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No. 89218-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Bayview Heights Owners Association, Appellant,

v.

Travelers Indemnity Company, Respondent/Cross-Appellant,

and

Philadelphia Indemnity Insurance Company, Defendant

BRIEF OF APPELLANT

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I. INTRODUCTION

For years, courts applying Washington law accepted that the undefined term “collapse” in an insurance policy means “substantial impairment of structural integrity” (“SSI”). However, this Court has never squarely addressed the issue. Recently, insurance companies have taken advantage of this perceived ambiguity in Washington law to essentially attempt a retroactive narrowing of coverage, arguing that “collapse” coverage does not cover SSI, instead arguing that “imminent collapse” must be shown.

That is precisely the argument Travelers Indemnity Company (“Travelers”) made in this case: The undefined term “collapse” in Travelers’ insurance policies means “imminent collapse,” not SSI. However, Travelers’ argument – and the trial court’s decision in Travelers’ favor – ignores nearly 20 years of judicial precedent, as well as the most basic rules of insurance contract interpretation. Accordingly, Bayview respectfully asks this Court to overturn the trial court’s summary judgment rulings, making clear that, under Washington law, the undefined term “collapse” in an insurance policy means SSI.

II. ASSIGNMENTS OF ERROR

A. Trial Court Rulings

1. The trial court erred as a matter of law when it denied Bayview’s Motion for Summary Judgment Re: Definition of Collapse.

2. The trial court erred as a matter of law when it denied Bayview's Motion for Partial Summary Judgment Re: Estoppel.

3. Because of the errors identified in Assignments of Error Nos. 1 and 2 above, the trial court erred as a matter of law in dismissing Bayview's claims against Travelers.

B. Issue Pertaining to Assignments of Error

Where the Travelers insurance policies provide additional coverage for "collapse," and the term "collapse" is not defined, what definition of "collapse" should apply? (Assignments of Error Nos. 1-3).

III. STATEMENT OF THE CASE

A. The Bayview Condominium Suffered Substantial Structural Impairment ("SSI") Due To Hidden Decay.

The Bayview Condominium building (the "Condominium") is a five-story structure in Seattle, Washington. CP 701 at ¶ 3. The building consists of four stories of conventional, light-framed wood construction over a one-story garage. *Id.* The majority of the exterior walls are shearwalls, which are designed to support the building against lateral loads, such as wind and seismic forces, in addition to gravity loads. *Id.*

Long-term water intrusion caused advanced decay in the Condominium's wood structure. CP 702 at ¶ 6-7. In numerous locations, the decay is bad enough that the structure is not merely damaged, but it is so damaged it meets an engineer's standard of "collapse," where "collapse" is defined as SSI. *Id.*; *see* CP 967-68.

B. SSI Occurs When A Structural Member Is Unable To Support Its Code-Prescribed Load.

Building codes require various structural components, called “members,” to support certain loads due to gravity, occupancy, wind, and seismic forces. *See* CP at 966. Normally, a structural member can experience some decay, and still have enough strength – also called load-carrying capacity – to meet building code requirements. *See id.* at Fig. 2. Despite some decay, those members are not in a state of SSI. *See id.* at Fig. 2. However, once the decay diminishes a particular member’s load-carrying capacity to a point where the member cannot support code-required loads, that member is in a state of SSI. *See id.* at § 5.1 and Fig. 2. Members in a state of SSI must be repaired or replaced. *Id.* at § 5.1.

C. Travelers Provided Coverage For “Collapse” Due To Hidden Decay, But Denied Coverage For SSI At The Condominium.

Upon discovering the damage at the Condominium, Bayview tendered a claim to its property insurers, including Travelers. CP 706 at § 7. Travelers insured the Condominium between 1996 and 1999. CP 985-86. The Travelers policies all provide coverage for “collapse” caused by hidden decay, and the term “collapse” is not defined in the policies. CP 988-89, 991-92, 994.

Specifically, the 1996 and 1997 Travelers policies cover collapse as follows:

We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building insured under this policy, if the collapse is caused by...[h]idden decay.

CP 988, 991. The 1998 policy's collapse provision is slightly different:

We will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building caused by...[h]idden decay.

CP 994. Without ever even visiting the Condominium, Travelers denied Bayview's claim. CP 706, 728-34.

D. Travelers And The Trial Court Accepted That "Collapse" Meant SSI.

Bayview filed suit in King County Superior Court on October 11, 2011. CP 1-8. Nearly a year later, another insurer attempted to obtain a summary judgment ruling that "No Admissible Expert Evidence of Collapse Exists" at the Condominium. CP 689. At that time, Bayview had performed only a preliminary investigation because the insurers refused to fulfill their duties to investigate, in bad faith. CP 706 at ¶ 6-8. The Court granted a continuance under CR 56(f) to allow Bayview to obtain expert evidence of "collapse." CP 768 at ¶ 16-22.

