exclusion is triggered, an ensuing loss clause applies only when there is significant attenuation between the direct result of a workmanship defect and the ultimate loss for

which coverage is sought, usually due to an independent or fortuitous intervening cause. In other words, an ensuing loss provision "excludes from coverage the normal results of defective construction, and applies only to distinct, separable, and ensuing losses." *Friedberg v. Chubb & Son, Inc.*, 691 F.3d 948, 953 (8th Cir. 2012) (internal quotation marks and alteration omitted) (applying ***193** Minnesota law); *see Taja Invs.*, 196 F.Supp.3d at 593 (citing, *inter alia*, *Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.*, 219 F.3d 501, 507 (5th Cir. 2000) (ensuing loss clause generally applies only to damage that "result[s] fortuitously from events *extraneous* to the construction process") (emphasis in original) (internal quotation marks omitted); *In Re Chinese Manufactured Drywall Prods. Liab. Litig.*, 759 F.Supp.2d 822, 850 (E.D. La. 2010) (ensuing loss clause not applicable to damages that are a direct and continuous result of workmanship defect)). [2]

Applying the consensus approach, the district court rejected Taja's effort to "separate cause and effect" by distinguishing between a wall collapse caused by defective workmanship and losses resulting directly from that collapse. *Taja Invs.*, 196 F.Supp.3d at 594. "If a defectively-designed building collapses, one does not characterize the effect of gravitational forces as a distinct and separate event, and the cost of replacing the collapsed building is not an ensuing loss." *Id.* at 593 (quoting *Performing Arts Cmty. Improvement Dist. v. Ace Am. Ins. Co.*, No. 13-0945-CV-W-ODS, 2015 WL 3491292, at *6 (W.D. Mo. June 3, 2015)). Endorsing Taja's approach, the court explained, would violate basic principles of Virginia contract interpretation by "essentially ... writ[ing] the Workmanship [E]xclusion out of the [p]olicy": Virtually any damage caused by a defect in workmanship could be re-characterized as a "resulting loss" for which coverage was restored. *Id.* at 594. The district court thus concluded that Taja could not invoke the ensuing loss clause and that its claim remains subject to the Workmanship Exclusion.

The district court also ruled for Peerless on the alternative ground that Taja's claim is barred under the policy's Earth Movement Exclusion, which applies to damages caused by "any movement or vibration of the earth's surface." J.A. 127. Before the district court, Taja argued that the Earth Movement Exclusion does not apply because the "movement" in this case occurred *below* the earth's surface, at the basement level of the row house being renovated. The court disagreed, explaining that Taja's position conflated movement below *grade*—that is, below street- or ground-level—with movement below the earth's *surface*. The court found no ambiguity in the terms of the exclusion: "Using the plain meaning of [the] words, it is evident that while the movement that caused the east wall's collapse occurred below grade (in the basement, below the ground level of the structure), it still involved movement of the earth surface (the uppermost layer of the soil and clay)." *Taja Invs.*, 196 F.Supp.3d at 597–98. Accordingly, the district court ruled, the Earth Movement Exclusion provided an independent basis for denial of Taja's claim.

On appeal, the parties now raise substantially the same arguments as they did before the district court. Having carefully considered the controlling law and the parties' briefs and oral arguments, we affirm on the reasoning of the opinion of the district court.

AFFIRMED

All Citations

717 Fed.Appx. 190

Footnotes

1 The district court properly applied Virginia law to this dispute. A federal court sitting in diversity applies the forum state's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Virginia choice-of-law rules provide that "the law of the place where an insurance contract is written and delivered controls." *Buchanan v. Doe*, 246 Va. 67, 431 S.E.2d 289, 291 (1993). Before the district court, the parties agreed that the policy was delivered in Virginia and that Virginia law applied. On appeal, Taja now suggests that Washington D.C. law should apply. Appellants' Br. at 26–27. Taja concedes, however, that "there is no difference" between D.C. and Virginia law as applied here. Appellants' Br. at 23 n.26. Because the parties agree there is no substantive difference between the applicable laws, we need not

perform a choice of law analysis. *Millennium Inorganic Chems. Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 744 F.3d 279, 284 n.5 (4th Cir. 2014).

2 As the district court recognized, the case law on ensuing loss clauses is not entirely uniform. *See Taja Invs.*, 196 F.Supp.3d at 593 (citing *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wash.2d 501, 276 P.3d 300, 307 (2012) ("[T]he dispositive question in analyzing ensuing loss clauses" is not causal attenuation, but "whether the loss that ensues from the excluded event is covered or excluded.")).

End of Document

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE GARDENS CONDOMINIUM, a Washington non-profit corporation, Appellant, v. FARMERS INSURANCE EXCHANGE, a reciprocal company, Respondent.	No. 83678-1-I PUBLISHED OPINION

BOWMAN, J. — Faulty design and construction of the Gardens Condominium roof assembly led to inadequate ventilation, which trapped condensation and excess humidity, damaging the roof. Gardens held an "all-risk" insurance policy issued by Farmers Insurance Exchange. The policy excludes coverage for faulty construction, but "if loss or damage by a Covered Cause of Loss results, [Farmers] will pay for that resulting loss or damage." Farmers denied coverage for the roof repairs and Gardens sued. The trial court granted summary judgment for Farmers. Because the trial court misinterpreted the resulting loss clause in Farmers' policy, we reverse and remand for further proceedings consistent with this opinion.

FACTS

Gardens is a 26-unit condominium building in Shoreline. In 2002, Gardens discovered water damage to its roof fireboard and sheathing. The

damage resulted from a faulty design of the roof assembly, which did not have adequate ventilation. An engineer redesigned the roof to improve ventilation by adding "2x2 sleepers" above the roof's structural joists. Gardens completed its roof repairs in 2004.

In 2019, Gardens discovered the 2004 repairs were defective because the sleepers did not add enough space in the roof to vent moisture. So, the roof joist cavities continued to trap water vapor emitted from inside the units and allowed condensation to form during cool weather and overnight temperature drops. That repeated exposure to moisture damaged the sheathing, fireboard, joists, and sleepers.

Gardens sought coverage from Farmers for repairs. Gardens held an all-risk insurance policy from Farmers, which covered all "direct physical loss or damage" to the building not specifically excluded by the policy.[1] But the policy excluded coverage for damage caused by faulty design or repair. The policy provides:

> 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 directly or solely results in loss or damage or initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.
>
> . . . .
>
> **b.** Faulty, inadequate or defective:
>
> **(1)** Planning, zoning, development, surveying, siting;

[1] Gardens has held insurance policies from Farmers since 2002. This appeal involves language from only the 2003 to 2004 policy.

> **(2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> **(3)** Materials used in repair, construction, renovation or remodeling; or
>
> **(4)** Maintenance;
>
> of part or all of any property on or off the described premises. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

The last sentence of the provision is known as a "resulting loss" clause.[2]

Farmers investigated Gardens' claim and determined that the claimed damage "was independently caused by lack of ventilation in the roof assembly caused by faulty, inadequate and defective construction." Farmers then denied coverage because the faulty construction "initiated a sequence of events resulting in the loss or damage." Gardens objected to Farmers' denial of coverage, contending that the resulting loss clause narrowed the faulty workmanship exclusion, preserving coverage for damage caused by a resulting covered peril, and that the policy covers the perils of humidity and condensation. Farmers still denied coverage.

In January 2021, Gardens sued Farmers for breach of contract and declaratory relief. Gardens and Farmers cross-moved for summary judgment. Both motions relied on stipulated facts, including that the damage to the roofing assembly "was caused by condensation and/or excess humidity resulting from

[2] It is also known as an "ensuing loss" clause. The terms "resulting loss" and "ensuing loss" are interchangeable. See Vision One, LLC v. Phila. Indem. Ins. Co., 174 Wn.2d 501, 514, 276 P.3d 300 (2012). We use "resulting loss" because that is the language of Farmers' policy.

inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs, and/or redesign."[3]

The court granted summary judgment for Farmers. It concluded that the policy excludes coverage because faulty construction began a sequence of events that resulted in the damage, and the resulting loss clause exception did not "somehow resurrect[ ]" coverage.

Gardens appeals.

ANALYSIS

Gardens argues the trial court misinterpreted the resulting loss clause and erred by granting summary judgment for Farmers. We agree.

