No. 97170-6

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 77303-8

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

FEENIX PARKSIDE LLC,

Plaintiff/Appellant,

v.

BERKLEY NORTH PACIFIC and CONTINENTAL WESTERN INSURANCE COMPANY,

Defendant/Respondent.

PETITION FOR REVIEW

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CASES

STATUTES

I. IDENTITY OF PETITIONERS

Berkley North Pacific ("BNP") and Continental Western Insurance Company ("CWIC") ask this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

BNP and CWIC seek review of the published decision terminating review in *Feenix Parkside LLC v. Berkley North Pacific and Continental Western Ins. Co.*, No. 77303-8-I, issued by Division I of the Court of Appeals on April 8, 2019 (the "Decision"). A copy of the Decision is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

This appeal arises out of BNP's denial of insurance coverage following the collapse of a part of a building owned by Feenix Parkside LLC ("Feenix"). The issue presented for review is whether the term "decay" can reasonably mean "a gradual decline in strength, soundness, or prosperity or in degree of excellence or performance" when that definition violates several of Washington's well-established rules of insurance policy construction and interpretation.

IV. STATEMENT OF THE CASE

A. Collapse of Feenix's Building and BNP's Initial Claim Investigation

Feenix owns a commercial building located in Auburn, Washington (the "Building"). Decision at 1. On July 4, 2015, a portion of the Building's roof truss system failed resulting in the collapse of that portion of the roof. *Id*. Feenix submitted a claim to BNP. *Id*.

BNP's structural engineering consultant inspected the Building on four occasions in July of 2015. Decision at 2. Based on his inspections and research, BNP's engineer performed a structural analysis of the roof truss system. *Id.* The engineer opined that the roof trusses failed as a result of two concurrent factors: (1) the configuration of the truss plate connection adjacent to the rear exterior bearing wall had inadequate strength to resist the applied loads (inadequate design issue), and (2) higher than normal temperatures which reduced the strength of the wood trusses by up to 30%. *Id.*.

B. The Insurance Policy and BNP's Initial Claim Decision

The CWIC property insurance policy BNP issued to Feenix (the "Policy") provides all-risk property coverage. Decision at 6. In the main, all-risk portion of the Policy, there are specific exclusions to coverage for damage caused by the following items: (1) wet or dry rot, (2) wear and tear, (3) decay, (4) deterioration, (5) any quality in property that causes it

to damage or destroy itself, (6) changes in or extremes of temperature, (7) continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more, (8) collapse, and (9) inadequate design of part or all of any property on or off the described premises. *Id.*; see also CP 292-94.

Despite excluding coverage for the peril of collapse under the main, all-risk portion of the Policy, there is a separate section which adds limited coverage back for collapse. Decision at 7. This limited coverage is not an all-risk coverage in which all risks are covered unless excluded; rather, it is a specified peril coverage, meaning it only applies if one of the specified perils causes the collapse. *Id.* Specifically, the Policy's collapse coverage only applies when the direct physical damage caused by collapse is caused by "one or more" of the following enumerated perils: (1) the "specified causes of loss"[1] or breakage of building glass; (2) decay that is hidden from view, unless the presence of decay is known to an insured prior to collapse; (3) insect or vermin damage that is hidden from view,

[1] "Specified Causes of Loss" means: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage. Decision at 8. "Water damage" is defined in the Policy as the "accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam." *Id*.

unless the presence of such damage is known to an insured prior to collapse; (4) weight of people or personal property; (5) weight of rain that collects on a roof; (6) use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.[2] Decision at 7-8.

Based on its retained engineer's opinions, BNP denied coverage on August 19, 2015, for the collapse at the Building because it was caused by excessive temperatures in the attic space and the inadequate design of the truss connection, neither of which is a specified peril in the Policy's collapse coverage under the facts surrounding this claim. Decision at 2

C. Feenix's Dispute of Claim Denial and BNP's Subsequent Investigation and Final Claim Decision

On June 22, 2016, Feenix disputed the basis for BNP's denial via a written letter, which enclosed a report from Feenix's engineer. Decision at 2. According to Feenix's engineer, the collapse was caused by the combined effects of elevated temperatures in the attic from the hot weather just prior to and at the time of the collapse and elevated moisture content (in excess of 19%) of the wood trusses resulting from long term water leaks which delivered moisture to the ends of the trusses. Decision

[2] If the collapse occurs after the course of construction, remodeling or renovation, then "defective material or methods in construction, remodeling or renovation" is a covered cause of collapse only if it combines with one of the other enumerated perils in causing the collapse. Decision at 7-8.

at 3. In its letter and based on its engineer's opinions, Feenix took the position that hidden decay caused by moisture seeping or leaking into the truss system caused the collapse and was covered by the Policy. *Id*.

Based on Feenix's letter and engineering report, BNP reopened its claim investigation and on July 13, 2016, its engineer re-examined the failed wood trusses. *Id.* During the inspection, the engineer did not observe any visible discoloration or wood decay on the failure surfaces of the trusses. *Id*. The engineer did note some iron staining on the wood surrounding nail penetrations in some truss members, but noted that this does not reduce the strength of the affected wood. *Id*. Based on its engineer's observations, BNP did not change its initial coverage denial and informed Feenix of its decision via a letter dated August 23, 2016. *Id*.