Bayview then spent thousands of dollars to investigate "collapse" at the Condominium and develop a structural engineer's expert report. *Id.* As the basis for the investigation and report, Bayview's expert structural engineer, Lee Dunham, defined "collapse" as follows:

Substantial Structural Impairment (SSI) [is defined] as the loss of capacity of a structural member or element to support code-prescribed loads due to gravity, occupancy, wind, or seismic forces.

CP 966. Applying this definition of collapse, Mr. Dunham calculated:

- 78% of the SSI at the Bayview Condos occurred prior to or during the Travelers policy period of December 17, 1998 – December 17, 1999.
- 8% of the SSI at the Bayview Condos occurred during the Travelers policy period of December 17, 1996 – December 17, 1999.

CP 972. In other words, Bayview’s 12-member homeowner association spent thousands of dollars to investigate “collapse” as SSI, and Travelers was aware of this investigation and report. Travelers did not object to Bayview’s definition of collapse as SSI. *See gen. CP; see CP 1378:8.*

The trial court also accepted, and implicitly held, that the undefined term “collapse” meant SSI. The trial court denied the motion for summary judgment, necessarily accepting that Bayview’s expert report regarding SSI was admissible evidence of “collapse.” CP 974-76. Again, Travelers did not object.

E. The Trial Court Applied An Incorrect Definition of Collapse When It Denied Bayview’s Motion For Summary Judgment Re: Definition of Collapse.

To confirm there was no issue regarding “collapse” as SSI, Bayview subsequently filed Plaintiff’s Motion for Summary Judgment Re: Definition of Collapse (the “Collapse Motion”). By this motion, Bayview

sought to make express the trial court's prior rulings, and confirm Washington's long-accepted rule, that the undefined term "collapse" in the Travelers' policies means SSI.¹ CP 977-84. Travelers opposed the Motion, asserting that "collapse" means either: (1) actual failure; or (2) "imminent collapse." CP 1014. This was the first time Travelers argued that "collapse" required anything more than SSI, in more than a year and a half of litigation and related investigation, and more than two years after Bayview first asserted its claim for SSI coverage.

Despite its prior ruling that Bayview's expert engineering report addressing SSI was "admissible evidence of collapse," the trial court did not hold that "collapse" meant SSI. Instead, the trial court added an additional element not previously addressed by the experts, defining "collapse" as:

"substantial impairment of structural integrity" ("SSI")
with an imminent threat of collapse.

CP 1358 (emphasis added). In doing so, the trial court effectively changed Bayview's burden of proof, because now Bayview would be required to prove not only SSI, but also an imminent threat of collapse.

¹ The motion also applied to another insurer, Philadelphia, but Philadelphia has since settled and so this appeal applies only to Travelers.

F. The Trial Court Applied Another Incorrect Definition of Collapse When It Denied Bayview's Motion For Summary Judgment Re: Estoppel.

Due to the conflicting rulings by the trial court, and Bayview's reliance on Travelers' prior failure to assert any definition of "collapse" other than SSI, Bayview filed its Motion for Partial Summary Judgment Re: Estoppel (the "Estoppel Motion"). CP 1375-82. The Estoppel Motion sought a ruling that Travelers was bound to its prior acquiescence in defining "collapse" as SSI. *Id.* In ruling on that motion, the trial court once again changed the definition of "collapse." *See* CP 1478. Just three months before trial, the trial court now held that:

collapse takes place when the building or any part of the building is so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities is exhausted.

Id. Not only does this definition combine two mutually exclusive definitions of "collapse,"² it is also wholly unsupported by any expert analysis. Bayview's expert proffered the SSI definition of collapse, and Travelers' expert – although disagreeing with how SSI was calculated – did not proffer any engineering definition of "collapse" at all. CP 1097-

² As explained by Bayview's expert structural engineer, "substantial impairment" is a different measure than exhaustion of reserve strength. To combine the two effectively sets the bar for measuring "collapse" at two different thresholds simultaneously. *See* CP 1444 at ¶ 5.

103. Nevertheless, the trial court ruled that “collapse” now meant SSI plus an exhaustion of reserve strength. *See* CP 1478.

G. Based On Its Erroneous Definitions of Collapse, the Trial Court Dismissed Bayview’s Claims.

Based on the trial court’s previous orders on the Collapse and Estoppel Motions, and the extensive resources already poured into Bayview’s SSI report, Bayview and Travelers stipulated that Bayview:

has no evidence sufficient to create a genuine issue of material fact as to whether any of the following physical damage due to hidden decay existed in the building or any part of the building during any Travelers policy period: (a) substantial impairment of structural integrity with an imminent threat of collapse, and/or (b) that the building or any part of the building was so substantially impaired that even the reserve strength due to the safety factors built into the building code allowable capacities was exhausted.