We review rulings on summary judgment de novo, performing the same inquiry as the trial court. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). We will grant summary judgment only if, from all the evidence, reasonable persons could reach but one conclusion. Ellis, 142 Wn.2d at 458.

We interpret language from an insurance policy de novo. Vision One, LLC v. Phila. Indem. Ins. Co., 174 Wn.2d 501, 512, 276 P.3d 300 (2012). We "construe insurance policies as the average person purchasing insurance would." Id. That is, we give the language a fair, reasonable, and sensible construction. Id. We construe ambiguities in a policy against the drafter-insurer. Id. And

[3] Gardens concedes that the resulting loss clause did not preserve coverage for correcting the defective sleepers.

because coverage exclusions " 'are contrary to the fundamental protective purpose of insurance,' " we strictly construe exclusions against the insurer, not extending them " 'beyond their clear and unequivocal meaning.' " Id. (quoting State Farm Fire & Cas. Co. v. Ham & Rye, LLC, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007)).

Citing Vision One, Gardens argues that the "trial court failed to properly consider the nature of Farmers' obligation" under the policy. According to Gardens, under Washington law, "a resulting loss clause preserves coverage for damage caused by a covered event . . . that results from an excluded peril."

In Vision One, our Supreme Court explained how resulting loss clauses operate in all-risk insurance policies. 174 Wn.2d at 513-17. There, an all-risk building policy excluded from coverage losses caused by faulty workmanship, but it covered losses from resulting covered perils such as collapse. Id. at 506-07. During construction, a floor slab collapsed when shoring gave way because of defective workmanship, leading to the loss of the slab and the need to clean up debris and hardened cement from the floor below. Id. at 506. The building owner sought coverage for the damage caused by the collapse, which the insurer denied. Id. at 507. The trial court ruled for the building owner, citing the policy's resulting loss clause. Id. at 510-11. Division Two reversed. Id. at 511. But our Supreme Court reinstated the trial court judgment. Id. at 523.

The Supreme Court explained that all-risk policies cover all risks unless explicitly excluded. Vision One, 174 Wn.2d at 513. But if an exclusion has a resulting loss clause, it "carve[s] out an exception to the policy exclusion." Id. at

514. That is, resulting loss clauses "limit the scope of what is otherwise excluded under the policy." Id. at 515. They ensure " 'that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered,' " but " '[t]he uncovered event itself . . . is never covered.' " Id. at 515 (quoting McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 734, 837 P.2d 1000 (1992)).

> [T]he dispositive question in analyzing [resulting] loss clauses is whether the loss that ensues from the excluded event is covered or excluded. If the ensuing loss is also an excluded peril or an excluded loss under the policy, there is no coverage. But if the policy covers the peril or loss that results from the excluded event, then the [resulting] loss clause provides coverage.

Id. at 516.[4] Applying those rules, the Supreme Court held that the policy's faulty workmanship provision excluded coverage for the faultily assembled shoring. Id. at 518. But the policy covered losses from the collapse because it was a covered peril resulting from the faulty workmanship. Id.

Here, Gardens' policy excludes coverage of faulty construction. That exclusion limits Gardens' coverage. But the resulting loss clause narrows that exclusion. In the resulting loss clause, Farmers agreed to pay for any loss or damage caused by a covered peril resulting from faulty construction. The parties stipulated that "[t]he damage was caused by condensation and/or excess humidity resulting from inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs and/or redesign." So, if the policy covers the perils of condensation and excess humidity, it covers the loss or damage from those perils.

[4] Citations omitted.

Farmers argues that we should apply the "efficient proximate cause rule" to determine whether the damage at issue flows from an excluded event preventing coverage. See McDonald, 119 Wn.2d at 732. Citing Vision One, 174 Wn.2d at 521, Farmers says, "This concept is known as 'inverse efficient proximate cause.' " But the efficient proximate cause rule mandates coverage when two or more perils combine in sequence to cause a loss, and a covered peril is the predominant or efficient cause of the loss. Id. at 519. We do not apply the rule in reverse. Id. In other words, 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. Id.

And Farmers' reference to the term "inverse efficient proximate cause" in Vision One is taken out of context. In Vision One, the insurer denied coverage under two policy exclusions—one for faulty workmanship and one for defective design. 174 Wn.2d at 508. The faulty workmanship exclusion in that policy contained a resulting loss clause, but the defective design exclusion did not. Id. The insurance company argued the resulting loss clause applied only if application of the efficient proximate cause rule showed that "faulty workmanship was the efficient proximate cause of the loss." Id. at 518. The Supreme Court made clear that we do not use the efficient proximate cause rule when "an excluded peril sets in motion a causal chain that includes covered perils."[5] Id.

[5] Farmers argues that even if the efficient proximate clause rule does not apply, nothing precludes an insurance company from drafting policy language that, as here, denies coverage when an excluded peril initiates an unbroken causal chain. See Vision One, 174 Wn.2d at 519. This is true. But here, Farmers also drafted a resulting loss clause, which limited the scope of that exclusion.

But it determined that even if it were to apply that "sort of inverse efficient proximate cause analysis," it would show that faulty design and faulty workmanship were concurrent causes of the covered peril of collapse, so the resulting loss clause applied. Id. at 521-22.

Citing TMW Enterprises, Inc. v. Federal Insurance Co., 619 F.3d 574 (6th Cir. 2010), Farmers next urges us to interpret its resulting loss clause to apply to losses from only unforeseen covered events, occurring independent of the excluded peril. According to Farmers, if we do not restrict the resulting loss clause to nonexcluded, unforeseen intervening events, it "[w]ould [s]wallow the [f]aulty [w]orkmanship [e]xclusion [w]hole."

In TMW, the Sixth Circuit considered the scope of a similar resulting loss exception to a faulty workmanship exclusion. 619 F.3d at 579. It concluded that the "faulty workmanship exclusion applies to loss or damage 'caused by or resulting from' the construction defect" and damage resulting " 'natural[ly] and continuous[ly]' from the faulty workmanship, 'unbroken by any new, independent cause.' " Id.[6] (quoting Mich. Sugar Co. v. Emp'rs Mut. Liab. Ins. Co. of Wis., 107 Mich. App. 9, 14, 308 N.W.2d 684 (1981)). And the court limited the resulting loss clause to "later-in-time loss" that "flows from a non-foreseeable and non-excluded cause." Id.

But our Supreme Court has not restricted resulting loss clauses to independent, unforeseen covered perils. Vision One, 174 Wn.2d at 517; Sprague v. Safeco Ins. Co. of Am., 174 Wn.2d 524, 529, 276 P.3d 1270 (2012).

[6] Alterations in original.

And Farmers' concern about the resulting loss clause swallowing the exclusion does not bear out. The resulting loss clause only limits the scope of the exclusion. See Vision One, 174 Wn.2d at 517. In contrast, if we were to interpret a resulting loss clause to apply to only independent, unforeseen covered perils, the clause would be superfluous. The policy already covers unforeseen independent perils that it does not otherwise exclude. See GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 129, 135, 317 P.3d 1074 (2014) (we favor contract interpretation that does not render language meaningless or ineffective).

Finally, Farmers argues that even if Gardens' interpretation of the resulting loss clause is correct, this case is like Sprague, where the only damage for which Gardens seeks coverage is not an "**ensuing** loss" but "**the loss**" excluded by the policy. But Farmers misconstrues Sprague.

In that case, an all-risk homeowner's insurance policy excluded coverage for rot and defective construction but provided that " 'any ensuing loss not excluded is covered.' " Sprague, 174 Wn.2d at 527. The homeowners discovered rot damage to the fin walls of their deck due to construction defects and sought replacement coverage. Id. Insurance denied the claim. Id. On appeal, our Supreme Court reiterated that the purpose of a resulting loss provision "is to limit the scope of an exclusion from coverage," and that "losses caused by the excluded peril will be covered unless they are subject to their own specific exclusions." Id. at 529. The court determined that there was no coverage for the fin walls because the policy excluded both rot and defective workmanship. Id. at 530. That is, because the only loss resulted from rot caused

by construction defects (both excluded perils), there was no coverage under the resulting loss clause. Id. at 530-31. Here, the parties stipulated that the perils of condensation and excess humidity caused the roof damage, but they dispute whether Farmers' policy covers those perils.[7]

Because the trial court misinterpreted the resulting loss provision in Farmers' all-risk policy, we reverse and remand for further proceedings consistent with this opinion.[8]

Brunson, J.