D. The Filing of the Lawsuit, Discovery, Motions for Summary Judgment and the Appeal

Feenix filed a lawsuit against BNP and CWIC on September 23, 2016. Decision at 4. During litigation, BNP took the deposition of Feenix's engineer. Decision at 14. Division I indicated that the engineer testified about the lack of decay on the trusses, meaning wet rot. *Id.* This is not entirely correct. In fact, during the deposition, Feenix's own engineer testified that he did not observe any "mold, wood decay or other decay" on the trusses which collapsed. CP 242.

Following the completion of discovery, the parties filed cross-motions for summary judgment regarding coverage under the Policy, *i.e.*, Feenix's breach of contract claim. Decision at 4. On August 4, 2017, the trial court granted BNP's motion and denied Feenix's motion. *Id*. On September 17, 2017, the trial court entered an amended order on the parties' cross-motions which contained all of the documents considered by the trial court, some of which had not been included in the initial order. *Id*. The amended order did not alter the trial court's substantive decision. *Id.*

Feenix subsequently appealed. On appeal, Division I reversed the trial court's orders on summary judgment; applied an expansive definition of the word "decay"; and found an issue of fact as to the causes of the collapse. Decision at 15-16.

Now, BNP and CWIC petition this Court for review of Division I's decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Petition Should be Granted Under RAP 13.4(b)(4) Because it Involves an Issue of Significant Public Interest

The Decision is of general public interest or importance. As the Court is aware, RCW 48.01.030 states that "[t]he business of insurance is one affected by the public interest, requiring that all persons be actuated

by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance." In addition, the Decision will give guidance to insureds and insurers alike regarding property claims involving collapse and decay, two issues which are prevalent in the Pacific Northwest, mostly in the context of water intrusion insurance claims. By defining decay as a "gradual loss of strength" in the abstract, the Decision opens the door to coverage for collapse damage that results from perils not enumerated in the named peril collapse coverage, or even collapse damage that results from unambiguously excluded perils.

In addition, the Decision is of particular importance to property insurers doing business in Washington in determining how to properly calculate premium on such policies. As written, the Decision may require property insurers to extend collapse coverage for damage caused by perils not enumerated in the named peril collapse coverage provision. This Court's review of the Decision will provide clarity to insurers on the meaning of the term "decay" in a property policy, thereby allowing them to determine the appropriate premium based on the covered causes of collapse enumerated in their policies – and not under the nebulous definition of "decay" adopted in Division I's decision.

B. This Petition Should be Granted Under RAP 13.4(b)(1) and (2) Because the Decision is in Conflict with Decisions of the Supreme Court and the Court of Appeals

As discussed herein, the Decision violates several of Washington's well-established rules of insurance policy construction and interpretation previously enunciated in prior decisions of this Court and the Washington Court of Appeals.

1. The Court of Appeals Erred When it Determined Feenix's Definition of Decay was Reasonable Because that Definition is a Strained Interpretation Which does not Apply in the Context Used

In the Decision, Division I adopted an alternative definition of decay: "a gradual decline in strength, soundness, or prosperity or in degree of excellence or performance," a definition taken from Webster's Dictionary. Decision at 9-10, 15. The Decision relies on Feenix's theory that repeated leakage or seepage of water into the wooden truss system caused a decline in the strength of the wood and that such moisture, in combination with excessive temperatures, caused the wood trusses to no longer be able to bear their load. Decision at 2-3. The Decision essentially labels this confluence of conditions neatly as "decay" so as to trigger coverage for collapse.

However, this definition does not apply in the context it is used in the Policy, as it must under well-established canons of insurance policy interpretation. *Queen*) *Anne Park Homeowners Ass'n v. State Farm Fire*

and Cas. Co., 183 Wn.2d 485, 489, 352 P.3d 790 (2015. Division I's definition of "decay" is not applicable when describing the gradual loss of strength of a wooden roof truss because a wooden roof truss cannot have a gradual decline in "prosperity" or "degree of excellence or performance," as the entirety of the definition demands. As such, the definition is a strained or forced interpretation that leads to an absurd conclusion. *See, e.g., Washington Pub. Util. Dists. Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989).

Rather, the definition adopted by Division I is appropriately used outside the realm of property damage insurance, to describe such things as "the decay of society" or "the decay of the public school system." It is not intended to describe the decay of a wood truss system or similar structural members of a building, resulting in the collapse of a roof or other parts of the building.

