11 FEB -9 AM 11:31
BY RONALD R. CARPENTER
CLERK

No. 85350-9

SUPREME COURT OF THE STATE OF WASHINGTON
(Court of Appeals No. 38411-6-II)

VISION ONE, LLC and VISION TACOMA, INC.,

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondent.

PHILADELPHIA INDEMNITY'S RESPONSE TO BRIEF OF CONSTRUCTION CONTRACTOR INDUSTRY AMICAE IN SUPPORT OF PETITION FOR REVIEW

Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Mountain Monroe, WSBA #35843
KARR TUTTLE CAMPBELL
1201 Third Ave., Ste. 2900
Seattle, Washington 98101
Telephone: 206.223.1313
Facsimile: 206.682.7100

Attorneys for Respondent Philadelphia Indemnity Insurance Company

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 1

III. ARGUMENT 4

A. The "directly and solely" language in Philadelphia's policy does not conflict with or supplant Washington's efficient proximate cause rule. 4

B. Vision One is consistent with Sprague. 6

IV. CONCLUSION 7

TABLE OF AUTHORITIES

Page

Cases

Safeco Ins. Co. of Am v. Hirschmann, 112 Wn.2d 621, 773 P.2d 413 8

Sprague v. Safeco Ins. Co., 158 Wn. App. 336, 241 P.3d 1276 (2010) 9, 10

Vision One, LLC v. Philadelphia Indem. Ins. Co., 158 Wn. App 91, 241 P.3d 429 (2010) 4, 7, 8, 9, 10

I. INTRODUCTION

The Construction Contractor Industry ("CCI") argues that the Court of Appeal's decision in *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 158 Wn. App 91, 241 P.3d 429 (2010) ("*Vision One*") is "directly at odds with long established black letter law on how insurance policies are interpreted." CCI contends that the *Vision One* court erred in construing the "direct and solely" language of the policy.

CCI's argument lacks merit. The *Vision One* court did nothing more than apply existing law to the policy language. The *Vision One* court's methods are straightforward and legally correct. CCI's pronouncement that *Vision One* represents a "radical change" to "established norms of policy interpretation" is mere rhetorical excess that adds nothing substantive to Vision One's Petition for Review.

II. BACKGROUND

Philadelphia's commercial builder's risk policy contained the following language:

> B. Exclusions
>
> 1. We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if that occurrence of that event:

> 1. Directly and solely results in loss or damage; or
>
> 2. a. Delay, loss of use, loss of market, or any other consequential loss.
>
> . . .e. Error, omission, or deficiency in design specifications. But we will pay for direct "loss" caused by or resulting fire or explosion.
>
> . . .3. a. Faulty, inadequate, or defective materials, or workmanship. [But if loss by any of the Covered Causes of Loss results, we will pay for the resulting loss]

CP 5971

Based on the post-collapse investigation, Philadelphia denied Vision One's claim, stating that:

> The damage to the construction project was a sole and direct result of the marginal shoring design and faulty installation of the shoring. The policy excludes loss caused by deficiency in design and loss caused by faulty workmanship. Coverage will exist for any resulting loss caused by another insured event or peril. *In this instance, the only peril, which caused the loss, was defective design and faulty workmanship, therefore there is not coverage for Vision One's claims*. To the extent any portion of this claim can be considered a resulting loss, other policy exclusions and limitation apply.

CP 13136

Philadelphia added:

> While the faulty workmanship exclusion contains an exception for resulting loss from a Covered Cause of Loss, *in this case the only cause of the loss was defective design and faulty workmanship*. There is not a separate and independent loss that resulted in the claimed damage. Therefore, the faulty workmanship exclusion bars coverage for this loss, and the "resulting loss" provision contained therein does not apply.

CP 13139

In pretrial hearings concerning jury instructions, the parties disagreed about the meaning of these and other policy provisions. Vision argued, as CCI does now, that if two perils combined to cause the collapse the loss is covered because neither peril, by itself, "directly and solely" caused the collapse. CP 13139. Philadelphia attempted to explain that an efficient proximate cause analysis is required if the loss was caused by an excluded event and a non-excluded event but the trial court disagreed, ruling: "If it is found that the loss was caused by one or more non-excluded event(s) in combination with one or more excluded event(s); the loss is covered." CP6587. Believing this to be a misstatement of Washington's efficient proximate cause rule, Philadelphia moved for reconsideration, asking the trial court to amend the ruling to state: "If there are two or more cause(s) of loss, the policy provides coverage if the efficient proximate cause of the loss is a

covered cause of loss." CP 6603-06. The trial court denied Philadelphia's motion.

On appeal, the *Vision One* court correctly found that the trial court erred in its application of efficient proximate cause rules by removing the determination of causation from the jury.