WE CONCUR:

Birk, J.

Andrus, C.J.

[7] The trial court did not reach the issue of whether water vapor and condensation are covered perils under Farmers' policy.

[8] Because we conclude the plain language of the policy mandates coverage if condensation is a covered peril, we do not address Gardens' alternative argument that the policy is ambiguous.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE GARDENS CONDOMINIUM, a Washington non-profit corporation, Appellant, v. FARMERS INSURANCE EXCHANGE, a reciprocal company, Respondent.	No. 83678-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent Farmers Insurance Exchange filed a motion for reconsideration and/or clarification of the opinion filed on December 19, 2022 in the above case. Appellant the Gardens Condominium filed an answer to the motion. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

Appendix B

THE HONORABLE BRIAN MCDONALD

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

THE GARDENS CONDOMINIUM, a Washington non-profit corporation, Plaintiff, v. FARMERS INSURANCE EXCHANGE, a reciprocal corporation, Defendant.	No. 21-2-00390-3 SEA JOINT STIPULATION FOR CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff The Gardens Condominium ("The Gardens") and Defendant Farmers Insurance Exchange ("Farmers") hereby stipulate to the following facts in support of the cross-motions for summary judgment the parties intend to file in the above captioned action. The stipulation set forth below is made for the sole purpose of the proposed cross-motions. The parties expressly reserve all claims and defenses not set forth or addressed in the proposed cross-motions.

1. The Gardens is a single building containing 26 residential units located at 17417 Ashworth Avenue N., Seattle, Washington 98133. The condominium building was constructed in or around 1979.

2. Farmers issued The Gardens an insurance policy, No. 035056546 (the "Policy"), which took effect October 15, 2002.

3. The Policy provides coverage for direct physical loss or damage to the building or structures caused by or resulting from any Covered Cause of Loss. The policy defines a Covered Causes of Loss to mean risks of direct physical loss unless the loss is excluded in section B or limited in paragraph A.4 of the Policy. A general condition provides that the Policy covers loss or damage commencing during the policy period. From inception of the policy on October 15, 2002 through October 15, 2004, the Policy excludes faulty, inadequate or defective design, repair, and/or construction as follows:

> **B. EXCLUSIONS**
>
> 3. 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 directly or solely results in loss or damage or initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.
> ...
> c. Faulty, inadequate or defective:
> (1) Planning, zoning, development, surveying, siting;
> (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> (3) Materials used in repair, construction, renovation or remodeling; or
> (4) Maintenance;
>
> of part or all of any property on or off the described premises. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

Form 91-3422, 2nd Ed., 3/00 (pages 6-8 of 14), as modified by Form 94-7918 2nd Ed., 11/98 and Form 94-7917, 1st Ed., 7/98 (emphasis added).

4. In late 2002, The Gardens discovered damage to the condominium building. The damage resulted from faulty, inadequate, or defective design, construction, and/or repair of the roof assembly including, without limitation, insufficient interior vents, rafter/joist spaces that did not have air spaces to provide ventilation, wood blocking/bridging between the rafters/joists that blocked the ventilation along the cavities, and rafters/joists changing directions and lacked ventilation openings at either end of the rafters/joists, in violation of the then-current Building

Code. The inadequate ventilation of the roof assembly resulted in long-term condensation of water vapor on the underside of the roof sheathing, which resulted in damage over time. The Gardens' consultant recommended a complete replacement of the roof be done as soon as possible.

5. The Gardens retained an engineer and contractor to remove the roof, fireboard, and sheathing, to install 2X2 sleepers on top of the joists, and to install new sheathing, fireboard, and roof membrane. The goal of installing the 2X2 sleepers was to add space to the joist cavities beneath the roof to increase ventilation and eliminate condensation. The redesign and repair work to the roof and joists began in August 2003, but was put on hold because the roof sheathing was damaged and could not be reused as originally intended. The repair work resumed in July 2004. Although the 2X2 sleepers and new sheathing were installed, unbeknownst to the Association, the redesign did not add enough additional ventilation to prevent condensation and damage.

6. The 2003-2004 redesign and/or repairs were faulty, inadequate, and defective. At the Gardens, the space between the flat roof surface and the ceilings below (i.e. the joist cavities) was intended to provide both insulation of the units below and passive ventilation to allow humidity and water vapor from inside the units to escape to the exterior. The space between the flat roof surface and the ceilings below was also intended to contain fans and ducts to mechanically expel humidity and water vapor from clothes dryers, kitchen range hoods, and bathroom fans to the exterior. The roof was redesigned and rebuilt in 2004 without enough space between the underside of the roof sheathing and the top of the insulation to provide adequate ventilation. This assembly does not provide the minimum net free area as required by the applicable building code.

7. As a result, even after the 2003-2004 redesign and rebuild, water vapor from inside the units continued to be trapped inside the roof joist cavities and could not ventilate to avoid damaging the sheathing, fire board, and/or joists, including the 2x2 sleepers installed to provide additional venting. This repeated exposure to water vapor resulted in damage. In addition, at night and/or during cooler weather, condensation forms on the underside of the roof sheathing, causing damage over time.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone 206.624.0900

8. In August and September 2019, the Association discovered damage to fireboard, sheathing, and some sleepers and joists. The damage was caused by condensation and/or excess humidity resulting from inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs and/or redesign. The construction defects are an independent cause of distressed and decayed building components and did not occur at the same time as the condensation. That is, the construction defects occurred before the condensation could occur.

9. The faulty, inadequate, and/or defective construction, repair, and/or redesign initiated a sequence of events including inadequate ventilation, excessive humidity, and condensation that resulted in loss or damage. Thus, the Gardens and Farmers agree that exclusion 3.c. in the Policy applies. The parties disagree, as to the scope and application of the resulting-loss exception to exclusion 3.c.

10. The Association does not allege that any portion of the building is in a state of collapse.

DATED this 18th day of May, 2021.

HOUSER LAW, PLLC

/s/ Daniel S. Houser
Daniel S. Houser, WSBA No. 32327
1325 4th Ave., Suite 1650
Seattle, WA 98101
(206) 962-5810
Email: dan@dhouserlaw.com

Attorney for Plaintiff The Gardens Condominium

STOEL RIVES LLP

/s/ Timothy W. Snider
Timothy W. Snider, WSBA No. 39808
Rita V. Latsinova, WSBA No. 24447
Jenna M. Poligo, WSBA No. 54466
600 University Street, Suite 3600,
Seattle, Washington 98101
(206) 624-0900
Email: timothy.snider@stoel.com
rita.latsinova@stoel.com
jenna.poligo@stoel.com

Attorneys for Defendant Farmers Insurance Exchange

Appendix C

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

THE GARDENS CONDOMINIUM, a Washington nonprofit corporation, Plaintiff, v. FARMERS INSURANCE EXCHANGE, a reciprocal corporation, Defendant.	) Cause No. 21-2-00390-3 SEA

HEARING

The Honorable Brian McDonald Presiding

August 16, 2021

TRANSCRIBED BY: Angela Dutenhoffer, CET

Reed Jackson Watkins, LLC

Court-Approved Transcription

206.624.3005

A P P E A R A N C E S

Appearing Via Zoom

On Behalf of Plaintiff:

DANIEL S. HOUSER

Houser Law, PLLC

1325 4th Avenue

Suite 1650

Seattle, Washington 98101

On Behalf of Defendant:

RITA LATSINOVA

JENNA M. POLIGO

TIMOTHY W. SNIDER

Stoel Rives

600 University Street

Suite 3600

Seattle, Washington 98101

I N D E X O F P R O C E E D I N G S

-o0o-

August 16, 2021

THE COURT: Good morning, everyone. Would the parties like to make their appearances?

MR. HOUSER: Good morning, Your Honor, yes. Dan Houser for Plaintiff, the Gardens Condominium.

MS. LATSINOVA: And Rita Latsinova, Stoel Rives, for Farmers Insurance. And I'm here with Jenna Poligo and Tim Snider on the phone. And Jenna will be driving the PowerPoint today.

THE COURT: All right. Very good. So I've got two, kind of, competing motions for summary judgment essentially dealing with the same issues. So the way I'm going to structure this is to have Plaintiffs go. Since given that they're the plaintiff in this case, and essentially this is -- appears to be a dispositive motion, I'm going to have Plaintiffs argue first and then the defense, and then I'll allow rebuttal for Plaintiffs. I'll allow up to 20 minutes -- you don't need to use it -- for purposes of your argument.