2. The Court of Appeals Erred When it Determined Feenix's Definition of Decay was Reasonable Because that Definition Inappropriately Recharacterizes the Perils of "Extremes of Temperature," and "Continuous or Repeated Seepage of Water" Which are not Covered Causes of Collapse, as "Decay"

Division I adopted its definition of decay based on Feenix's engineer's opinion that the collapse was caused by the combined effects of extreme temperatures in the attic space and excessive moisture in the

trusses resulting from long term seepage or leakage of water. Decision at 12. Division I failed to recognize that extremes of temperatures and repeated seepage or leakage of water are (1) excluded under the Policy's all-risk coverage and (2) not listed as covered causes of collapse in the Policy's Additional Coverage - Collapse. Instead, Division I allowed Feenix to impermissibly recharacterize those excluded perils as "decay," meaning a generic "loss of strength," thereby avoiding applicable exclusions and triggering the limited collapse coverage.

The Decision therefore violates another basic principle of Washington insurance law: an insured may not avoid a contractual exclusion or other provision merely by affixing an additional label or separate characterization to the act or event causing the loss. *Kish v. Insurance Co. of North America*, 125 Wn.2d 164, 883 P.2d 308 (1994). In that case, an insured attempted to avoid a contractual exclusion for flood by characterizing the cause of its loss as rain, when rain-induced flooding caused property damage. *Id.*, at 167-68. On appeal, this Court held that an insured may not simply recharacterize an excluded cause of loss in order to avoid a policy exclusion. *Id.*, at 171. Thus, the insured in *Kish* could not avoid the flood exclusion by characterizing the cause of the loss as rain when those two terms meant the same thing in that particular context. *Id.*, at 173.

Here, in contravention of the holding in *Kish*, the Decision improperly recharacterizes the perils of extremes in heat (in the attic space) and excessive moisture content in the trusses by way of repeated seepage or leakage of water as "decay" because "decay" is one of the covered causes of collapse and these perils which caused the collapse are not. Because "decay," as defined by Division I, means the same thing as the combination of excessive heat and repeated seepage or leakage of water in the context of Feenix's insurance claim, this Court cannot simply allow the renaming of those perils in order to trigger coverage, as this Court refused to do in *Kish*.

Moreover, this is particularly true because the Policy contains specific policy references to extremes in temperature and repeated seepage or leakage of water. In fact, these two perils are specifically excluded in the Policy under the all-risk coverage. CP 293 (Exclusion 2.d.(7)(b) and Exclusion 2.f.). Because BNP specifically identified and excluded those perils in the main portion of the Policy, and chose not to include them in the list of covered causes of collapse, BNP clearly intended to bar coverage for any collapse caused by those perils – and a reasonable reader of the Policy would understand the collapse coverage does not nullify the exclusion of those perils from coverage. In this instance, Division I's recharacterization of these non-covered perils as "decay" is not permitted

under the *Kish* holding. Moreover, the various provisions of the Policy "must be construed together in order to give force and effect to each clause." *Washington Pub. Util. Dists. Utils. Sys.*, 112 Wn.2d at 10. As such, decay cannot mean the same thing as extremes in temperature and repeated seepage or leakage of water as they do in the context of the insurance policy, which expressly bars coverage for damage that results from such perils.

3. The Court of Appeals Erred When it Determined Feenix's Definition of Decay was Reasonable Because that Definition Ignores the Policy's Definition of "Water Damage," Thereby Impermissibly Expanding Collapse Coverage to Include Uncovered "Water Damage"

The definition of decay adopted by Division I is also unreasonable because it failed to give full force and effect to the defined term "water damage," which is one of the named covered perils in the Policy's collapse coverage. In doing so, the definition adopted by Division I inappropriately expands the scope of collapse coverage caused by "water damage," which renders the limited definition in the Policy meaningless.

As stated above, collapse coverage in the Policy extends only to specific named perils. The first named peril in the Policy's collapse coverage is identified as the "specified causes of loss." Decision at 7. The definition of "specified causes of loss" includes the peril of "water damage," which is defined in the Policy as the "accidental discharge or

leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam." Decision at 8. Because the Policy's collapse coverage is a named-peril coverage, the only covered causes are specifically listed therein. Thus, the only kind of "water damage" which is covered in the collapse coverage is water damage resulting from the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance. Given this definition in the Policy, water damage of any other kind should not trigger collapse coverage under the express terms of the coverage.

However, the definition of decay adopted by Division I, under the particular facts of this claim, impermissibly expands the definition of covered "water damage" to include not only water damage from failed plumbing, heating, air conditioning systems, but also water damage resulting from rainwater or any other source of moisture intrusion. As a result, Division I's definition, when read in conjunction with the Policy's collapse coverage, is unreasonable because it renders the definition of "water damage" ineffective and impermissibly expands the scope of

collapse coverage to include water damage not contemplated by the Policy.

BNP and CWIC note that Feenix argued on appeal that the "water intrusion through the Parkside roof system and the elevated moisture which resulted from it being trapped in the roof system over time reduced the strength of the wood trusses, which led to the collapse of the roof system." Decision at 16. There, Feenix asserted that the term "system" in the Policy is susceptible to more than one reasonable interpretation, arguing that the definition of "system" can also apply to the "roof system" of the building. *Id.*

Applying the doctrine of ejusdem generis, Division I correctly determined that the roof system was not of the same general class as the specific systems cited in the Policy. Decision at 17. That is, a roof system is not the equivalent of a plumbing, heating, or air conditioning system, because those systems are all designed to use water or steam in their operation, while a roof system serves to exclude water. *Id.* Thus, Division I correctly rejected Feenix's argument in this regard.