CP 1483 at ¶ 1. However, if “collapse” were defined as SSI, then there would have been appropriate issues for trial:

At any trial or motion, plaintiff could produce evidence which plaintiff contends is sufficient to create a material issue of fact concerning the existence of substantial impairment of structural integrity in the building or part of the building during one or more Travelers policy periods. Travelers would object to this evidence and produce contrary evidence.

Id. at ¶ 2. Based on this stipulation, the trial court entered summary judgment dismissing all of Bayview’s claims against Travelers. CP 1490-91.

IV. ARGUMENT

The sole issue in this appeal is the meaning of the term “collapse” in Travelers’ insurance policies, where the policies themselves do not define the term. The interpretation of an insurance policy is a question of law, which appellate courts review *de novo*. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 512, 276 P.3d 300 (2012). Therefore, this Court is to look at the issues anew, and is not required to give deference to the trial court decisions from which this appeal arises.

In this case, there are at least three independent reasons that the undefined term “collapse” in the Travelers’ policies should be interpreted to mean SSI: (1) courts applying Washington law consistently define “collapse” as SSI; (2) the term “collapse” in the Travelers policies is ambiguous, and therefore must be construed in favor of Bayview as SSI; and (3) Travelers is estopped from asserting any definition of “collapse” other than SSI. If Bayview prevails on any one of these three arguments, then the trial court’s decisions should be reversed, and this matter should be remanded to the trial court for further proceedings under an SSI standard of “collapse.”

A. Courts Applying Washington Law Consistently Define “Collapse” As SSI.

1. For Nearly 20 Years, Courts Applying Washington Law Accepted That “Collapse” Meant SSI.

In 1995, federal Judge Barbara Rothstein was asked to predict how the Washington Supreme Court would interpret the term “collapse” in an insurance policy, where “collapse” is undefined. *See Allstate Ins. Co. v. Forest Lynn Homeowners Ass’n*, 892 F. Supp. 1310 (1995). In a reasoned opinion, Judge Rothstein concluded that Washington would follow “the majority of modern courts” and interpret “collapse” to include SSI. *Id.* at 1314.

Since then, Washington courts have routinely accepted the conclusion that “collapse” means SSI. *Mercer Place Condo. Ass’n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 17 P.3d 626 (2000) (citing *Forest Lynn*, court accepted parties’ stipulation that “collapse” in insurance policy meant SSI); *Panorama Village Condo. Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 149, 26 P.3d 910 (2001) (a structure need not fall down for collapse coverage to apply); *id.* (Madsen, J. dissenting on other grounds) (explaining “collapse” occurs when the structure reaches a point of SSI); *Ellis Ct. Apts. v. State Farm*, 117 Wn. App. 807, 72 P.3d 1086 (2003) (“collapse” due to hidden decay occurred when SSI was no longer hidden); *The Bedford, LLC v. Safeco Ins. Co. of*

Am., No. 55341-1-I, 2006 Wash. App. LEXIS 2702 (Dec. 11, 2006) (trial court held that “collapse” meant SSI).

Federal courts have also accepted SSI as the definition of “collapse” under Washington law, and in 2006 Judge Lasnik of the Western District of Washington confirmed what Judge Rothstein concluded more than ten years earlier: “the Washington Supreme Court would adopt the majority view of ‘substantial impairment of structural integrity’ as the definition of collapse in this policy.” *Dally Props., LLC v. Truck Ins. Exch.*, No. C05-0254L, 2006 U.S. Dist. LEXIS 30524 at *7 (W.D. Wash. May 5, 2006), Appx. 1.

Travelers is quick to point out that not all of these cases distinguish between imminent collapse and SSI, sometimes conflating the two. CP 1010. While this may be true, these courts have generally not had the opportunity to directly resolve this definitional issue of “collapse.” Moreover, *Forest Lynn* and its progeny confirm there is no need to make this distinction, since under those cases, “**any**” SSI qualifies as collapse. *See Forest Lynn*, 892 F. Supp. at 1314.

In May 2012, the Washington State Supreme Court was just one justice shy of fulfilling the long-standing “collapse” prophecy when it issued its opinion in *Sprague v. Safeco Insurance Company of America*, 174 Wn.2d 524, 276 P.3d 1270 (2012). Although the majority opinion

declined to address the definition of “collapse,” the concurring and dissenting opinions debated this question intensely. On the one hand, a two-justice concurrence argued that “collapse” should mean “to break down” or “fall apart” or “crumble.” *Id.* at 531-532. On the other hand, a four-justice dissent argued strenuously that “collapse” meant SSI. *Id.* at 534-535. *Sprague’s* four-justice dissent recognized that the Washington State Supreme Court “implicitly adopted” SSI as the definition of “collapse” in *Panorama Village*, 144 Wn.2d 130. *Sprague*, 174 Wn.2d at 534.