A couple other things to just comment on. I did see a reference to agreeing to file overlength briefs. I just want to let the parties know for future reference, you -- parties can't agree amongst themselves to exceed the word

limit. You need to seek permission from the Court, so just for future reference. It wasn't that much over the word limit, but it's not something you should do on your own. Those word limits are for the benefit of the Court, not something the parties can agree amongst themselves to circumvent. So in the future, you should file a motion to -- for approval to file an overlength brief.

With that, though, I've reviewed all of the briefing and read the cases, some multiple times, and I'm ready to hear argument.

So, Mr. Houser, why don't you go.

MR. HOUSER: Thank you, Your Honor. And I want to start off by acknowledging that this is a difficult area of the law that can be confusing, and so I'd like to begin with two simple points that I think will lead the Court to the correct result here.

Number one, we know that the Court must interpret the ensuing loss exception as written and may not modify it or create ambiguity where none exists.

Number two, we know that the ensuing loss exemption should be interpreted to cover fire damage as an ensuing loss.

All the parties here agree on that. All the cases that have ever examined ensuing loss coverage also agree on that. So that's a guide point for the Court to keep in mind.

There are also several points that the parties agree on

here that is very helpful to reaching a decision. First, Washington law governing ensuing loss coverage is authoritatively set forth in Vision One. Vision One is the key case here.

Second, no one is arguing that water vapor/condensation is a risk beyond the reasonable contemplation of this policy.

Third, water vapor and condensation are covered causes of loss under Farmers' policy.

Just parenthetically, we cited three cases regarding coverage for condensation. Farmers has cited no cases, finding no coverage for condensation.

Fourth, water vapor/condensation is separate and distinct from faulty design.

Fifth, the damage to the roof sheathing and fireboard at the gardens was caused by condensation. And faulty design was also an independent cause of the damage.

And, sixth, faulty design initiated the sequence of events that resulted in damage.

We're all in agreement on those points. And now we get to our areas of disagreement, which, unfortunately, outnumber our areas of agreement.

First disagreement is whether the policy covers damage caused by water vapor and condensation that resulted from vaulty design. That is the key question here. We believe that on a plain meaning interpretation of the ensuing loss

exception, there is coverage.

Second, we disagree about what Vision One held and why. And before I get to Vision One, let me back up for a second and just get to the policy language.

So what is -- what is the language of the ensuing loss exception that we're talking about? It says, quote, But if loss or damage by a covered cause of loss results, we will pay for that resulting loss or damage.

What does that mean? Well, the very first word "but," that means "with the exception that." That means no matter how broad the exclusion is originally, this carves out an exception to preserve some coverage. Moving on, If loss or damage by a covered cause of loss results, we will pay for that resulting loss or damage.

So if damage by a fire results from faulty design, that fire damage will be covered under the ensuing loss exception. If damage caused by condensation results from faulty design, that condensation damage will be covered under the ensuing loss exception.

THE COURT: So can I can ask you a question about -- so isn't one of the issues I, you know, obviously have to deal with is this provision? Unlike Vision One did involve this language, but in a different way, but it's -- at the heart of this is it initiates a sequence of events that results in loss or damage, right, in that particular language?

Under your interpretation, why wouldn't I be rendering that language essentially meaningless? I mean, don't you agree that they -- that's inserted when there are multiple events that could be attributed for it, right? Some of which are covered and some of which are not covered. So --

MR. HOUSER: Yes.

THE COURT: -- can you give me a factual scenario where that language would then have meaning and where your interpretation -- and where your interpretation of the ensuing loss provision wouldn't essentially render it meaningless or ineffectual for what it appears to be trying to do?

MR. HOUSER: Thank you, Your Honor. That's a great question. I tried to think of an example and I couldn't think of one. I agree with you it's not meaningless because that language tells us -- it's some broad causation language at the beginning of the exclusion, and, essentially, Farmers has already got the job done of saying this is initially excluded. They're going above and beyond that by adding more language to make it really clear that the exclusion applies initially. But in -- on these facts, it doesn't really add anything beyond the fact that we already know that this is excluded because faulty design was one of the causes.

THE COURT: But --

MR. HOUSER: And if you -- there is a footnote --

THE COURT: But could --

MR. HOUSER: -- in Vision One.

THE COURT: So let me -- so that raises the issue of -- when I'm looking at interpretations, don't I want to try to interpret -- I mean, absolutely I interpret it in the light -- if there are reason- -- two reasonable interpretations, I favor that of the insured. But aren't I supposed to come up with an interpretation that tries to harmonize all of them together without essentially eliminating one provision?

So that's kind of what I'm struggling with, to put it out there. It seems as though your interpretation would only -- that really would never -- I was having a hard time thinking of a scenario where that would apply at all because it seems under your -- because I appreciate you being candid and saying if there's an uncovered event and a covered event, under your interpretation, the ensuing loss provision would provide coverage. Right?

MR. HOUSER: Yes. What I'm saying is if the insurer wants to eliminate coverage for a combination of covered and excluded events, then they would want to eliminate the ensuing loss exception. And I can jump into this --

THE COURT: Sure.

MR. HOUSER: -- Belmain now if you want. But, you know,

what -- Belmain is just starting from the wrong place in the analysis. They're starting from a false assumption that you have to have this ensuing loss exception. And it's just a necessary evil. And what are we going to do with it? That is just not true at all. You don't need an ensuing loss exception. Lots of exclusions don't have any ensuing loss exception. Or if you want it to be narrow, if you only want it to cover fire and explosions, you can just write down "the only ensuing loss that's covered is fire or explosion."

That's not what happened here. What happened here was there was a very broad ensuing loss exception.

But, you know, I totally agree the Court is absolutely applying Washington law correctly. You are supposed to try to harmonize that language, if you can, but there may be circumstances where you can't. When you have an extra broad initial scope of an exclusion, broadening it even further doesn't really matter when you have an exception to the exclusion that applies. That's what we're saying. So --

THE COURT: Can I ask you a --

MR. HOUSER: -- getting back --

THE COURT: So I'll ask you another difficult question. So Vision One, Justice, I think, Stephens says the dispositive question is whether the loss that ensues is also an excluded peril or an excluded loss under the policy. That's what ultimately she kind of says. And she says, If

so, there's no coverage.

So why wouldn't that bring me back to, okay, is the damage to this roof an excluded peril or excluded loss under the policy? And that brings me back to Section B that has the sequence of events.

So, I mean, why isn't that the right analysis for me to apply when I try to follow Vision -- what's being said by Vision One?

MR. HOUSER: Well, what Vision One says is if there is a covered peril or a covered loss that results from this initial excluded event, there is coverage under the ensuing loss exception.

So the Court was pointing out there in the language you're talking about that it's possible that there could be a combination of exclusions that could bar coverage. In a case like Wright vs. Safeco, there was a separate exclusion for mold. The resulting damage was mold, so, therefore, if you combined the initial excluded event with another separate exclusion for mold, there was no coverage. That's the point that Justice Stephens is making there. But it's also -- it's difficult to track and understand Vision One sometimes because they are trying to distinguish between loss and peril. And that brings me back to the plain meaning approach.

Some ensuing loss exceptions are phrased in terms of any

ensuing loss is covered. And those are -- those are actually narrower than what we're dealing with here. What we have here is if there's resulting damage caused by any covered event, we'd have coverage. So we have really broad ensuing loss language here like was present in Vision One.

THE COURT: Okay. So can I -- I'll ask you yet another question about the hypo that's used, I think, in the briefs and in Vision One, the faulty wiring in the fire. And, you know, Vision One says, I think -- you know, it's just a hypo that's given out and it says, well, the cost of fixing the wiring still wouldn't be covered, but the fire is. Right? I mean, if there's a fire and the place burns down, the wire is all probably melted and gone. Right? I'm asking as a practical matter trying to apply that factual scenario to real life. You know, it's thrown out as a hypo.

But if we really had faulty wiring and fire, and the house burnt down, and the Court is saying, Well, fixing the wiring isn't covered, I would think -- and maybe I'm wrong about this -- the plaintiffs would be saying the fire destroyed the wiring. You know, it melted it. Right? And, in fact, the house is all gone, and the cost of rebuilding the house with wiring would be covered. Wouldn't it? So --

MR. HOUSER: So that is a -- that's a difficult question, Your Honor, and it's one that I did address in a footnote.