Despite correctly rejecting this argument, Division I undermined its own ruling by adopting a decay definition that encompasses any collapse resulting from a "gradual loss of strength," which impermissibly allows coverage for collapse caused by water damage well beyond the

limited definition of "water damage" contained in the Policy. With respect to its ruling that a roof system was not the same type of system contained in the definition of "water damage," Division I understood that proper policy interpretation cannot expand coverage by applying a definition that makes no sense viewed in the context of the overall structure and purposes of the Policy. However, Division I erred in failing to use the same common sense reading of the Policy as a whole, taking into account all of the applicable exclusions and the inherently limited "named peril" collapse coverage, when it adopted its definition of "decay."

4. The Court of Appeals Erred When it Determined Feenix's Definition of Decay was Reasonable Because that Definition is Overbroad Given that any Collapse of a Building Necessarily Involves a "Loss of Strength"

Division I's definition of "decay" is also unreasonable because it is overly broad, rendering the limitations of the Policy's collapse coverage nonsensical or ineffective, in contravention of this Court's well-established rules of policy interpretation. *Washington Pub. Util. Dists. Utils. Sys.*, 112 Wn.2d at 11.

By defining decay as it did, Division I adopted Feenix's circular reasoning. That is, when a wooden building collapses, it necessarily involves a loss of strength of its structural members; and any building

collapse would be covered regardless of the actual cause, whether that be extreme temperatures, repeated exposure to rain water, flood, hidden or latent defect or any quality in property which causes it to damage or destroy itself, earth movement, wear and tear, deterioration, an insured's failure to maintain a building in normal condition, weather conditions, etc., because all of these otherwise excluded perils can cause a "gradual loss of strength" in wood. Simply put, Division I's definition "decay" is unreasonable because it nullifies numerous unambiguous Policy exclusions and expands the scope of coverage to perils not otherwise identified as covered perils in the limited collapse coverage portion of the Policy.

A simple example illustrates the unreasonableness of the definition of "decay" that Division I has adopted. Under that definition, getting a flat tire after running over a small nail would be "decay" because the tire has gradually declined in "strength or soundness." Similarly, "collapse" would always involve "decay" of this type because with any collapse there is must have been a "loss of strength or soundness" in the structural members supporting a roof assembly or other portions of a building. The relevant question under the Policy is not whether there was a "loss of strength" – every collapse is generally the result of "a loss of strength." Under the limited, named peril collapse coverage afforded under the

Policy (and other similar property damage policies), the relevant inquiry is whether the *cause* of a loss of strength that results in the collapse of a building is a *covered peril*.

Unfortunately, as Division I has defined the term "decay," the distinction between a building collapse that results from a covered "named peril" and one that results from perils that are not "named perils" is written out of the Policy. So is the distinction between a building collapse that results from a specifically excluded peril – which can be covered so long as it is the result of a generic "loss of strength" of the building's supporting structure. As a result, Division I's definition of decay is unreasonable because it is overly broad, rendering the limitations of Collapse Coverage ineffective and because a reasonable purchaser of insurance would not view the clear language in the collapse coverage otherwise. *Washington Pub. Util. Dists. Utils. Sys.*, 112 Wn.2d at 11; *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012).

In summary, Division I has adopted a definition of "decay" that does violence to the plain meaning of the Policy, obliterating clear exclusions and expanding the limited collapse coverage beyond the specific named perils for which coverage is afforded. This Court should accept review to correct Division I's error – which if allowed to stand will

affect numerous collapse claims in the state of Washington and likely will result in increased premiums for such coverage in the future.

VI. CONCLUSION

This Court should accept review for the reasons indicated in Part V. and affirm the trial court's summary judgment order dismissing the case.

RESPECTFULLY SUBMITTED this 7th day of May, 2019.

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CERTIFICATE OF SERVICE

I, Karen Langridge, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on May 7, 2019, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Petition for Review; and**
- **Certificate of Service.**

Counsel for Plaintiff Feenix Parkside LLC
Jose D. Vasquez
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Karr Tuttle Campbell
701 5th Ave Ste 3300
Seattle, WA 98104-7055

☐ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Overnight
■ E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of May, 2019.

/s Karen Langridge
Karen Langridge

APPENDIX A

FILED
4/8/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FEENIX PARKSIDE LLC,

Appellant,

v.

BERKLEY NORTH PACIFIC and CONTINENTAL WESTERN INSURANCE COMPANY,

Respondents.

No. 77303-8-I

DIVISION ONE

PUBLISHED OPINION

FILED: April 8, 2019

APPELWICK, C.J. — The ceiling of a commercial building owned by Feenix partially collapsed. Feenix sought coverage under the insurance policy's coverage for collapse due to decay, claiming the collapse was caused by a gradual decline in strength, soundness. Berkley denied coverage for the loss. The trial court granted summary judgment to Berkley on the coverage issue. We reverse.