Given this longstanding history, Travelers’ current argument that Washington courts have not weighed in regarding the definition of “collapse” does not accurately represent the bigger picture of “collapse” jurisprudence under Washington law. The long history of this issue in Washington supports defining “collapse” as SSI, and Travelers’ argument otherwise effectively seeks to remove coverage that Bayview, as the insured, reasonably believed it had.

Washington courts construe insurance policies as the average person purchasing insurance would, giving the language a fair, reasonable, and sensible construction. *Vision One*, 174 Wn.2d at 512. Here, the long history of “collapse” jurisprudence from courts applying Washington law

gave the insured, Bayview, good reason to understand that Travelers' additional coverage for "collapse" would provide coverage for SSI.

2. Recent Dicta Does Not Change This Long History Of Collapse Jurisprudence.

There are two cases in which courts applying Washington law required something more than SSI to trigger collapse coverage, where collapse was undefined.³ This case is the second, and the trial court's reasoning in this case relies heavily on flawed reasoning in the first case, *Queen Anne*.

In, *Queen Anne Park Homeowners Association v. State Farm Fire & Casualty Co.*, C11-015779 (Dkt. #57) (W.D. Wash. Nov. 8, 2012), CP 1078-81, the court began its analysis with two potential collapse standards: (1) rubble on the ground (sometimes referred to as abrupt collapse); and (2) imminent collapse. *See id.* SSI is lumped into the latter category, and in the first eight pages of the 10-page opinion, there is no distinction between imminent collapse and SSI. *Id.* In this confusion, the

³ It is true that the court in *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557 (9th Cir. 2004) held that "collapse" meant "imminent collapse." However:

Correctly interpreted, *Wall* stands for the proposition that Washington law does not limit collapse to actual collapse. The *Wall* opinion includes a discussion of imminent collapse not to the exclusion of collapse coverage for structures with substantially impaired structural integrity, but rather because the factual circumstances of *Wall* were limited to structures facing imminent collapse.

Dally Properties, Appx. 1, at *7; *see also Wall*, 379 F.3d at 558-59 (the building "created a serious risk to passersby as the [cladding] was in danger of completely falling off the building" and "with the slightest touch, the brick facades simply fell off the building").

court inaccurately claims that the courts in *Dally Properties* and *Forest Lynn* applied an “imminent collapse” standard, when both of those courts actually adopted the SSI standard. *See Dally Properties*, Appx. 1 at *8; *Forest Lynn*, 892 F. Supp. at 1314.

When the *Queen Anne* decision does finally recognize a distinction between imminent collapse and SSI, the court decides between the two by inexplicably leaping across the county to rely on *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Insurance Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002). There, a South Carolina court determined that “imminent collapse,” not SSI, should apply. The *Queen Anne* decision follows this reasoning.

The *Queen Anne* opinion provides no justification for its reliance on geographically or chronologically remote authority, in defiance of nearly 20 years of jurisprudence at home, including numerous cases issued under Washington law after the *Ocean Winds* decision. Instead, the *Queen Anne* court supports its decision by referring to this Court’s 2012 opinions in *Sprague*, pointing out that two justices signed a concurring opinion that would define “collapse” as rubble on the ground. *Id.* at 8. There is no mention of the four-justice dissent that would define “collapse” as SSI. *See id.*

The anomalous decision in *Queen Anne* is by no means a solid foundation for the trial court's holding in this case that "collapse" is anything other than SSI, in contravention of nearly 20 years of Washington law.

3. Chief Judge Pechman Directly Addressed the Shortcomings In *Queen Anne* To Hold That "Collapse" Means SSI.

The most recent decision interpreting "collapse" under Washington law, like the *Queen Anne* decision, is also out of the Western District of Washington, and comes from Chief Judge Pechman. In *Houston General Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, C11-2093MJP (W.D. Wash. March 19, 2013), CP 1452-56, Judge Pechman held:

The correct definition of "collapse"... is "substantial impairment of structural integrity," or SSI.

CP 1454. To reach this conclusion, Judge Pechman began her analysis by recognizing the long history of collapse as SSI under Washington law:

The clearest evidence of how the Washington Supreme Court would decide this issue is its landmark 2001 case of *Panorama Village Condo. Owners Ass'n Bd. Of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130. In *Panorama Village*, the Court construed an insurance contract covering "collapse," and held that loss could occur either when the building actually collapsed or when decay posed a risk of collapse. *Id.* at 133-34. The Court implied that a collapse provision in an insurance contract does not limit coverage solely to damages resulting from actual collapse. *Id.*

CP 1454-55. Then, going on to cite *Mercer Place* and *Forest Lynn*, Judge Pechman held:

Together, these cases strongly indicate that the parties would have understood Washington law in 2010 to define “collapse” as SSI.