THE COURT: Okay.

MR. HOUSER: And the Sprague Court did address that in a footnote. Justice Stephens' dissent in Sprague, signed by four justices, kind of gives a possible solution to that. I don't think we need to get to that here. But her possible solution was you could subtract the cost of upgrading the wire to comply with code from the covered repair.

But the easier, simpler way to deal with it here is to say, Well, we have an initial excluded event here, which is the installation of these sleepers that were poorly designed and did not add enough ventilation. That's the excluded event.

We are okay with no coverage for the cost of replacing those sleepers just to make it simpler, easier for everyone to understand. Even though some of them were damaged by water vapor and condensation, we don't need to insist on getting that last little bit of coverage. So you have defectively designed sleepers, the initial excluded event that resulted in condensation damage to sheathing and fireboard that are nailed down to those sleepers. There's nothing wrong with how the sheathing and fireboard are installed.

So that's separate from the initial excluded event. So that's an easier way to make that distinction in this -- on these facts.

When somebody next has a case involving a fire and a

faulty wire, then they'll have to wrestle with that difficult issue.

But getting back to my list of disagreements, Farmers disagrees with us about what Vision One held. They seem to think that Vision One only ruled against the insurer because the insurer didn't say the right thing in its denial letter. That is not at all what happened in Vision One. The Vision One holding is about ensuing loss coverage. That's not dicta or some little add on. That's the whole case.

We disagree, third, about how to reconcile Sprague and Vision One. The easiest, clearest way to reconcile those cases is to look at what actually happened. There was no separate covered event in Sprague. All you had was rot. And that rot was caused by faulty construction. So both of those things are excluded. Nothing covered ever happened. No covered event, simple.

Vision One you had a covered event because something actually fell down. Here it's undisputed we have a covered event because condensation and water vapor are covered, and there's damage from those covered events.

Fourth, we have a disagreement about whether or not a plain meaning interpretation of the ensuing loss exception is so broad that it swallows the entire exclusion.

We have the better argument there because we're not asking for you to swallow the entire exclusion. We're saying --

we're conceding that there's no coverage for the cost of replacing the poorly designed sleepers. That exclusion is still effective.

Fifth, we disagree about whether or not ensuing loss coverage is limited to independent and unforeseeable covered events. That issue was addressed, although, not real specifically, but it was addressed in Vision One. The Vision One court of appeals had required independence. The Supreme Court reversed that and said, no. All you need is any covered event. Moreover, on a plain meaning interpretation, there's no requirement in a policy that says it has to be independent and unforeseeable.

Sixth, we disagree about whether there's damage beyond the initial excluded event, and that just goes to how you characterize the initial excluded event. But if you go to the stipulated facts, we've already stipulated what was wrong, what was the bad design. It was that the sleepers didn't add enough ventilation. So that's the initial excluded event. And the damage to the fireboard and sheathing is damage beyond that initial excluded event.

And then seventh, we disagree about whether or not you should follow Belmain Place, which is not precedential. It's just a trial court decision from a federal district court. They've got one on their side. I've got two on my side: Green Lake and Sunwood.

Belmain, it was just a mistake. There was a motion for reconsideration pending when that case was dismissed, and so we don't know what would have happened on that motion for reconsideration.

But if you just apply the simple fire example to the reasoning of Belmain Place, you'll come out with this ensuing loss exception would not cover a fire, which everyone agrees should be covered under this ensuing loss exception.

You're giving no meaning at all to the ensuing loss exception in Belmain Place, which just cannot be right.

So if you simply apply the plain meaning of the policy language and ask: Was there loss or damage by a covered cause of loss here that resulted from faulty design, the answer is unequivocally yes. We've stipulated to that. There is damage caused by condensation and water vapor. And for that reason, there is coverage.

THE COURT: All right. Thank you. And I'll give you a couple extra minutes. I'll give the other side, as well, if it's necessary for some rebuttal.

Okay. I'll hear from the defense.

MS. LATSINOVA: Thank you, Your Honor. There are three points really dispositive on the cross-motions here. The policy, the stipulation that Counsel barely mentions, and really the state of Washington law on the initiated prong in

Farmers' policy that the Court -- the Court raised the question about that. And I'll talk about that. But I'll address these issues in the order that I mention them. The policy first, stipulation second, and the Washington -- controlling Washington law third, so -- and Jenna will help me with a PowerPoint today. So first the policy.

Let's go with Slide 1, Jenna.

Farmers' policy has a faulty workmanship exclusion that covers very broadly faulty, inadequate, deceptive design, construction, repairs, and remodeling.

And the current thing about Farmers' policy is that unlike some policies, unlike the policy in Greenwood -- in Green Lake, for example, it has two prongs. The first prong is loss of damage caused directly or solely by faulty workmanship. That's a narrow prong.

The broad prong is when faulty workmanship initiates a sequence of events that results in loss of damage, regardless of an intervening event.

And then, of course, there is the ensuing loss clause at the end.

THE COURT: So --

MS. LATSINOVA: Now, these two prongs --

THE COURT: So I'm going to interrupt you here and ask --

MS. LATSINOVA: Yes.

THE COURT: -- a similar question that I asked Mr. Houser.

MS. LATSINOVA: Yes.

THE COURT: And that is, yes, you describe it as a broad clause initiated a sequence of events that -- so when would the ensuing loss provision ever kick in if there's combination -- if there's a combination of an uncovered and a covered cause of loss? When would -- when would -- if I -- it ever apply? And how would I know that from --

MS. LATSINOVA: You know what? I think --

THE COURT: -- these -- from reading the words here? When does -- because the initiate is broad language, and it would appear that in -- you know, I have a hard time coming up with a hypothetical when the ensuing loss provision would then apply.

MS. LATSINOVA: Okay. Well, I think the answer to this question was answered by the Sixth Circuit in the TMW case that was cited both by Vision One and by Sprague. And it was -- the limiting principle of what does an ensuing loss hold.

Just backing up a little bit, we know that every part of the policy has to be given meaning. The faulty workmanship exclusion has meaning. The initiated sequence of events are from all the faulty workmanship exclusions have meaning. The ensuing loss also has meaning.

But if ensuing loss, as the Court pointed out, is read as the plaintiffs read it, then it would swallow the exclusion

whole, completely. And Belmain said -- and every Washington case that dealt with this issue said this is not allowed. Everything has to be given meaning.

Then the next question is: What is the limiting principle? Well, how do we limit the ensuring loss of cause so that it doesn't swallow the exclusion whole? And the answer in TMW was the limiting principle is it has to deal -- ensuing loss that interrupts the normal natural chain of events initiated by an excluded loss is an ensuing loss that is potentially covered, depending on the facts in the case, or if there's damage to other property. This is a limiting principle. That's how ensuing loss has meaning without completely devouring the exclusion.

THE COURT: Well --

MS. LATSINOVA: And, of course, in Vision One, there was damage to other property.

THE COURT: So --

MS. LATSINOVA: But we don't have that here.

THE COURT: And I think TMW said there are two possible explanations. The first, frankly, was it just doesn't -- it's arguably superfluous, I think, was the first suggestion, which I don't think would be consistent with Washington law to read it that way. And then the second is what you say: Causation, in fact, breaking link. But that would require me to essentially read something into the

contract. Wouldn't it?

MS. LATSINOVA: No. No, I don't think so because ensuing loss has been interpreted that way by Washington State Supreme Court in Sprague. It's exactly what Sprague says. Sprague says there's no ensuing loss here for two reasons. Number one -- and, of course, the chain of events was very similar to here. The fin walls that supported the deck were built without proper ventilation. They were covered in stucco and there was not enough flashing. So the interior of deck supports was exposed to the elements and that created conditions where the wood deteriorated.

And so the chain of events is very similar to building a roof assembly without proper ventilation. It's the same, you know, principle of physics, so -- and the Court says Sprague -- says there's no ensuing law here. There is none. Everything is the result of the faulty construction and --

THE COURT: So why --

MS. LATSINOVA: -- there's no damage to the property and there's nothing intervening, so there's no ensuing loss here.

THE COURT: Why would --

MS. LATSINOVA: There doesn't have to be (inaudible) --

THE COURT: So let me ask you --

MS. LATSINOVA: -- in every case.

THE COURT: I'm trying to apply --

MS. LATSINOVA: Yeah.

