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Case No. 85350-9

**IN THE SUPREME COURT FOR THE STATE OF
WASHINGTON**

VISION ONE, LLC and VISION TACOMA, INC.,
Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE CO.,
Respondent,

**AMICUS BRIEF OF CONSTRUCTION
CONTRACTOR INDUSTRY**

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I. Identity of construction contractor industry amicae.

Five Washington state construction contractor associations submit this amicus brief in support of the positions of the insureds (Vision One and Sprague) in this consolidated appeal. The five amicae are:

1. The Associated General Contractors of Washington.
2. The Associated Builders & Contractors of Western Washington.
3. The National Electrical Contractors Association.
4. The National Utility Contractor's Association of Washington.
5. The Mechanical Contractor's Association of Western Washington.

Formed in 1922, the **AGC of Washington** is the state's largest construction industry trade organization. Its membership in Washington encompasses more than 600 general contractors, subcontractors, and associates, including construction industry suppliers and other service providers.

The **Associated Builders & Contractors of Western Washington** is a 501c6 non-profit trade association representing employers engaged in all facets of the construction industry. Established in 1982, the ABC of Western Washington currently has nearly 400

members, consisting of general contractors, subcontractors, industry professionals and suppliers.

The **National Electrical Contractors Association** is the largest electrical contractors' association in Washington, and has 168 contractor members (57 in the Chapter), and has been in business since 1901 (NECA National) or 1949 (Puget Sound Chapter, NECA). NECA contractors perform specialized construction work related to the design, installation, and maintenance of electrical systems.

The **National Utility Contractors Association of Washington** is an independent chapter of the National Utility Contractors Association. UCAW WA was founded in 1978 and is the largest utility contractors association in Washington state. The association represents over 53 utility contractors, as well as other large and small construction contractors, material suppliers, bonding companies, equipment companies, engineering, graphic design companies, and other construction industry related firms.

The **Mechanical Contractor's Association of Western Washington**, in existence since 1986, represents 52 contractor members who provide construction services to major commercial, industrial and public institutions throughout Western Washington. Contractor members

employ over 6,000 plumbers and pipefitters who perform the majority of plumbing and pipefitting work in the non-residential market.

II. The 'efficient proximate cause' rule does not rewrite the insurance policy to provide less coverage than the policy language promises.

Division Two's opinion below erred by applying the efficient proximate cause rule so as to exclude coverage, even though the unambiguous language of the policy did not exclude coverage. That result violated basic tenets of Washington insurance law in a number of respects.

The policy, as amended by the Washington Changes endorsement, provides in relevant part:

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

1. Directly and solely results in loss or damage; or
2. Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.

But if "loss" by any of the Covered Causes of Loss results, we will pay for that resulting "loss".

- a. Faulty, inadequate or defective materials or workmanship.

CP 5971-72 and CP 5977-78. Following the close of discovery the trial court entered an order *in limine* restricting the exclusions Philadelphia

could invoke to subsection (1) of the deficient design and the defective materials or workmanship exclusions. CP 5723 § P. Exclusion subsection (1) recites that each exclusion applies where the excluded peril “directly and solely” results in the loss. The order *in limine* properly prohibited Philadelphia from excluding coverage on other grounds, such as the sequence-of-events provision in subsection (2) of the same exclusions. Philadelphia never appealed from that order in limine.

The only exclusionary language available to Philadelphia was therefore the provision denying coverage for loss that “[d]irectly and solely results” from a designated excluded peril, such as “[f]aulty, inadequate or defective materials or workmanship.” The trial court’s Order on Insurance-Related Issues was therefore entirely correct: “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.” 158 Wn. App. at 98 (quoting Order). Philadelphia admitted as much to the trial court. *See* discussion of record at Petition for Review, p. 17, and CP 6623-24.