CP 1455. Finally, in response to Judge Zilly’s opinion in *Queen Anne* and its reliance on the two-justice dissent in *Sprague*, Judge Pechman stated:

But two justices do not a majority make. In fact, twice as many justices joined the dissenting opinion in *Sprague*, which reiterated the consistent holding of Washington Courts that collapse means SSI. *Id.* at 534-35.... Additionally, the *Queen Anne* decision is unpersuasive because it relies on the two-justice concurrence in *Sprague*, rather than the four-justice dissent. These cases [*Sprague* and *Queen Anne*] are insufficient to show that Washington law has adopted a new definition of collapse.

CP 1456. As recently as 2013, when applying Washington law, the Western District of Washington continues to hold that “collapse” means SSI.

4. The Majority of Jurisdictions Define Collapse As SSI, And There Is No “Trend” To The Contrary.

The last misconception to be dealt with regarding Washington’s long history of SSI jurisprudence is Travelers’ assertion that there is a trend toward holding that “collapse” means something other than SSI. It is true that South Carolina, applying South Carolina law, chose an imminent collapse standard over SSI. *Ocean Winds*, 350 S.C. at 271.

However, in doing so, South Carolina recognized:

The modern trend is to find the word “collapse” ambiguous and construe it to mean a “substantial impairment” of the building’s structural integrity.

Ocean Winds, 350 S.C. at 270. Indeed, the “trend” is to define “collapse” as SSI, and not imminent collapse.⁴

5. Public Policy Favors Defining “Collapse” As SSI.

Finally, during Washington’s long history of “collapse” jurisprudence, numerous courts – and courts of other jurisdictions – have recognized that public policy considerations support defining “collapse” as SSI. As explained in *Beach v. Middlesex Mutual Assurance Co.*, 205 Conn. 246, 532 A.2d 1297 (1987), and adopted in *Forest Lynn*, and the plurality dissent in *Sprague*:

Requiring the insured to await an actual collapse would not only be economically wasteful...but would also conflict with the insured’s contractual and common law duty to mitigate damages.

Beach, 532 A.2d at n.2; *Forest Lynn*, 892 F. Supp. at 1311; *Sprague*, 174 Wn.2d at 533 (Stephens, J. dissenting). Although insurers claim this reasoning could transform insurance policies into maintenance

⁴ See e.g., *Machea Transp Co. v. Phila. Indem. Ins. Co.*, 649 F.3d 661 (8th Cir. 2011); *American Concept Ins. Co. v. Jones*, 935 F. Supp. 1220, 1227 (D. Utah 1996) (“The court concludes that Utah would likely follow the modern trend”); *John Akridge Co. v. Travelers Companies*, 876 F. Supp. 1, 2 (D. D.C. 1995); *Island Breakers v. Highlands Underwriters Ins. Co.*, 665 So. 2d 1084 (Fla. App. 1995); *Beach v. Middlesex Mut. Assur. Co.*, 205 Conn. 246, 252, 532 A.2d 1297 (1987) (“the more persuasive authorities hold that the term ‘collapse’ is sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building.”); *Auto Owners Ins. Co. v. Allen*, 362 So. 2d 176, 177-78 (Fla. App. 1978); *Indiana Ins. Co. v. Lilaskos*, 297 Ill. App. 3d 569, 577, 697 N.E.2d 398 (1998); *Rogers v. Maryland Cas. Co.*, 252 Iowa 1096, 1102, 109 N.W.2d 435 (1961); *Gov’t Employees Ins. Co. v. DeJames*, 256 Md. 717, 724, 261 A.2d 747 (1970); *Morton v. Travelers Indem. Co.*, 171 Neb. 433, 449, 106 N.W.2d 710 (1960); *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 709 P.2d 649 (1985); *Morton v. Great American Ins. Co.*, 77 N.M. 35, 38-39, 419 P.2d 239 (1966); *Rankin v. Genreali-U.S. Branch*, 986 S.W.2d 237 (Tenn. 1998).

agreements, this is merely a straw argument based on unsupportable extremes. Contrary to insurers' cries, defining "collapse" as SSI still requires the insured to meet a measurable threshold of engineer-defined collapse in order to obtain coverage for collapse. Instead, defining "collapse" as SSI fulfills widely accepted public policies that favor a broader definition of "collapse."

6. "Collapse" Means SSI.

Given the long judicial history of interpreting "collapse" as SSI under Washington law, and the policy reasons cited in that history for doing so, the only "fair, reasonable, and sensible" construction of the term "collapse" in the Travelers policies is to define collapse as SSI. *Vision One*, 174 Wn.2d at 512 (Washington courts construe insurance policies as the average person purchasing insurance would, giving the language a fair, reasonable, and sensible construction). The trial court erred when it adopted any standard other than SSI in this case. This Court should reverse and remand to the trial court for further proceedings under an SSI standard of "collapse."