III. ARGUMENT

A. The "directly and solely" language in Philadelphia's policy does not conflict with or supplant Washington's efficient proximate cause rule.

Like Vision One, CCI contends that the efficient proximate cause rule should yield to the "directly and solely" policy language because that language essentially narrows the "predominant cause standard" articulated in decisions of this Court. This argument twists the policy language beyond all reasonable interpretation. As the *Vision One* court explained, "[w]henever covered and excluded perils combine to cause a loss, the loss will be covered only if the predominant or efficient proximate cause was a covered peril." 158 Wn. App. at 105-06. Under the interpretation urged by Vision One and CCI, an insured would be entitled to coverage <u>any</u> time two or more perils combine because neither peril can be said to have directly and solely caused the loss. Indeed, by CCI's logic even when two *excluded* perils combine to cause a loss there would be coverage because neither peril would be a direct

and sole cause. This interpretation is illogical, unreasonable and contrary to Washington law. Nothing in the policy or Washington law supports such an interpretation. Instead, the "directly and solely" language must be interpreted in light of Washington's long-standing efficient proximate cause rule. According to that rule, where two or more perils (some covered, some not) combine to cause a loss, a fact finder must determine the efficient proximate cause of a loss in order to determine the existence of coverage. The *Vision Court* clearly recognized as much in ruling that "whenever the term 'cause' appears in an exclusionary clause, it must be read as "efficient proximate cause." 158 Wn. App. at 105 citing *Safeco Ins. Co. of Am v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413.

The *Vision One* court correctly found that the trial court's rulings "contradict the efficient proximate cause rule by allowing coverage as long as at least one of the contributing causes was a covered peril." *Id.* The trial court also usurped the jury's role in determining causation. 158 Wn. App. at 105-06. Philadelphia should have been allowed to defend itself on the alternative grounds of defective design and faulty workmanship. The trial court, however, misapplied the efficient proximate cause rule and determined causation as a matter of law. The

trial court's errors have been corrected by the *Vision One* court. This Court should deny review so that the case may proceed to trial.[1]

B. Vision One is consistent with Sprague.

CCI repeats Vision's argument that *Vision One* is at odds with *Sprague v. Safeco Ins. Co.*, 158 Wn. App. 336, 241 P.3d 1276 (2010). The decisions do not conflict, they simply have nothing in common. *Sprague* involved a homeowner's policy, not a commercial Builder's Risk policy. In *Sprague* the insurer's own representative essentially acknowledged the existence of coverage under the policy. Moreover, the "ensuing loss" provision in *Sprague* operates like the type **distinguished** by the *Vision One* court, a type that excludes the cost of repairing faulty workmanship but covers the loss resulting directly from faulty workmanship. 158 Wn. App. at 110. In contrast, the provision here:

> "excludes damage *resulting from* faulty workmanship but provides coverage when 'loss caused by any of the covered causes of loss results' from faulty workmanship.... In other words, this policy covers damage resulting from an independent covered cause but

[1] CCI's asserts that *Vision One* has widespread impact on the construction industry. Property insurance may be prevalent in the construction industry but that does not make *Vision One* especially significant. The argument that a particular industry is uniquely affected by a particular decision can be made in nearly any commercial insurance dispute. This case involves well-established principles of Washington law. The construction context does not make it more worthy of review.

> does not cover damage resulting directly from faulty workmanship. ..... "

158 Wn. App. at 110. (citations omitted).

The *Vision One* court correctly notes that a resulting loss follows from a covered cause of loss. Logically, the covered cause must be independent of the non-covered faulty workmanship or it too would be part of the excluded peril. The "ensuing loss" provision in *Sprague* lacks this context and thus may lend itself to a different interpretation. Because *Vision One*'s "resulting loss" provision differs from Sprague's "ensuing loss" clause in phrasing and effect, there is no conflict.

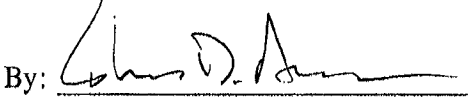
IV. CONCLUSION

The Petition for Review should be denied.

DATED this 9th day of February, 2011.