No dispute ever existed over the fact that neither defective design nor defective work or materials “directly and solely” caused Vision One’s loss. Philadelphia itself asserted that defective equipment (a non-excluded peril under the policy) was a cause of the loss. CP 13070, 13072

(Philadelphia's expert admits defective shoring equipment was a cause of the collapse. CP 6588(¶1)). The trial court therefore correctly ordered that trial would be on causation, bad faith, and damages. 158 Wn. App. at 99.

Division Two nevertheless held that the trial court erred in not interpreting the policy to mean that any excluded peril (even though not "directly and solely" causing the loss) would preclude coverage if it was the efficient proximate cause of the loss. That holding was error in three respects. First, it ignores Washington law requiring courts to interpret broadly those provisions in a policy that grant coverage, and to interpret narrowly those provisions excluding coverage.

If the portion of the policy being considered is an *inclusionary clause* in the insurance policy, the ambiguity should be liberally construed to provide coverage whenever possible. However, the basic principle that applies to *exclusionary clauses* in insurance contracts is that any ambiguity should be "most strictly construed against the insurer."

Ross v. State Farm, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997)

(Emphasis in original) (citations omitted).

Second, it conflicts with Washington law mandating that the court not rewrite the language of the policy.

If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may

not modify the contract or create ambiguity where none exists.

Transcontinental Insurance Co. v. Washington Public Utilities Districts Utilities' System, 111 Wn.2d 452, 456, 760 P.2d 337 (1988); *see Washington PUD v. PUD No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989) (“[I]f 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. In the event of an ambiguity, the contract will be construed in favor of the insured.”) (Citations omitted); *Public Employees Mutual Insurance Co. v. Muckleston*, 111 Wn.2d 442, 444, 758 P.2d 987 (1988) (Courts will not interpret the policy “to make it read so as to provide the exclusion [the insurer] wishes it had drafted.”) The only relevant language in the policy (after the un-appealed Order *in limine*) excluded loss caused “directly and solely” from designated perils. The appellate court erred by interpreting the policy to exclude all loss proximately caused by those designated perils when in combination with other, non-excluded perils.

Third, Division Two erred in applying the efficient proximate cause rule to deny coverage where the language of the policy contained no exclusion purporting to deny coverage for the loss. Repeatedly in explaining the efficient proximate cause rule this court has held that the

rule is to save coverage, not defeat it: “[Stating the rule] in another fashion, where an insured risk itself sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not *defeat* recovery.” *Villella v. Public Employees Mutual Insurance Co.*, 106 Wn.2d 806, 815, 725 P.2d 957 (1986) (emphasis added); *Allstate Insurance Co. v. Raynor*, 143 Wn.2d 469, 479-80, 21 P.3d 707 (2001). Likewise, this court has explained that the rule comes into play only when the efficient proximate cause is a *covered* peril:

Only if the peril of negligent construction or repair is a covered peril does the efficient proximate cause rule come into play. This is the effect of the statement in *Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 773 P.2d 413 (1989) that “[i]f the initial event, the ‘efficient proximate cause,’ is a covered peril, then there is coverage under the policy regardless whether subsequent events within the chain, which may be causes-in-fact of the loss, are excluded by the policy.” *Hirschmann*, at 628.

McDonald v. State Farm Fire & Casualty Co., 119 Wn.2d 724, 735, 837 P.2d 1000 (1992).

This court’s observations about the efficient proximate cause rule in *McDonald* and *Hirschmann* derive from the fact that efficient proximate cause cases all involve all-risk insurance policies, where the insurer promises a broad grant of coverage (hence, it being “all risk” insurance), counterbalanced by the exclusion of specific perils defined by the policy exclusions. See *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d

724, 734, 837 P.2d 1000 (1992) (“Because the structure of an all-risk homeowners’ insurance policy consists of a grant of coverage counterbalanced by coverage exclusions, an interpretation of provisions contained in such a policy must acknowledge this structure, which is an important objective source of meaning and intent.”); *Villella v. Public Employees Mutual Insurance Co.*, 106 Wn.2d 806, 816, 725 P.2d 957 (1986) (“In the case of all risk homeowners insurance, the peril insured against would be any peril that is not specifically excluded.”); *Frank Coluccio Construction Co. v. King County*, 136 Wn. App. 751, 757 n.1, 150 P.3d 1147 (2007) (“All-risk insurance covers all risks that are not specifically excluded in the terms of the contract and takes the opposite approach of traditional policies, sometimes called ‘named perils’ or ‘specific perils’ policies, which exclude all risks not specifically named.”).