B. At Best, "Collapse" Is Ambiguous, And Ambiguities Must Be Construed In Bayview's Favor.

A term in an insurance policy is ambiguous if it is susceptible to more than one reasonable interpretation. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000).

Ambiguities are construed against the drafter-insurer, and in favor of the insured. *Vision One*, 174 Wn.2d at 512; *Weyerhaeuser*, 142 Wn.2d at 666.

In this case, the parties have proposed three different interpretations of the term “collapse” as used in the Travelers policies: (1) SSI, proposed by Bayview; (2) imminent collapse, proposed by Travelers; and (3) rubble on the ground, also proposed by Travelers. *See* CP 997-998. Even if SSI were not the only reasonable interpretation, the term is ambiguous and must be construed in favor of Bayview. Travelers admits that the term is susceptible to at least the latter two definitions, *see* CP 1014:18-23, so there is no dispute that the term is ambiguous.

Instead, Travelers implicitly argues that an SSI definition of “collapse” is unreasonable, and ought to be taken out of the running. Travelers’ argument ignores significant decisions that would necessarily be “unreasonable” under Travelers’ standard under both Washington law and the laws of other states. *See, e.g., Houston General*, CP 772; *Forest Lynn*, 892 F. Supp. at 1314; *Island Breakers v. Highlands Underwriters Ins. Co.*, 665 So.2d 1084 (Fla. App. 1995); *Rankin v. Genreali-U.S. Branch*, 986 S.W.2d 237 (Tenn. App. 1998). Travelers’ argument also ignores the fact that, had Travelers wanted to disambiguate the term, it could have done so by supplying a definition. *See Panorama Village*, 144 Wn.2d at 137 (courts do not have the power, under the guise of

interpretation, to rewrite contracts); *Public Employees Mut. Ins. Co. v. Mucklestone*, 111 Wn.2d 442, 444, 758 P.2d 987 (1988) (insurer as drafter of the policy is responsible for defining the scope of coverage). Travelers failed to do so, and the admittedly ambiguous term “collapse” should be construed in favor of the insured, Bayview, to mean SSI.

C. Travelers Admitted “Collapse” Means SSI, and Travelers Is Estopped From Asserting A Different Definition Applies to Bayview’s Claim.

Travelers is equitably estopped from requiring that Bayview show anything more than SSI for collapse coverage to apply. Equitable estoppel applies where:

- (1) A party makes an admission, statement, or act inconsistent with the claim afterwards asserted;
- (2) The other party acts on the faith of the admission, statement, or act; and
- (3) That other party is injured if the first party is permitted to repudiate the admission, statement, or act.

Dombrowsky v. Farmers Ins. Co., 84 Wn. App. 245, 256, 928 P.2d 1127 (1996). Washington applies this principle in the insurance context to prevent an insurer from taking one position, and then arguing a different position in litigation, if the insurer’s change in position would prejudice the insured. *See e.g., Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864, 454 P.2d 229 (1969); *Rizzuti v. Basin Travel Serv.*, 125 Wn. App. 602, 613, 105 P.3d 1012 (2005). In this case, all criteria for equitable estoppel are

met, and Bayview need only show SSI – not imminent collapse – in order for collapse coverage to apply under the Travelers policies.

1. For Nearly Two Years, Travelers’ Acts Were Consistent With Acceptance Of Collapse As SSI.

When Travelers denied Bayview’s claim in June 2011, it admitted that a covered “collapse” takes place when SSI occurs. CP 732. There is no mention of “imminent collapse” in Travelers’ denial letter. *See id.* **This admission alone is enough to establish that SSI is the governing standard in this case.**

Then, Travelers continued to abide by a definition of “collapse” as SSI for nearly two years. First, after Philadelphia filed its motion for summary judgment in August 2012, Travelers learned (if it did not know before) that Bayview was unable to pay for an investigation of “collapse” at the Condominium. CP 705-06. When Bayview was granted a continuance to attempt an investigation of “collapse” as SSI, Travelers said nothing. *See gen.* CP.

2. Bayview Undertook To Investigate Collapse As SSI, When No Other Standard Was Proposed.

Bayview expended significant resources and produced a report analyzing “collapse” as SSI; even then Travelers remained silent, *see gen.* CP, and there was no reason to believe that “collapse” meant anything other than SSI. The Court then ruled that Mr. Dunham’s SSI analysis was

admissible expert evidence of “collapse,” and Travelers acquiesced in this ruling. *See gen. id.* For nearly two years, Travelers accepted SSI as the definition of collapse, while Bayview went to great lengths and significant expense to develop its claim for “collapse” as SSI. *See gen. id.*

3. Bayview Will Be Unfairly Prejudiced If Travelers Is Permitted To Assert A New “Collapse” Standard Now.

Travelers knows that applying an “imminent collapse” standard now is a significant change in the established landscape of this case, and it effectively priced Bayview out of this litigation. It was a great hardship on Bayview to fund the last investigation, and a second investigation under a different standard was not possible. *See* CP 1483 at ¶ 1. Put simply, Bayview was severely prejudiced after Travelers was permitted to change its definition, because it was required to stipulate that it did not have evidence of “collapse” under the trial court’s new and varying standards. Accordingly, equity demands that Travelers be held to defining “collapse” as SSI.