Respectfully submitted,

KARR TUTTLE CAMPBELL

By: 

Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Monroe, WSBA #35843
Attorneys for Philadelphia Indemnity Insurance Company

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
11 FEB -9 AM 11:31
BY RONALD R. CARPENTER
CLERK

Certificate of Service

I hereby certify that on the 9th day of February, 2011, I caused to be served a copy of *PHILADELPHIA INDEMNITY'S RESPONSE TO BRIEF OF CONSTRUCTION CONTRACTOR INDUSTRY AMICAE IN SUPPORT OF PETITION FOR REVIEW* via email and U.S. Mail on the following:

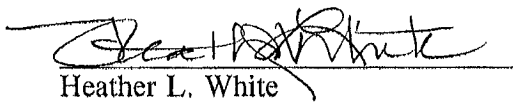
Jerry Edmonds Teena Killian Williams, Kastner & Gibbs PLLC Two Union Square 601 Union Street, Ste. 4100 Seattle, WA 98101 Tel: 206.628.6600 Fax: 206.628.6611 jedmonds@williamskastner.com tkillian@williamskastner.com ***Counsel for D&D, Vision One, and Vision Tacoma***	Daniel F. Mullin Tracy A. Duany Mullin Law Group PLLC 101 Yesler Way, Ste. 400 Seattle, WA 98104 Phone: 206.957.7007 dmullin@mullinlawgroup.com tduany@mullinlawgroup.com ***Counsel for Berg Equipment & Scaffolding, Inc.***
Dennis J. Perkins Attorney at Law 1570 Skyline Twr. 10900 NE 4th St. Bellevue, WA 98004 Phone: 425.455.5882 dperklaw@seanet.com ***Counsel for Berg Equipment & Scaffolding Co., Inc.***	Michael D. Helgren Barbara H. Schuknecht David A. Linehan McNaul Ebel Nawrot & Helgren 600 University St., Ste. 2700 Seattle, WA 98101-3143 Phone: 206.467.1816 MHelgren@mcnaul.com BSchuknecht@mcnaul.com DLinehan@mcnaul.com ***Counsel for RSUI Indemnity Company***
Charles K. Wiggins Wiggins & Masters PLLC 241 Madison Ave. N. Bainbridge Island, WA 98110 Phone: 206.780.5033 Charlie@appeal-law.com ***Counsel for RSUI Indemnity Company***	

FILED AS
ATTACHMENT TO EM

ORIGINAL

Via Facsimile and U.S. Mail to:

John P. Ahlers Ahlers & Cressman PLLC 999 Third Ave., Ste. 3800 Seattle, WA 98104-4023 206-287-9902 ***Counsel for Construction Contractor Industry Amicae***	Joseph E. Lynam Abraham K. Lorber Lane Powell PC 1420 Fifth Ave., Ste. 4100 Seattle, WA 98101-2338 206-223-7107 ***Counsel for Amici Curiae Building Owners and Managers Association Seattle/King County, Building Owners and Managers Association South Puget Sound, Building Owners and Managers Association Tri-Cities, Building Owners and Managers Association Spokane, and NAIOP – Washington State Chapter***
John S. Riper Ashbaugh Beal LLP 701 Fifth Ave., Ste. 4400 Seattle, WA 98104-7012 206-344-7400 ***Counsel for Construction Contractor Industry Amicae***	



Heather L. White

OFFICE RECEPTIONIST, CLERK

To: Heather White
Subject: RE: Second Filing via Email

Rec. 2-9-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Heather White [mailto:hwhite@karrtuttle.com]
Sent: Wednesday, February 09, 2011 11:25 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Second Filing via Email

Vision One and Vision Tacoma, Inc. v. Philadelphia Indemnity Insurance Company
No. 85350-9

Filed on behalf of:
Thomas D. Adams, WSBA #18470
Karr Tuttle Campbell
1201 Third Ave., Ste. 2900
Seattle, WA 98101
206-223-1313

KARR ▾ TUTTLE ▾ CAMPBELL

Heather White
Legal Secretary
1201 3rd Avenue, Suite 2900
Seattle, Washington 98101
- direct 206-224-8190
- main 206-223-1313
- fax 206-682-7100

Visit our website www.karrtuttle.com

A Law Firm for the Pacific Northwest

Please consider the environment before printing this email

IMPORTANT/CONFIDENTIAL: This e-mail message (and any attachments accompanying it) may contain confidential information, including information protected by attorney-client privilege. The information is intended only for the use of the intended recipient(s). Delivery of this message to anyone other than the intended recipient(s) is not intended to waive any privilege or otherwise detract from the confidentiality of the message. If you are not the intended recipient, or if this message has been addressed to you in error, do not read, disclose, reproduce, distribute, disseminate or otherwise use this transmission, rather, please promptly notify the sender by reply e-mail, and then destroy all copies of the message and its attachments, if any.

IRS Circular 230 Disclaimer: To ensure compliance with requirements imposed by the IRS, we inform you that to the extent this communication contains advice relating to a Federal tax issue, it is not intended or written to be used, and it may not be used, for (i) the purpose of avoiding any penalties that may be imposed on you or any other person or entity under the Internal Revenue Code or (ii) promoting or marketing to another party any transaction or matter addressed herein.