The significance of this policy structure comes into play with the two-step process required for an initial determination of coverage.

Determining whether coverage exists is a 2-step process. The insured must show the loss falls within the scope of the policy’s insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.

McDonald v. State Farm Fire & Casualty Co., 119 Wn.2d 724, 731, 837 P.2d 1000 (1992); see *Villella v. Public Employees Mutual Insurance Co.*, 106 Wn.2d 806, 816, 725 P.2d 957 (1986) (“In the case of all risk

homeowners insurance, the peril insured against would be any peril that is not specifically excluded.”); *Overton v. Consolidated Insurance Co.*, 145 Wn.2d 417, 431, 38 P.3d 322 (2001) (Determining coverage is a two-step process).

Where a loss falls within the coverage grant in an all-risk policy and the insurer cannot point to an exclusion in the policy denying coverage, the coverage analysis is finished. The courts may not further construe the policy to find an exclusion that the insurer did not write. “The industry knows how to protect itself and it knows how to write exclusions and conditions.” *Panorama Village Condominium Owners Assoc. v. Allstate Insurance Co.*, 144 Wn.2d 130, 141, 26 P.3d 910 (2001). Where, however, the insurer invokes an exclusion purporting to deny coverage for loss from an excluded peril *regardless of how slight the role of the excluded peril may have been*, the efficient proximate cause rule operates to construe such an exclusion to conform with the reasonable expectations of insureds.

Thus, in *Villella* this court rejected the literal application of an exclusion that would have applied regardless of how slight the role of an excluded peril may have been. “Pemco argues that if earth movement contributed to the loss, *regardless how slight in degree*, coverage is precluded.” *Villella*, 106 Wn.2d at 817 (emphasis added). Likewise in

Hirschmann, this court tempered the literal exclusionary language of a policy so that an excluded peril would deny coverage only where the peril was found to be the efficient proximate cause of the loss, not where it was a more remote contributing factor. *Safeco Ins. Co. v. Hirschmann*, 112 Wn.2d 621, 627, 773 P.2d 413 (1989) (“Safeco’s [exclusionary language] is an attempt to exclude from coverage losses connected with certain perils no matter how *insignificant those perils may have been to the loss.*”) (emphasis in original).

Nowhere in Washington, nor anywhere else that these amici are aware of, has the efficient proximate cause rule been used to deny coverage where the unambiguous language in the policy contains no applicable exclusion. Yet that is the holding of Division Two below; that holding was error.

In its Supplemental Brief (p. 2), Philadelphia argues that the *Capelouto* case requires an efficient proximate cause analysis even where the only exclusionary language at issue is the “directly and solely” language in the Philadelphia policy. But that is not what *Capelouto* says. Rather, as the court explained (quoting the relevant policy provisions), the primary policy form excluded loss “caused directly *or indirectly*” by excluded perils. That clause was amended by an endorsement excluding loss caused *either* “directly and solely” by an excluded peril *or* if the

excluded peril “Initiates a sequence of events that results in loss or damage[.]” *Capelouto v. Valley Forge Insurance Co.*, 98 Wn. App. 7, 19-20, 990 P.2d 414 (1999). The *Capelouto* court never suggested that an efficient proximate cause analysis would be appropriate when the policy excludes coverage for an excluded peril that “directly and solely” causes a loss.

Moreover, *Capelouto* had nothing to do with the application of the efficient proximate cause rule. In *Capalouto*, rain (an excluded peril) combined with an inadequately designed temporary sewer bypass system (another excluded peril) to cause sewer water (another excluded peril) to damage the insured’s property. All of the perils that combined to cause the insured’s loss were explicitly excluded from coverage; there was no non-excluded peril that could have been found to be the cause of the loss, so the efficient proximate cause rule was not relevant to the case.