THE COURT: -- sort of the TMW standard, which is it could be construed as a causation, in fact, breaking link; establishing independent nonforeseeable losses caused by faulty construction are covered.

But the example we get, at least in Vision One of the faulty wiring, that's not unantic- -- you know, that causing a fire is hardly unanticipated. So how does that fit in with this kind of theory?

MS. LATSINOVA: Yeah. I thought about this, and I think that the -- well, there are two examples in Vision One. One is a fire started when something strikes a wall and then there's a fire. And the other --

Oh, and I apologize. My pets are not cooperating.

So there is -- that's one example. And the other one is faulty wiring and then followed by a fire. But not all faulty wiring necessarily leads to a fire. Just like not every earthquake is followed by a fire. If a fire is after an earthquake or after faulty wiring, still is an independent in that -- that breaks the chain. It's attenuated. It's certainly much more attenuated than, you know, condensation and humidity and vapor that causes rot -- the wood to deteriorate, and the steel and iron metal to oxidize and rust.

So the chain between condensation, vapor, lack of

ventilation -- starting with lack of ventilation -- is an uninterrupted natural chain. Basically, the distinction with the fire example is that when you have conditions where a closed wood structure lacks ventilation, there will always be deterioration of the wood and whatever else the structure is built out of, whether it's fireboard, which deteriorates when it's exposed to moisture, and iron rusts and wood rots.

These are all natural events, and there's nothing attenuated there. And I use the word "attenuated" because that's the word -- the Russell case from New Hampshire that we cited in the brief that -- it's a recent case, and I think is very helpful because it goes through some examples, and it really clarifies the holding in TMW.

So if I answered the Court's question, I'll move on to --

THE COURT: You may.

MS. LATSINOVA: Okay. All right. And so, you know, when they say they have the Green Lake case on their side, no, they don't. In the Green Lake case, Judge Rothstein said that these two prongs are a far cry from each other; that -- she said that, you know, they -- in Green Lake, there was no initiated series of events prong. So that's the big distinction. So I don't think they have Green Lake on their side.

And then they mentioned the Sunwood case. And the Sunwood case is also not on their side, and I think that's Judge

Coughenour's decision where Judge Coughenour said that if -- you have to have special language to exclude a chain of events. And that language has initiated the change of events that, for various reasons, Sunwood did not apply.

But the second point here is that, you know, Counsel mentions that there's a problem with the sleepers and there's a stipulation. Stipulation is critical here.

Let's look at the stipulation, Jenna. I think it's Slide 2.

So the stipulation is not about sleepers. The stipulation says the roof assembly. The roof assembly, the entire roof assembly was defectively designed and that included the sleepers; that included the fireboard; that included all components of the roof assembly.

So when they say now it's only the sleepers, that's not what the stipulation said. And they can't argue with their own stipulation now.

And so I think there are -- the key provisions are on the -- on the screen. And I'm sure the judge -- the Court has read it carefully. It's in the record. But I think that there are three points that are critical here.

First of all, the stipulation doesn't describe some sort of strange or unusual chain of events. What happened is exactly what you would expect to happen when there's lack of ventilation. The moist air gets trapped. Humidity goes up.

Vapor builds, and moisture condenses. And then moisture is bad for wood and fireboard is bad for everything, and everything deteriorates. So everything is natural and predictable, and there's absolutely no unexpected intervening events such as a fire or (inaudible). And so there's no damage, also, to anything, other than the roof assembly itself. And just Counsel's belated attempt to, like, separate the roof assembly into sleepers and other things, that just doesn't work.

So, and then, a second important thing here is there's no chicken-and-egg problem here. The stipulation is very clear that the entire chain of events that caused damage to the roof assembly was initiated by the lack of ventilation, which is faulty. It's very explicit. But then the third thing is the most important thing here; is that the stipulated facts are legally significant because under Washington law, a cause that sets other causes in motion in unbroken sequence is called efficient proximate cause, or EPC, of the loss. And here the only possible reading of the stipulation is that the faulty lack of ventilation is the EPC of the damage to the roof assembly as a matter of law.

So let's go to Slide 3, Jenna, to summarize this.

So what we have is this chain, a chain that started by the faulty construction and design of the roof assembly that lacked ventilation. And because that chain is unbroken,

that's the EPC. So it leads to humidity, it leads to vapor, leads to condensation, and leads to the loss of damage to the roof assembly. So the EPC is a critical starting point here.

Now, this leaves the Court with a very narrow legal issue: Is there coverage for damage to the roof assembly under these stipulated facts? Not the facts that Counsel now wishes he had stipulated to, but the facts that he did stipulate to. It's the entire roof assembly, not sleepers.

And so I think the law on this -- Washington law -- is very consistent. And there's certainly no -- Belmain is not an aberration.

And so the earliest case to address was chain of events and these -- when something initiates a chain of events is Findlay. And that's from 1996. It was an "all risk" policy that excluded weather-related damage followed by earth movement.

The house was on a slope. It was damaged when heavy rain saturated the ground and the house -- and the earth moved behind the house. And so the Supreme Court ruled that the weather-related earth movement was the efficient proximate cause, EPC, of the damage to the house. And then it held that when EPC is excluded -- because EPC is excluded, the insurer may deny coverage for the chain of events that was initiated by EPC, regardless of the ensuing (inaudible).

So if Plaintiff is right, then Findlay was wrongly decided. But it's not wrongly decided. It's the law. It has been the law in Washington since 1996. And these are the ones that cited it. So did Sprague.

THE COURT: Well --

MS. LATSINOVA: Nobody has ever suggested --

THE COURT: Right. But I don't -- so -- but the question really for me isn't so much can you draft that sequence of events. It's, like, how do I make sense of the ensuing -- yeah, presumably the insurer could have taken out that ensuing loss per- -- the exception to the exception. Right? That doesn't have to be there either. But having that in there now doesn't -- is why we're here right now is because we have an exception and then an exception to the exception. And then the question is: How do you reconcile those two? Right?

MS. LATSINOVA: Right.

THE COURT: And I think it gets back to if I -- if I were to boil it down, the only way to make sense of the ensuing loss provision is to essentially import some further break of cause- -- break of chain causation. Otherwise, it would be meaning -- you know, in order to have put meaning to it under your interpretation. Is that right? Fair to say?

MS. LATSINOVA: Well, our interpretation is the same interpretation that the Supreme Court adopted in Sprague.

Right? The limiting -- the limiting principle of ensuing loss is Sprague. Sprague says it is an ensuing loss when it breaks -- something unexpected happens and when there is damage to other property. That's the limiting principle. And that didn't happen here.

So if there was a fire, for example, in the roof for some reason, that would be covered because it's under -- it's under an ensuing loss. And that's the -- that's the limiting principle. There is no -- that's what ensuing loss means. It's not just everything that happens after something else. Because if that's the case, then a whole initiating chain of events would be out the window. And every case has said that's not possible.

So I think what we are searching for is what is the nature of the limiting principle. And the nature of the limiting principle -- I believe that question was answered in TMW and adopted in Sprague. Because if one did -- and I'll go back to their argument that fire is just like condensation here. No, it is not. Fire doesn't always follow miswired electrical work. But wood deterioration always follows exposure to the elements, condensation, vapor. It's in the chain. It's in the same chain. When this is one continuous chain, it can be excluded under Findlay. And it is not -- this exclusion is not reversed by the ensuing loss clause.

So I think the answer is Sprague. The two limiting

principles are something that interrupts the chain. That didn't happen here. And then restore the property.

There was damage to other property in Vision One. Let's remember that the -- some retaining walls were incorrectly -- were incorrectly poured and then that job failed, and the result, some floor on the second -- on the first floor of the parking garage fell down. So there was faulty workmanship that was followed by damage to other property. Damage to other property is ensuing loss. That's what it means. That's what TMW says it means. That's what Vision One says it means. And that's what Sprague said it means. There has to be damage to other property.

And here that's absolutely -- it's impossible to say that because we have a stipulation that says the roof assembly -- not the sleepers -- the roof assembly was defectively designed and built. And then the chain of events that pulls from that is just a natural chain that just follows the rules -- the rules -- the laws of physics. It's a matter of time, not a matter of chance. So that's, I think, the correct answer to the limiting principle here.

Let's go to Belmain, Jenna.