FACTS

Feenix Parkside LLC (Feenix) owns a single story commercial building in Auburn, Washington. The building was built approximately 40 years ago, around 1979. On or about July 4, 2015, a portion of the building's roof truss system failed, and that portion of the roof collapsed. At that time, Feenix was insured by a Continental Western Insurance Company policy issued by Berkley North Pacific (Berkley). Feenix submitted a claim to Berkley. Berkley retained Independent

Adjuster Rob Stone from McLarens Young and Engineer Mark Schaefer with Pacific Engineering Technologies Inc. (PET) to investigate the claim.

Stone and Schaefer initially inspected the building on July 8, 2015. Schaefer again inspected the building on July 13, 21, and 27, 2015. Based on his inspections and research, Schaefer performed a structural analysis of the roof truss system. In his opinion, the roof trusses failed when the top chord members fractured as a result of applied tension perpendicular to the wood grain immediately adjacent to the rear exterior bearing wall. He determined that the roof trusses failed because of two concurrent factors: (1) the configuration of the truss plate connection adjacent to the rear exterior bearing wall had inadequate strength to resist the applied loads, and (2) higher than normal temperatures reduced the strength of the wood trusses by up to 30 percent.

In a letter dated August 19, 2015, Berkley denied Feenix's claim because the loss was caused by "defective methods in construction and excessive temperatures in the attic," which are not covered causes of loss under the policy's collapse coverage.

Feenix retained CT Engineering Inc. to conduct an independent investigation of the loss shortly after receiving Berkley's denial. CT Engineering concluded,

> [W]ater penetrated thru [sic] the upper layer of roofing and collected between the two layers providing a concealed, encapsulated water delivery system. The water between the roofing layers sought the drain location although [sic] became trapped. As the water volume increased, so did the pressure on the old roofing layer which we believe, slowly allowed the water to penetrate into the interior of the building near the roof drains. The water wicked through the blocking

> and delivered moisture to the truss bearing ends. In support of this, water staining is clearly visible in both the blocking and truss bearing ends [on] each side of the roof drains.

CT Engineering also wrote, "It is our opinion that the cause of the truss collapse is due to the combined effects of both an elevated temperature in the attic space due to solar radiation gain (125 -150 degrees) as well as a moisture content exceeding 19% for an extended period of time." Based on CT Engineering's findings, Feenix requested that Berkley reconsider its denial of coverage.

As a result of Feenix's letter, Berkley reopened its investigation and instructed PET to determine whether "'hidden decay'" contributed to the roof collapse. On July 13, 2016, PET revisited the building site and inspected portions of the original roof sheathing and roof trusses still onsite. Schaefer did not alter his opinions on the cause of the collapse, and noted the following:

- Visual examination of the failure surfaces in the top chord members of trusses in place shortly after the collapse showed no evidence of wood decay in the failure surface.
- Examination of the failure surfaces in the top chord members truss pieces stored on site in 2016 showed no evidence of wood decay in the failure surface.
- Examination of the failure surfaces in the top chord members truss pieces stored at the MDE [Inc.] in 2016 showed no evidence of wood decay in the failure surface. The darkened wood along the shafts of nails that were exposed in the failure plane appears to be iron staining, which is a common phenomenon in wood where elevated moisture is present at some point. Iron staining does not reduce the strength of the affected wood.

Following PET's supplemental report, Berkley confirmed its denial of Feenix's claim.

On September 23, 2016, Feenix sued Berkley. Berkley and Feenix filed cross motions for summary judgment on the issue of coverage for the building roof collapse. On August 4, 2017, the trial court granted Berkley's motion for summary judgment and denied Feenix's motion. On September 18, 2017, the trial court entered an amended order on the parties' cross motions, which reflected all submissions and materials considered by the trial court at the summary judgment hearing. The amended order did not alter or modify the legal conclusions and findings of fact in the trial court's August 4, 2017 orders. Feenix appeals.

DISCUSSION

Feenix makes two arguments. First, it argues that the trial court erred in finding the term "decay" unambiguous in Berkley's insurance policy. Second, it argues that the trial court erred by construing the term "system" against Feenix and in favor of Berkley.

I. Standard of Review

An order granting summary judgment is reviewed de novo, "with the reviewing court performing the same inquiry as the trial court." Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). When we review a summary judgment order, we must consider all evidence in favor of the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); TracFone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010).

II. Insurance

Courts in Washington construe insurance policies as the average person purchasing insurance would, giving the language a fair, reasonable, and sensible construction. Vision One, LLC v. Phila. Indem. Ins. Co., 174 Wn.2d 501, 512, 276 P.3d 300 (2012). Undefined terms are to be given their ordinary meaning. Id. The entire contract must be construed together in order to give force and effect to each clause. Wash. Pub. Util. Dists.' Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County., 112 Wn.2d 1, 10, 771 P.2d 701 (1989). The court must enforce the contract as written if the language is clear and unambiguous. Id. If the language on its face is fairly susceptible to two different but reasonable interpretations, the contract is ambiguous, and the court must attempt to discern and enforce the contract as the parties intended. Id. at 10-11. In the event of an ambiguity, the contract will be construed in favor of the insured. Id. at 11.