III. The appellate court in *Vision One* erred by effectively rewriting the ensuing loss provision so it would apply only to ensuing loss from a separate and independent peril.

The insurance policies in both cases consolidated in this appeal contain exclusions that are qualified by an exception: Both policies recite that coverage exists if the excluded peril results in loss not otherwise

excluded. The resulting loss language at the end of the policy exclusions in *Sprague* reads: “However, any ensuing loss not excluded or excepted in this policy is covered.” 158 Wn. App. at 339-340. The resulting loss language in the *Vision One* policy exclusion for defective design and workmanship is functionally the same: “But if ‘loss’ by any of the Covered Causes of Loss results, we will pay for that resulting ‘loss’.” 158 Wn. App. at 96-97. The *Vision One* policy defines ‘loss’ as “accidental loss or damage.” CP 5979.

Both the *Vision One* and *Sprague* policies also identify collapse as a separate peril. *Sprague* CP 54 & 79; *Vision One* CP 5977 & 5979. But in neither policy is collapse named as an excluded loss or peril to the all risk coverage at issue. Because both the *Vision One* and *Sprague* policies recognize collapse as an insurable peril, and because neither policy excludes the peril of collapse from the coverage at issue here, loss from collapse is covered for purposes of each consolidated case. *See Villella v. Public Employees Mutual Insurance Co*, 106 Wn.2d 806, 816, 725 P.2d 957 (1986) (“In the case of all risk homeowners insurance, the peril insured against would be any peril that is not specifically excluded.”); *Frank Coluccio Construction Co. v. King County*, 136 Wn. App. 751, 757 n.1, 150 P.3d 1147 (2007) (“All-risk insurance covers all risks that are not specifically excluded in the terms of the contract and takes the opposite

approach of traditional policies, sometimes called ‘named perils’ or ‘specific perils’ policies, which exclude all risks not specifically named.”).

The appellate court in *Sprague* read the policy the way any reasonable insured would have read it: If collapse (a non-excluded loss or peril) resulted from defective workmanship (an excluded peril), the policy covers the collapse. Division Two came to the opposite conclusion by effectively rewriting the resulting loss provision so that it could never apply to afford coverage for collapse (or any other non-excluded loss) unless (in Division Two’s words) “an excluded peril *causes a separate and independent covered peril.*” 158 Wn. App. at 107 (Emphasis added).

Philadelphia, however, did not write its policy to provide coverage for resulting loss only when it resulted from a “separate and independent covered peril.” Instead, Philadelphia wrote and sold its policy to provide (as other carriers’ policies routinely provide) for coverage where the excluded peril results in any non-excluded “loss.”

The *Vision One* appellate court’s requirement that no ensuing loss coverage can exist except for loss from a separate and independent covered peril is error in three respects. First, it creates a requirement for coverage that cannot be found anywhere in the language of the policies sold to the insureds in these consolidated cases. *See Transcontinental Insurance Co. v. Washington Public Utilities Districts Utilities’ System,*

111 Wn.2d 452, 456, 760 P.2d 337 (1988) (“If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity where none exists.”); *Public Employees Mutual Insurance Co. v. Mucklestone*, 111 Wn.2d 442, 444, 758 P.2d 987 (1988) (Courts will not interpret policy “to make it read so as to provide the exclusion [the insurer] wishes it had drafted.”).

Second, to the extent any unclarity could be gleaned from the carriers’ policy language, that unclarity would have to be construed against the insurer, and in favor of the insured. See *Queen City Farms, Inc. v. Central National Insurance Co.*, 126 Wn.2d 50, 60-61, 882 P.2d 703 (1994) (“Where exceptions to or limitations upon coverage are concerned, this principle [of construing ambiguities against the insurer] applies with added force.”); *Shotwell v. Transamerica Title Insurance Co.*, 91 Wn.2d 161, 167, 588 P.2d 208 (1978) (“Where a provision of a policy of insurance is capable of two constructions, the meaning and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise.”).