And so, of course, Belmain, is exactly on point. And Counsel can say, Oh, Vision One is dicta. A discussion of the ensuing loss there initiated broad dicta. But they can't distinguish Belmain. And, of course, Belmain is not

binding. It's a decision by the federal district court. But it's on all fours. It has all three things that we have. It has the identical second prong in the policy. It has the admission that the faulty construction initiated the entire chain. And, unlike in Vision One, the insurer relied on that prong to deny coverage. And so Belmain is certainly not a mistake, because Belmain followed Findlay and followed many cases before it in Washington, so it's consistent. The problem was not Belmain. The problem is that Belmain correctly states Washington law. And, moreover, Belmain is consistent with Sprague. And Sprague is binding. Yes, that's the issue.

And so Belmain, in fact, specifically -- I just want to emphasize the second bullet here. That's really the critical holding in Belmain. An insurance company can legitimately seek protection from an ensuing loss clause when an excluded peril sets in motion a chain of events leading to a loss. That's the holding in Findlay. That's what Findlay says in 1996. And that's what Sprague said on the same day as Vision One. Certainly, Sprague knew what -- the authors of the Sprague decision knew what the Court said the same day in Vision One. These cases are companion cases and up to -- and Belmain and Sprague are completely consistent.

Yes, an insurance company can seek protection from the

ensuing loss clause so when there's a chain of events leading to a loss, regardless of the ensuing loss clause, the exclusion -- it excludes the entire chain. That's Washington law according to Findlay and according to Belmain and according to Sprague because Sprague said the same thing.

And the important thing, I think, in Sprague, is that Sprague didn't even have the initiated language. Right? It only had the cause background, which is even narrower.

So if there is no ensuing loss in Sprague, there can be no ensuing loss here because we have the initiated sequences of events prong, so --

And I just want to -- let's go to Slide 7, Jenna, just to summarize.

So there's an important case I think that Plaintiffs have to grapple with, and that's Capeluoto. And that was in 1999, Division I, I believe. Capeluoto said that ensuing loss provisions are exceptions to the policy exclusions, and they should not be interpreted to create coverage.

And I think that's what the Court asked about when the Court referred to Justice Stephens' language in Vision One. The ensuing loss can never swallow the policy exclusion whole. And it cannot create coverage that was excluded to begin with. And we know that you can exclude an entire chain of events when it is started by an EPC.

And here, based on the stipulation, we know that faulty workmanship exclusion, faulty workmanship initiated the entire chain. So the entire chain is excluded and the ensuing loss cannot be interpreted to undo that.

And I think the other two bullets on this slide are the -- just illustration to show that Sprague adopted that TMW limiting principle. It says right here -- and I'll move the -- I need to organize my hard drive.

So Sprague says two things, citing TMW. The classic example, the covered fire loss resulting from defective wiring explains the essence of the clause. The clause breaks the causal chain between excluded risk and losses caused by excluded (inaudible) in order to provide coverage for the subsequent loss.

If there had been losses other than to the fin walls, then there would be. So that's the second limiting principle in TMW. And then there might be coverage.

And so I think Sprague is on point. The only difference between Sprague and our case is that in Sprague, the -- there was a caused-by prong and no initiated -- the broader prong in the faulty workmanship exclusion wasn't there. And so certainly that difference is what -- it doesn't help Plaintiff's argument. It helps our argument. That's what Sprague is controlling.

And just to illustrate again the chain of events here and

the chain of events in Sprague. In Sprague, the faulty construction of the walls, like the vents and flashing that led to exposure to the elements, deterioration of fin walls, and then impairment of the structural integrity and ultimately damage to the -- damage to the fin walls and deck supports.

And the Court looks at this sequence and the Court says there's no ensuing loss here anywhere, citing TMW. There is no ensuing loss at all. Why? Because the EPC -- the EPC is the faulty construction. And faulty construction is excluded, even without the initiated prong. And certainly with the initiated prong, that argument is even stronger. And we have the same thing. We have faulty construction and design of the roof assembly -- again, roof assembly, not just the sleepers -- that result in humidity vapor condensation and ultimately very predictable damage to the -- to the entire roof assembly, not just the sleepers or not just the fireboard that they're trying to now separate, so -- and they're really -- the answer to this is -- well, let's just take the vapor out of this chain and call it an ensuing loss. Is this what they're doing. They're trying to break this chain and say, well, vapor is independent.

Well, that doesn't work. First of all, it's not independent from the stipulation. The independent cause of the loss in the stipulation in Paragraph 8 at Line -- at

Line 6 approximately -- is the faulty construction of the entire roof assembly. So you cannot just take vapor out and call it an ensuing loss. How do we know that? Well, Capeluoto said that in 1999.

Do you have that slide? No. I think we don't have a slide on that. But Capeluoto said --

THE COURT: If you could wrap up -- if you could wrap up, Ms. Latsinova, because --

MS. LATSINOVA: Yes.

THE COURT: -- I've already gone beyond.

MS. LATSINOVA: Yes. Yes, I am. And so how do we know they cannot do this, what the slide represents? We know that they cannot do that because in Capeluoto, the Court said you cannot just take one element in the chain and call it an ensuing loss or say that it is independent. It doesn't work that way.

So just to summarize everything, the four points I think are important to remember, and they are dispositive. In Washington, an insurer can exclude a chain of events when the EPC initiated their chain. That's Findlay. We have a situation that shows the excluded faulty workmanship, lack of ventilation of the entire roof assembly is the EPC of the loss. The Farmers' policy legitimately excludes the entire chain that was started by faulty workmanship. And we know from Capeluoto and from Sprague that Gardens cannot just

pull one element out of the chain and call it an ensuing loss. It doesn't work that way.

So we think we read the policy correctly, read the -- certainly we rely on the stipulation accurately. We don't try to reargue the stipulation. And we follow the Washington law currently. Belmain and Sprague and Vision One, but mostly Sprague. Sprague is on point. It applies Vision One to a chain of events that's very similar, and there is no coverage. Thank you.

THE COURT: Thank you.

Okay. Mr. Houser, rebuttal.

MR. HOUSER: Yes, Your Honor. I'd like to start by going back to I think your first question about how to give meaning to the initiates the sequence of events language.

I do want to point out in this exact factual scenario, it's difficult to explain additional meanings, but there are other scenarios where it does have different meaning. For example, it's actually narrower in certain circumstances than just loss caused by rot, for example. So it -- I'm often citing it to say rot isn't excluded here because rot wasn't the direct and sole cause and it wasn't the initiating cause. So it does have meaning, and this is not the only factual scenario that Farmers was addressing. That's addressing lots of different factual scenarios when it selects meaning for policy language.

Next, I want to follow up on Ms. Latsinova's comments about what is the limiting principle, because I think that's important. Vision One did ask a question and say, Well, what's to stop creative policyholder attorneys from just showing up and arguing, like, well, we think there's coverage for gravity as an ensuing loss, for example. I'm going to tell you why I can't do that, because that's exactly what I try to do as a creative policyholder attorney. It's because it's the insurance companies who decide how to divide up the entire world into categories of damage and causation. They don't mention gravity as something that is a separate and distinct cause that could be covered or excluded. That's why I can't go there and I can't make that argument.

But when you're talking about condensation and water vapor, the insurance companies are the ones who told us that that's a potential cause of damage. And so here that's a covered peril because it's contemplated, but it's not excluded. So that's a real important distinction that Vision One made. And that's why Vision One cited TMW, for that principle, not to endorse TMW as a rule. In fact, the Vision One rule contradicts the TMW rule.

Counsel said that there will always be damage from lack of ventilation. That is just not true. And not from personal testimony to that, but also this case -- the facts of this

case show that. If you look at Footnote 8 in my opposition, I've cited examples from the expert reports where in some locations there is no damage here. And that's the areas where there's not much water vapor or condensation.

Green Lake and Sunwood, they do favor us. They say that if any cause or any resulting damage is not [sic] covered, and even if other things are excluded, there's going to be coverage. And Sprague said that Washington law governing ensuing loss coverage is authoritatively set forth in Vision One. And we defer to Vision One. We're not going to repeat the analysis. We're just applying it here. So we have to look to Vision One to get the authoritative analysis.

Final point, Belmain and what it says about Vision One. Well, Belmain says Vision One never looked at the initiated sequence of events language and never said whether or not it was effective. That is just not true. Pages 521 to 522 the Court concludes its analysis in Vision One by saying even if we allow the insured to belatedly rely upon the initiates a sequence of events language, there's no indication that it would apply here. And it doesn't specifically call out any conflict between the ensuing loss exception in that language, but it does say there's still going to be ensuing loss coverage here regardless of whether or not we apply the initiates a sequence of events language.