A. Burden

Property insurance policies generally fall into two categories: named-peril and all-risk. 174 Wn.2d at 513. "Named perils" policies provide coverage only for the specific risks enumerated in the policy and exclude all other risks. Id. All-risk policies, on the other hand, provide coverage for all risks unless the specific risk is excluded. Id. In both types of property insurance, coverage is commonly triggered—or excluded—when a specified peril "'causes'" a loss. Id. at 514.

Determining whether coverage exists is a two-step process. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992). The insured must show the loss falls within the scope of the policy's insured losses. Id.

To avoid coverage, the insurer must then show the loss is excluded by specific policy language. Id.

B. The Policy

Here, the coverage form states, "[Berkley] will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss."

The Causes of Loss—Special Form (COL Form) states,

> A. Covered Causes of Loss
>
> When Special is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:
>
> 1. Excluded in Section B., Exclusions; or
> 2. Limited in Section C., Limitations;
> that follow.
>
> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. Ordinance Or Law
> . . . .
> b. Earth Movement
> . . . .
> c. Governmental Action
> . . . .
> d. Nuclear Hazard
> . . . .
> e. Utility Services
> . . . .
> f. War and Military Action
> . . . .
> g. Water
> . . . .
> h. "Fungus", Wet Rot, Dry Rot And [sic] Bacteria
> . . . .

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

   a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph 1. above to produce the loss or damage.

. . . .

D. Additional Coverage - Collapse

The term Covered Cause of Loss includes the Additional Coverage - Collapse as described and limited in D.1. through D.5. below.

1. With respect to buildings:

   a. Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.

. . . .

2. We will pay for direct physical loss or damage to Covered property, caused by collapse of a building or any part of a building that is insured under this Coverage Form . . . if the collapse is caused by one or more of the following:

   a. The "specified causes of loss" or breakage of building glass, all only as insured against in this Coverage Part;

   b. Decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse;

   c. Insect or vermin damage. . . .

   d. Weight of people or personal property;

   e. Weight of rain that collects on a roof;

   f. Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the court of the construction, remodeling or renovation. However, if the collapse occurs after construction,

remodeling or renovation is complete and is caused in part by a cause of loss listed in 2.a. through 2.e., we will pay for the loss of damage even if use of defective material or methods, in construction, remodeling or renovation, contributes to the collapse.

. . . .

E. Additional Coverage–Limited Coverage for "Fungus", Wet Rot, Dry Rot And Bacteria

1. The coverage described in E.2 and E.6 only applies when the "fungus", wet or dry rot or bacteria is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence.

. . . .

G. Definitions

. . . .

(2) "Specified Causes of Loss" means the following: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

. . . .

c. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning, or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

(Boldface omitted.)

C. Meaning of Decay

Feenix sought coverage for collapse under section D.2.b. Feenix asserts first that the undefined term "decay" in that section is ambiguous, and must be

construed in its favor. Below, Feenix proposed that the trial court define "decay" as "a gradual decline in strength, soundness," from Webster's Ninth New Collegiate Dictionary 329 (1988). It offered alternative definitions of "decay": "to decline from a sound or prosperous condition," and "to undergo decomposition." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/decay (LAST VISITED March 28, 2019).

The trial court rejected Feenix's argument that "decay" was ambiguous in the policy, stating,

> I, however, do not believe that the term decay [sic], as used in the policy, is an ambiguous [sic] and the idea that it would mean . . . a decline in strength I don't find to be a reasonable use of the term in the context of the policy. Any structural failure could ostensibly be defined as decay if that more generalized term were used.
>
> . . . .
>
> Additionally, I think it is important that the -- as defined in the policy, it's not simply decay, but it is decay hidden from view, and . . . that phrase becomes superfluous unless it actually means some kind of material decomposition that is visible rather than more general just weakening of the material over time that doesn't have any visual component to it.
>
> Otherwise, the phrase hidden from view has no meaning in the contract. And as the defendants have argued, it is the court's job to interpret contractual language in total and to give meaning to it all.
>
> And so here, I think that when read in the context of defining a cause of a collapse, the only reasonable interpretation is one that indicates some kind of decomposition of the material, and whether that's rot. You know, in the specific instance of wood, that may be rot.

To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

Citing Webster's Ninth at 329, Feenix urges the court to use the definition of "decay": "a gradual decline in strength, soundness." The complete definition of "decay" upon which Feenix relies is "a gradual decline in strength, soundness, or prosperity or in degree of excellence or performance." Id.

Webster's Third New International Dictionary also defines "decay" as "the condition of a person or thing that has undergone a decline in strength, soundness, or prosperity or has been diminished in degree of excellence or perfection." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 584 (2002). It alternatively defines "decay" as "the material process of dilapidation : wasting or wearing away." Id. It also offers the definition, "Rot; [specifically]: the aerobic decomposition of proteins chiefly by bacteria in which the products of putrefaction are completely oxidized to stable compounds having no foul odors." Id.