Third, the *Vision One* appellate court interfered with the contractual relations between Vision One and its insurer. By effectively rewriting the policy, the court absolved Philadelphia from providing

coverage despite collecting premium payments from Vision One for an ensuing loss that the policy promised to cover. Division Two's decision thus provided Philadelphia with a windfall.

As its authority for imposing the requirement that coverage for an ensuing loss exists only when it is caused by a separate and independent covered peril, Division Two cited two out-of-state cases: The California court of appeals decision in *Acme Galvanizing Co. v. Fireman's Fund Insurance Co.*, 221 Cal. App. 3d 170, 270 Cal. Rptr. 405, 407 (1990), and the New Hampshire case of *Weeks v. Co-Operative Insurance Cos.*, 149 N.H. 174, 817 A.2d 292 (2003). Neither of those cases supports Division Two's holding because the policy language in those cases was fundamentally different from the ensuing loss provisions here.

The insurance policy in *Acme* did not have any clause promising coverage for ensuing loss. Instead, it had a clause for coverage from an ensuing, covered *peril*. The *Acme* policy excluded various perils such as latent defect, and then said, "unless loss ***by a peril not otherwise excluded*** ensues and then the Company shall be liable only for such ensuing loss" 270 Cal. Rptr. at 407. When a defective weld in a steel kettle at the insured's galvanizing plant gave way and ruptured, the kettle's molten contents spilled out, damaging adjacent equipment. The trial and appellate courts held that the policy's exclusion for "latent defect" applied

to exclude coverage for the loss. The insured nevertheless argued for coverage under the policy's 'ensuing peril' clause. But because that clause promised coverage only where "a peril not otherwise excluded ensues" from an excluded peril, and because no such peril separate from the excluded peril of latent defect existed, the court rejected the insured's argument:

We interpret the ensuing loss provision to apply to the situation where there is a "peril," i.e., a hazard or occurrence which causes a loss or injury, separate and independent but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues. . . .

Here, there was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture.

270 Cal. Rptr. at 211.

Likewise in *Weeks*, the policy said that where a loss resulted from an excluded peril, coverage would exist only if the excluded peril resulted in an ensuing, covered *peril*: "But if an excluded cause of loss that is listed [below] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss." 817 A.2d at 294. The insured's property suffered loss when a veneer wall separated from the underlying structure. The loss resulted from negligent workmanship, which was an excluded peril. Because the policy language promised coverage only where the excluded peril of negligent workmanship resulted

in a covered peril, and because no such resulting covered peril existed, the court in *Weeks* denied coverage. 817 A.2d at 296.

Unlike the insurance policies in *Acme Galvanizing* and *Weeks*, the policies in these consolidated cases do not require the presence of an ensuing, covered peril. Instead, both policies promise coverage if any non-excluded *loss* ensues from an excluded loss or peril. Division Two erred by imposing on the insureds in these consolidated cases requirements written into policies that other insureds in other states purchased in previous decades, but that are not in the policies purchased by the insureds here.

IV. Enforcing ‘ensuing loss’ provisions by their plain meaning, without adding requirements that are absent from the policy language, is of substantial interest to the construction contracting industry.

Builders Risk insurance is ubiquitous to the construction industry. It is purchased for most new construction projects, whether public or private. Washington insurers almost always sell Builders Risk coverage based on standard insurance forms, rather than as custom drafted contracts. Judicial interpretation of one carrier’s standard insurance form therefore tends to directly implicate the scope of coverage under other carriers’ policies.

Because Builders Risk coverage is a routinely used mechanism for risk allocation on construction projects, changes to established norms of policy interpretation would be a substantial shock to a large and vital part of the state's commerce. According to an annual University of Washington study done in 2009, Washington contractors, construction services and material suppliers employ more than 216,000 workers in this state, representing 9.4 percent of our private workforce. The total payroll for construction industry jobs exceeds \$11.4 billion, which represents 10.5 percent of the state's non-government payroll.