So Vision One -- really, this argument begins and ends

with Vision One. It's the closest factual case. It's the case that authoritatively sets out Washington law. And it conclusively demonstrates that you start with the exclusion and then you analyze the ensuing loss exception as it operates as an exception to the exclusion to carve it out. So if you're going to give meaning to it, it covers fire damage resulting from faulty design. It covers condensation damage resulting from faulty design. Thank you, Your Honor.

THE COURT: All right. Thank you. Thank you both, Counsel, for the thorough briefing on the issue.

The facts here somewhat unusually are all -- essentially all stipulated. I know there's a dispute about some things Plaintiffs raised in their motion. But I'm going to rely on the stipulated facts to make a determination on the issue about the application of the insurance policy to the facts that were stipulated to. And here essentially the stipulated facts are these condominiums were constructed in 1979, and then in 2001 damage was discovered due to a faulty design construction. There was inadequate ventilation of the roof assembly and that resulted in the long-term condensation of the water vapor of the underside of the roof sheathing. Repairs were done in 2003 and '04, but those were also defective. There wasn't enough ventilation to prevent condensation and damage.

And then in 2019, the condominium association discovered

damage caused by the inadequate ventilation. And there had been long-term condensation of water vapor on the underside of the roof sheathing resulting in damage. And there's a recommendation for complete replacement of the roof.

At issue is an insurance policy that Farmers issued in October of 2002, which allows coverage for direct physical loss or damage to a building caused or resulting from any covered cause of loss. A cause of loss is a risk of direct physical loss, unless it's excluded. Excluded is a loss or damage will be considered to be caused by an excluded event if the occurrence of that event directly or solely results in the loss or damage or initiates a sequence of events that results in the loss or damage. And among those are faulty, inadequate, or defective design, repair, or construction.

And the parties have agreed this exclusion in their stipulation applies in this case based on those facts. The question is, the exception to the exception, the ensuing loss provision that provides but if a loss or damage by a covered cause of loss results, we will pay for the resulting loss or damage.

And so at the outset, I think as I kind of questioned Mr. Houser, in Vision One, the Court in that case essentially said you should look -- let's see if I have my -- let me pull out exactly what Justice Stephens said. The dispositive question in analyzing ensuing loss causes is

whether the loss ensues from the excluded event is covered or excluded. The ensuing loss is also an excluded peril or an excluded loss under a policy. There is no coverage. But if the policy covers the peril or loss that results from the excluded event, then the ensuing loss clause provides coverage.

So I have to go back and then look at whether or not the loss is a covered or not covered event. And in this case, unlike -- this issue came up in Vision One in a much more different way -- is that language provides that it's not covered if it's -- the loss or damage initiates a sequence of events that results in damage or loss.

And the parties have stipulated that's at issue here. And that's what the faulty construction is -- initiated the sequence of events.

So I think simplistically, and if I were to just stop there under this analysis, it wouldn't be covered, so -- but I wanted to apply a little deeper thinking in that and ultimately kind of the question is, we have two interpretations of this insurance policy. And there's some general provisions. Insurance contracts are construed as a whole, and each clause is given force and effect. It's to be given a fair and reasonable construction as an average person purchasing insurance. Any ambiguities are construed in favor of insured.

Here, essentially -- and I appreciate Mr. Houser in rebuttal saying there is some meaning to the sequence of events language. But I have a hard time envisioning any in which the clear purpose of that provision would have import if I were to interpret that provision as covering something that's in this case. And that is damage that has been initiated by a sequence of events of an uncovered event. It's clearly intended to exclude that.

On the other hand -- so it's hard for me to follow the Plaintiff's interpretation, not essentially render that provision superfluous.

On the other hand, I have to consider the defense's interpretation, which could arguably render the ensuing loss clause superfluous if I were to interpret that broadly. And that's where I do look at TMW. I know that Vision One cited it. It didn't necessarily endorse everything in there, but there's a body of case law that also says -- and it kicks in when there's some sort of unexpected or some kind of causal break, particularly when you have that sequence of events language.

That interpretation allows me to harmonize both provisions and allow them both to stand. So, given that, I do think it's the reasonable -- I go back to my original interpretation applying the Vision One test suggested by Justice Stephens, and I'm going to conclude this -- the

damage that's alleged here to the -- I shouldn't say "alleged" -- stipulated to, is not covered under this insurance contract because it falls under an excluded damage. It is a -- loss or damage will be considered to be caused by excluded event, the faulty workmanship, if the occurrence of that directly and solely results in the loss or damage or initiates a sequence of events that results in the loss or damage. And it's agreed that it initiated that sequence. I can't find that the ensuing loss exception somehow resurrected that provision.

So I am going to grant the defense's motion. I assume this isn't going to be the probably last word in the case. I guess my question is: The defense sought this. The briefing covered the legal issue with respect to the application of the insurance policy. And the ultimate question -- Defense is seeking dismissal. I don't think -- I looked at the complaint. I didn't see any kind of response to the -- somehow, if I were to interpret this in the way as I've done, that there's still a case.

Does that resolve the case, Mr. Houser? Of which case, of course, then you would have an immediate appeal.

MR. HOUSER: I believe so, Your Honor. I can't think right now why it wouldn't resolve the case immediately in a judgment for Defendant.

THE COURT: Okay. So I will issue the order that was

proposed by the defense.

I want to say I appreciate -- I doubt I'm the last word on this, absent some resolution. And I appreciate there isn't quite a case on all fours. I appreciate all the thorough briefing. I'm sure the Court of Appeals will have an interesting time with this issue. And perhaps I'll see you again.

MR. HOUSER: Thank you, Your Honor.

THE COURT: All right.

MS. LATSINOVA: Thank you, Your Honor.

(August 16, 2021 hearing concluded)

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings or other legal recordings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the electronic recording directly from the trial court conducting the hearing; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of August, 2021.

s/ Angela Dutenhoffer, CET
Reed Jackson Watkins, LLC
800 5th Avenue, Suite 101-183
Seattle, Washington 98104
Telephone: (206) 624-3005
E-mail: info@rjwtranscripts.com

DECLARATION OF SERVICE

I, Rachael Y. Cullen, declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct. On April 12, 2023, I caused a copy of the foregoing document to be served upon the Court and to the following individual(s) in the manner indicated below:

Daniel S. Houser, WSBA No. 32327 HOUSER LAW, PLLC 1325 4th Ave., Suite 1650 Seattle, WA 98101 (206) 962-5810 Email: dan@dhouserlaw.com shelly@dhouserlaw.com	☐ hand delivery ☐ facsimile ☐ overnight delivery ☐ first class mail ☒ efiling
Ian C. Cairns, WSBA No. 43210 Howard M. Goodfriend, WSBA No. 14355 SMITH GOODFRIEND, P.S. 1619 8th Avenue N. Seattle, WA 98109 (206) 624-0974 Email: ian@washingtonappeals.com howard@washingtonappeals.com	☐ hand delivery ☐ facsimile ☐ overnight delivery ☐ first class mail ☒ efiling

Attorneys for The Gardens Condominium

Executed on April 12, 2023.

/s/ Rachael Y. Cullen
Rachael Y. Cullen, Legal Practice Assistant

STOEL RIVES LLP

April 12, 2023 - 2:34 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	The Gardens Condominium, Appellant v. Farmers Insurance Exchange, Respondent (836781)

The following documents have been uploaded:

- PRV_Petition_for_Review_20230412141840SC078962_3764.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 20230412 Farmers Petition for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- dan@dhouserlaw.com
- howard@washingtonappeals.com
- ian@washingtonappeals.com
- jenna.poligo@stoel.com
- karrie.fielder@stoel.com
- lauren.markovich@stoel.com
- leslie.lomax@stoel.com
- shelly@dhouserlaw.com
- timothy.snider@stoel.com

Comments:

Sender Name: Rachael Cullen - Email: rachael.cullen@stoel.com
Filing on Behalf of: Margarita V. Latsinova - Email: rita.latsinova@stoel.com (Alternate Email:)

Address:
600 University St.
Suite 3600
Seattle, WA, 98101
Phone: (206) 386-7574

Note: The Filing Id is 20230412141840SC078962