To support its proffered definition of decay, Feenix cites non-Washington authority. In a Sixth Circuit case, a building's insurance policy covered "loss resulting from 'decay that is hidden from view.'" Joy Tabernacle-The New Testament Church v. State Farm Fire & Cas. Co., 616 Fed. Appx. 802, 808 (6th Cir. 2015). Because there was no definitive guidance in the contract itself, the court turned to dictionaries to determine the plain meaning of "decay." Id. The dictionaries indicated that "decay" encompasses both "organic rot" and a broader reference to a general decline or degeneration over time. Id. The court held that

that the insured "likely carried its burden of proving coverage under the collapse extension of the policy." Id. at 810. It explained that

> the deterioration of the 90–year old church roof structure was unlike the four-year-old building with loosened nails . . . and more similar to . . . the older buildings . . . in which wood and mortar weakened over time due to age and extended exposure to humidity and weather.

Id. at 810-11.

Feenix also cites Stamm Theaters, Inc. v. Hartford Casualty Insurance Co., 93 Cal. App. 4th 531, 113 Cal. Rptr. 2d 300 (2001). In Stamm Theaters, a theater built around 1948 was in danger of imminent collapse when wood trusses gave way but showed no signs of rot. Id. at 534-35. Reversing the trial court's narrow reading of "decay" as including only organic rot, the California Court of Appeals adopted the broader definition of "the gradual loss of strength." Id. at 537-38, 542-43.

Additionally, Feenix cites Easthampton Congregational Church v. Church Mutual Insurance Co., 322 F. Supp. 3d 230 (D. Mass. 2018), aff'd, 916 F.3d 86 (1st Cir. 2019). In that case, the insurer denied coverage when a church ceiling failed and fell to the floor. Id. at 233-34. The question for the court was whether the church produced evidence establishing that decay that was hidden from view and unknown to the church contributed to the collapse. Id. at 236. The court turned to dictionary definitions and found that the definitions include both a broad definition and a narrower one which referenced rot. Id. at 236. The court stated,

> The most reasonable reading of the word "decay" as it is used in the Policy is that it refers to the broader concept of the word. This is because the Policy elsewhere uses the term "rot" in an exclusion for " 'Fungus,' Wet Rot, Dry Rot and Bacteria." If Church Mutual wanted

> to limit coverage for collapse to collapse caused or contributed to by "rot," as opposed to "decay," it could have done so. It did not, and the only reasonable implication is that the plain and ordinary meaning of "decay" as used in the Policy encompasses decay in the broader sense of a gradual deterioration or decline in strength or soundness.

Id. at 236-37. The court held that the church had shown that the failure of the ceiling was caused, at least in part, by such a gradual deterioration or decline in strength or soundness. Id. at 237.

Berkley argues that Feenix's broader definition of "decay" is unreasonable, and nothing more than an attempt to "recharacterize the perils of excessive heat (in the attic space) and excessive moisture content in the trusses . . . as 'decay.'"

But, as the court reasoned in Easthampton, if Berkley wanted to limit coverage for collapse to collapse caused or contributed to by "rot," as opposed to "decay," it could have done so. It did not. The policy here is nearly identical to the policy in Easthampton. The policy references "'Fungus', Wet Rot, Dry Rot, And Bacteria" when it initially excludes them from covered causes of loss or damage in section B.1.h. And the policy again mentions fungus, wet rot, dry rot, and bacteria under section E, which provides "Additional Coverage - Limited Coverage," for those losses. The only reasonable implication is that the plain and ordinary meaning of "decay," as used in the policy, is not limited to organic rot. Rather, it encompasses "decay" in a broader sense.

Berkley also contends that Feenix's definition of "decay" is substantially similar to "deterioration," a term that the policy specifically references as an exclusion. It argues that "deteriorate" means "'to grow worse; degenerate; to weaken or disintegrate; decay.'" And, because the policy contains a specific

reference to "deterioration," "decay" necessarily means something other than to grow worse over time, i.e., gradually lose strength, soundness, prosperity or degree in excellence.

The policy provides an exclusion for deterioration at COL Form section B.2.d(2): "We will not pay for loss or damage caused by or resulting from any of the following: . . . Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself."

Though the policy uses both terms, a distinction between decay and deterioration is not so apparent as Berkley would argue. In Sprague v. Safeco Insurance Company of America, 174 Wn.2d 524, 529-30, 276 P.3d 1270 (2012), the court turned to the dictionary for a definition of the term "rot" which was not defined in the policy. It noted: "'Rot' is defined: '1 a : to undergo natural decomposition : decay as a result of the action of bacteria or fungi . . . b : to become unsound or weak . . . 2 a : to go to ruin : DETERIORATE." Id. at 530 (alterations in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1976 (1993)). The court continued, "Stated simply, 'rot' describes the process of deterioration." Id. The same dictionary also references deterioration in its definition of decay: "DECAY indicates deteriorating change, often gradual, from a sound condition or perfect state." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 584 (2002).