D. Bayview Is Entitled To An Award Of Fees And Expenses On Appeal.

Bayview requests an award of its attorney fees and expenses on appeal pursuant to RAP 18.1(b) and *Olympic S. S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

V. CONCLUSION

The trial court held that collapse requires more than SSI alone. CP 1357-59; 1477-78. This was error, for three independent reasons: (1) in Washington, “collapse” has long been interpreted as SSI; (2) the term “collapse” as used in the Travelers policies is ambiguous and must be construed in Bayview’s favor; and (3) Travelers is estopped from asserting any definition of “collapse” other than SSI.

The trial court rulings establishing standards of “collapse” other than SSI are error, and should be reversed. Remand to the trial court is appropriate for further proceedings in which “collapse” is defined as SSI.

Respectfully submitted this 2nd day of January, 2014.

HEFFERNAN LAW GROUP PLLC

By 

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Attorneys for Appellant Bayview Heights Owners
Association

APPENDIX

Dally Props., LLC v. Truck Ins. Exch., 2006 U.S. Dist. LEXIS 30524
United States District Court for the Western District of Washington
April 5, 2006, Decided ; May 5, 2006, Filed
Case No. C05-0254L

Reporter: 2006 U.S. Dist. LEXIS 30524

DALLY PROPERTIES, LLC, Plaintiff, v. TRUCK INSURANCE EXCHANGE, a foreign corporation; TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, a foreign corporation; and LEXINGTON INSURANCE COMPANY, a foreign corporation, Defendants.

ORDER ON DALLY PROPERTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: COLLAPSE COVERAGE

This matter comes before the Court on "Plaintiff's Motion for Partial Summary Judgment Against Truck Insurance for Collapse Coverage" (Dkt. # 45). Travelers Property Casualty Company of America ("Travelers"), Lexington Insurance Company ("Lexington") and Truck Insurance Exchange ("Truck") are being sued by Dally Properties, LLC ("Dally") for breach of insurance contract, bad faith claims handling, [2] Consumer Protection Act Violations and attorney's fees. Dally now moves for summary judgment on the issue of collapse coverage in Truck's policy. The facts relevant to this claim that have been recited in other orders will not be repeated here.

I. Discussion

A. Summary Judgment Standard

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). For the purpose of this motion, the Court will construe all facts in favor of Truck. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255,

106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If Dally demonstrates the absence of a genuine issue of fact as to one or more of the essential elements of a claim or defense, Truck must make an affirmative showing on all matters placed at issue by the motion as to which Truck has the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Ambiguous Insurance Policies

[3] Where insurance policies contain ambiguous terms or provisions, they are interpreted against the drafter. Nat'l Union Fire Ins. Co. v. Zuver, 110 Wn.2d 207, 210, 750 P.2d 1247 (1988). A term is ambiguous if "it is fairly susceptible to two different interpretations, both of which are reasonable." McDonald v. State Farm Fire & Casualty Co., 119 Wn.2d 724, 733, 837 P.2d 1000 (1992). Absent an explicit definition, the term "collapse" has been found to be ambiguous in insurance policies. See, e.g., Assurance Co. of Am. v. Wall & Assocs. LLC, 379 F.3d 557, 560-61 (9th Cir. 2004).

C. Washington Law on Collapse Coverage

The Washington Supreme Court has not defined "collapse" for the purpose of insurance collapse coverage. See Wall, 379 F.3d at 561; Allstate Ins. Co. v. Forest Lynn Homeowners Ass'n, 892 F. Supp. 1310, 1312-13 (W.D.Wa. 1995) opinion withdrawn at 914 F. Supp. 408; see also, Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co., 104 Wn.App. 597, 17 P.3d 626, 628 & n.1 (2000). The Ninth Circuit pointed out in Wall, however, that the Washington Supreme Court has interpreted the collapse provision providing [4] coverage "'for risk of direct physical loss involving collapse'" as "not limit[ing] coverage solely to damages resulting from an actual collapse." Wall, 379 F.3d at 561 (citing policy). The Wall court also relied on the Mercer decision, which favorably cites Forest Lynn for Judge Rothstein's conclusion that "the Washington Supreme Court would find the term 'collapse' to be ambiguous and would adopt the construction that the majority of courts have placed upon the term 'collapse.'" Wall, 379 F.3d at 561-62; Forest Lynn, 892 F. Supp. at 1314 ("Therefore, the court finds that coverage under the Collapse provision of the policy is triggered by any substantial impairment of the structural integrity of a building.") (internal quotations omitted).