In 2008, in-state business activity in the construction industry exceeded \$35 billion, comprising 18.2 percent of all in-state sales. Construction industry businesses paid \$1.9 billion in state sales and B&O taxes, amounting to 21.5 percent of all sales and B&O tax receipts.

Insureds buying Philadelphia's coverage were never supposed to have been left wondering whether, in hindsight, their non-excluded loss resulting from excluded perils such as defective workmanship would be deemed "separate" or "independent" from that workmanship. With the publication of Division Two's decision, *all* insureds who were promised coverage for loss resulting from the same excluded perils must now worry that their policies will be interpreted much more narrowly than the way they were written.

V. Safeco's new argument for denying coverage based on a 'separate property test' is barred by RAP 9.12.

In its Supplemental Brief, Safeco raises for the first time a new argument for denying coverage: That this court should adopt as Washington law a 'separate property test' for coverage, and use that test to deny coverage to Safeco's insureds. *See* Safeco's Supplemental Brief, pp. 12-16.

Judgment in *Sprague* resulted from cross-motions for summary judgment. 158 Wn. App. at 340. Safeco never raised its argument for adopting and applying a 'separate property test' in those motions. Its insureds had no opportunity to develop a summary judgment record, as well as legal argument, on that issue. Safeco likewise never raised the issue in the court of appeals. Its insureds had no opportunity to brief the issue. Only in its Supplemental Brief, to which its insureds have no chance to respond, does Safeco raise the prospect of imposing a 'separate property test' to deny coverage.

RAP 9.12 exists to forestall just such arguments as the one Safeco belatedly makes: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *See Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258, 1266 (1995); *Brinkerhoff v.*

Campbell, 99 Wn. App. 692, 700, 994 P.2d 911 (2000) (Where theories for desired relief were not raised in the trial court, adversary did not know to respond to them, and the appellate court “will not consider them on appeal.”)

The prospect of adopting a new test as Washington law for denying coverage not only to the Spragues, but potentially to all similarly situated Washington insureds, deserves an opportunity to develop a record at the trial court level, and the opportunity for both sides to brief the issue on appeal. Safeco’s argument violates RAP 9.12, and this court should decline to consider it.

Conclusion

These construction industry amicae respectfully request that the appellate decision in *Sprague* be affirmed, and that the appellate decision in *Vision One* be reversed, both regarding its interpretation of ensuing loss coverage and because of its holding regarding efficient proximate cause.

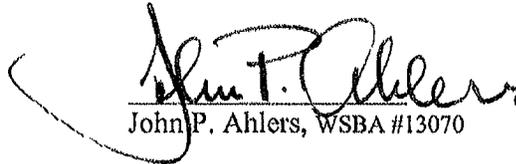
— Dated this 15th day of August, 2011.

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AHLERS & CRESSMAN, PLLC



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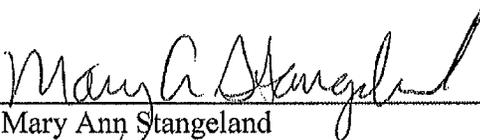
CERTIFICATE OF SERVICE

On this 15th day of August, 2011, a true and correct copy of the foregoing was caused to be served via the delivery methods mentioned below to the following:

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Mary Ann Stangeland
Legal Assistant to John S. Riper

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From: Mary Ann Stangeland [<mailto:MStangeland@lawasresults.com>]
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Vision One, LLC and Vision Tacoma, Inc. v. Philadelphia Indemnity Ins. Co.
Washington Supreme Court No. 85350-9
John S. Riper, Attorneys for Construction Contractor Industry Amicae
(206) 386-5900
WSBA #11161
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mstangeland@lawasresults.com, assistant to John S. Riper

Attached please find the following for filing:

- 1) Motion to File Amicus Brief of Construction Contractor Industry; and
- 2) Amicus Brief of Construction Contractor Industry.

Thank you for your assistance.

Mary Ann Stangeland
Assistant to John S. Riper
Ashbaugh Beal