We must strictly and narrowly construe exclusions, such as the exclusion for deterioration. See Campbell v. Ticor Title Ins. Co., 166 Wn.2d 466, 472, 209 P.3d 859 (2009). Insurance policies are liberally construed to provide coverage

wherever possible. W. Nat'l Assurance Co. v. Shelcon Constr. Grp., LLC, 182 Wn. App. 256, 261, 332 P.3d 986 (2014). And, because Berkley did not define "decay" in the policy, the term must be interpreted in a way the average purchaser of insurance would understand it, and any ambiguity is construed against the insurer and in favor of the insured. Vision One, 174 Wn.2d at 512. The broader definition of "decay," a gradual decline in strength or soundness, is the more reasonable manner to construe the term.

In granting summary judgment to Berkley, the trial court stated,

> At best, Mr. [Benjamin] McCann states that decay on the support sleeper allowed water intrusion into the roof, which then . . . combined with excessive heat over time weakened the structural integrity and the roof then collapsed. But he doesn't point to specific areas of decay that led to the collapse.
>
> As [Berkley's counsel] discussed further this morning, there are several spots throughout, the sleeper, the end of one of the trusses, a couple of spots where decay was noted, but Mr. McCann actually testified that there was no decay in the trusses. And that is -- this is at his deposition page 56 lines 3 to 12, and that the wood's exposure to water and heat over time was not the same as decay. It wasn't synonymous with decay.

Feenix's expert testified in his deposition, "The sleeper obviously sits on the trusses, and it's in a decayed state, and I'm saying that it had a factor in the decay -- or the collapse of the trusses." He continued, "[W]hat I am saying is that I did not find any decay in the truss members themselves." And, when asked if "moisture content of wood exceeding 19 percent" was the "equivalent of wood decay," McCann answered, "No." The record indicates the sleeper had wet rot and the trusses did not. In the context of his testimony, McCann was using "decay" to indicate "wet rot." Using that definition, the trial court could have correctly

concluded there was no evidence of decay in the trusses. But, that is not the proper definition of "decay." That conclusion was not appropriate under the correct definition.

The trial court also found that the phrase "hidden from view" would be rendered meaningless unless decay requires "some kind of material decomposition that is visible rather than more general just weakening of the material over time that doesn't have any visual component to it." But, the phrase "decay that is hidden from view" must be interpreted in context of the entire sentence which concludes "unless the presence of such decay is known to an insured prior to collapse." Decay that is not hidden from view is not covered. Decay that is hidden from view is not covered if known to an insured prior to collapse. Coverage turns on what the insured could have known by viewing the property or what the insured did know. Presumably known risks could be addressed prior to collapse.

The trial court erred in concluding that the "only reasonable interpretation" of "decay" is one that indicates some kind of decomposition of the material, and rejecting Feenix's definition.

D. Issue of Fact

Feenix asserts that it raised a material issue of fact as to whether decay, under the broader definition it advanced, caused the collapse. Feenix's expert opined,

> [T]he cause of the truss collapse is due to the combined effects of both an elevated temperature in the attic space due to solar radiation gain (125 – 150 degrees) as well as a moisture content exceeding

> 19% for an extended period of time. The net effect of these conditions cause a reduction in the allowable stresses of the truss top chord by sixty percent.

Thus, Feenix presented evidence of weather conditions—moisture and extreme heat—that caused damage that led to the roof collapse.

The COL Form section B.3 provides,

> We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> a. Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph [B.]1. above to produce the loss or damage.

Feenix states a claim for a covered cause of loss under the collapse coverage. As a result, the exclusion of weather conditions is not applicable.

The expert evidence Feenix offered demonstrates the existence of genuine issues of material fact concerning the cause of the collapse. Therefore, the trial court's grant of summary judgment for Berkley was in error.

E. Water Damage and System

Feenix also argues that the "intrusion of water through the Parkside roof system and the elevated moisture which resulted from it becoming trapped in the roof system over time reduced the strength of the wood trusses, which led to the collapse of the roof system." Feenix asserts that the term "system" in the policy is susceptible to more than one reasonable interpretation, and argues that the definition of "system" can also apply to the "roof system" of the building.

Berkley contends that Feenix's definition inappropriately expands the scope of collapse coverage caused by "water damage," which renders the limited definition in the policy ineffective.

The policy defines "water damage" in this manner:

> Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning, or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

In rejecting Feenix's argument, the trial court stated, "Plaintiff has argued that the roof structure qualifies as [another] system within this definition of water damage, but I have to find that the plaintiff's damage is very strained and simply untenable within the context of the policy."

Under the rule of ejusdem generis, where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808-09, 16 P.3d 583 (2001). Instead, they are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Id.

A "roof system" is not the equivalent of a plumbing, heating, or air conditioning system, because those systems are all designed to use water or steam in their operation, while a roof system serves to exclude water. Feenix's argument violates the rule of ejusdem generis and its offered definition of "system" fails.

We reverse.

Appelwick, C.J.

WE CONCUR:

Dwyer, J.

Andrus, J.

APPENDIX B

RCW 48.01.030

Public interest.

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

[1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

BETTS, PATTERSON & MINES, P.S.

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