As Truck correctly points out, the Wall opinion interpreted a provision that [5] covered the "risk of loss due to collapse," and therefore is not totally analogous to the instant case and, furthermore, might imply that coverage--such as Truck's--which is limited just to "loss due to collapse" (not risk of) might be less. Truck's provision for additional coverage due to collapse says "We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building insured under this policy. . . ." Response at 2. Under these terms, Truck argues, the coverage is *at most* limited to the standard of "imminent collapse" used in Wall. *Id.* at 563.

The Court is satisfied that the Truck policy for the St. Theodore lacks guidance to aid the reader in determining whether "collapse" is intended to mean only "actual collapse" or something greater. The Court is further satisfied, relying on the reasoning in Wall, Forest Lynn, and Mercer, that the Washington Supreme Court would interpret "collapse" in this insurance policy as meaning something greater than "actual collapse."

The parties do not seem to contest this approach. Rather, the parties dispute whether the collapse coverage stops at structures facing [6] imminent collapse or extends to structures suffering substantial impairment of structural integrity. The issue was faced head-on in Doheny West Homeowners' Ass'n v. Am. Guarantee & Liability Ins. Co., 60 Cal.App.4th 400, 70 Cal. Rptr. 2d 260 (1997). In that opinion, the California Court of Appeals determined that when considered in light of a policy's exclusion of coverage for "settling, cracking, shrinkage, bulging or expansion," the collapse coverage provision should not extend to substantial impairment of structural integrity. *Id.* at 405-06. The opinion implies, but does not state, that "settling, cracking, shrinkage, bulging or expansion" must equate to substantial impairment of structural integrity, and that is why an explicit exclusion of such events (settling, etc.) and an explicit inclusion substantial impairment of structural integrity (through an expansive interpretation of collapse) would be contradictory. *Id.* Notwithstanding Truck's assertions, Washington has not addressed this issue.

Truck incorrectly cites Wall for the proposition that the Ninth Circuit has held that Washington law limits collapse coverage to actual and imminent collapse. [7] Correctly interpreted, Wall stands for the proposition that Washington law *does not limit* collapse to actual collapse.

The Wall opinion includes a discussion of imminent collapse not to the exclusion of collapse coverage for structures with substantially impaired structural integrity, but rather because the factual circumstances of Wall were limited to structures facing imminent collapse. Wall, 379 F.3d at 559 ("Wall sought [and was denied] coverage for collapse loss and described the cause of the damage as 'deterioration of gypsum wall-board forming substrate of exterior wall system, creating high risk of failure of structural support for brick facing.'). To expand the implications of the Wall holding to the exclusion of coverage for structures suffering substantial impairment of structural integrity would stretch the holding beyond the facts of the case. Moreover, it would be unusual for a case that favorably cites Mercer and Forest Lynn to somehow stand for the ejection their implications.

Truck's policy, like that in Doheny, contains an exclusion for "settling, cracking, shrinking or expansion." Fletcher Decl. Ex. A at 25. Notwithstanding [8] this similarity, the Court does not perceive an inherent contradiction in a policy that covers substantial impairment of structural integrity and contains this exclusion. The Court hereby concludes that the Washington Supreme Court would adopt the majority view of "substantial impairment of structural integrity" as the definition of collapse in this policy.

D. Collapse Under Dally's Policy

The Court already has concluded that Dally has presented a reasonable interpretation of the policy's collapse coverage that does not involve altering the text to omit the alleged typo. See Fletcher Decl. Ex. A at 18 (policy section A.5.d.(1)(d)). Notwithstanding this determination, there remains a jury question as to whether the efficient proximate cause of Dally's loss was covered under the policy.

II. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that Dally's motion for summary judgment on the issue of collapse coverage is GRANTED as to the definition of collapse and the interpretation of the collapse coverage provision, and DENIED as to its request for a finding of coverage as a matter of law.

DATED this 5th day of April, 2006.
Robert S. Lasnik
United [9] States District Judge

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Bayview Heights Owners Association, Appellant v. Travelers Indemnity
Company, Respondent/Cross-Appellant
Case No. 89218-I

I am attaching for filing:

1. Brief of Appellant; and
2. Certificate of Service

Counsel for appellant and respondent/cross-appellant have agreed to electronic service.

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Thank you,

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Bayview Heights Owners Association, Appellant v. Travelers Indemnity Company, Respondent/Cross-Appellant
Case No. 89218-I

Pursuant to our telephone conversation I am resubmitting the following attached documents for filing:

1. Brief of Appellant (corrected title page); and
2. Certificate of Service

Please disregard my earlier email and attachments.

Counsel for appellant and respondent/cross-appellant have agreed to electronic service.

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