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NO. 90651-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

QUEEN ANNE PARK HOMEOWNERS ASSOCIATION, a Washington non-profit
corporation,

Appellant,

vs.

STATE FARM FIRE AND CASUALTY COMPANY, a foreign insurance company,

Appellee.

CERTIFICATION FROM UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Honorable Arthur L. Alarcón, Honorable A. Wallace Tashima, and Honorable
Mary H. Murguia

APPELLEE'S ANSWER TO BRIEF OF AMICUS CURIAE
BAYVIEW HEIGHTS OWNERS ASSOCIATION

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ORIGINAL

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I. ARGUMENT

Amicus curiae Bayview Heights Owners Association claims this Court should define “collapse” as “substantial impairment of structural integrity.” Amicus Bayview does not attempt to discuss how the alleged substantial impairment of structural integrity in the instant case could have reasonably qualified as “collapse” in 1998, when the last State Farm policy was in effect, given that the buildings remain standing with no evidence of deflection, falling, or dropping more than a decade later.

It is true this Court’s task is *not* to determine coverage. Rather, this Court is to answer the certified question:

What does “collapse” mean under Washington law in an insurance policy that insures “accidental direct physical loss involving collapse,” subject to the policy’s terms, conditions, exclusions, and other provisions, but does not define “collapse,” except to state that “collapse does not include settling, cracking, shrinking, bulging or expansion?”

But the facts here are critical to answering this question because they demonstrate “collapse” cannot reasonably be defined or otherwise described as “substantial impairment of structural integrity” without more. The average purchaser of insurance would never think “collapse” includes buildings that remain standing with no evidence they or any part has fallen, dropped, or deflected, 16 years after allegedly “collapsing.”

A. “COLLAPSE” IS NOT AMBIGUOUS.

Amicus Bayview claims “collapse” is ambiguous. But, as discussed at Brief of Appellee, pages 10-16, incorporated by reference herein, the average purchaser of insurance would not think so in the context of a policy insuring against “direct physical loss . . . involving collapse.” Indeed, the average purchaser of insurance would never think “collapse” means “substantial impairment of structural integrity.” No dictionary defines “collapse” as such. Moreover, the average insurance purchaser would never believe the buildings at issue have collapsed, either now or 16 years ago, when the State Farm policy was last in effect.

B. WASHINGTON COURTS HAVE NEVER FACED A “COLLAPSE” CLAIM LIKE THIS ONE.

Amicus Bayview’s next argument is that courts in Washington have accepted the substantial impairment test for a long time. But, no Washington state appellate court has ever actually decided how “collapse” should be defined. *See Queen Anne Homeowners Ass’n v. State Farm Fire & Cas. Co.*, 763 F.3d 1232, 1234 , 1235 (9th Cir. 2014); *Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 341, 241 P.3d 1276 (2010), *rev’d on other grounds*, 174 Wn.2d 524, 526, 276 P.3d 1270 (2012). Otherwise, there would have been no need for the Court of Appeals for the Ninth Circuit to have certified this case, and no need for this Court to have

accepted the case. *See* RCW 2.60.020 (federal court may certified question of local law when “local law has not been clearly determined”).

Further, no Washington appellate court has ever decided a case like this one: where the insured claims its buildings collapsed 16 years ago although they remain standing, without evidence of any falling, dropping, or deflection, let alone evidence that substantial falling, dropping, or deflection will occur anytime soon. These facts illustrate that although the insured’s expert claims there has been “substantial impairment of structural integrity,” that term cannot reasonably mean “collapse.”

1. *Forest Lynn* Does Not Support Amicus’s Position.

Amicus Bayview relies heavily on *Allstate Ins. Co. v. Forest Lynn Homeowner’s Ass’n*, 892 F. Supp. 1310 (W.D. Wash. 1995), *opinion withdrawn*, 914 F. Supp. 408 (W.D. Wash. 1996). That case involved walkways whose supports were so decayed they had to be propped up. *Id.* at 1311-12. No one claims supports are needed at the buildings at issue here, let alone in 1998 when the last State Farm policy was in effect.

Nonetheless, amicus Bayview argues that *Forest Lynn* said “‘any’ SSI qualifies as collapse.” (Brief of Amicus Curiae Bayview 5) In so stating, *Forest Lynn* quoted *Beach v. Middlesex Mut. Assur. Co.*, 205 Conn. 246, 532 A.2d 1297, 1300 (1987). *Beach* involved a house whose foundation had tipped over into the basement so that it was no longer

supporting the house. Witnesses said the house would have caved in had the problem not been fixed. The cases *Beach* cited for the proposition that “any” substantial impairment is covered either (1) did not adopt the substantial impairment test advocated by amicus Bayview¹ or (2) involved damage far worse than in the instant case, yet the insurers were insisting there was no coverage on the ground that “collapse” should be defined by the strict rubble-on-the-ground standard or something very similar.²

Thus, none of the cases cited in *Beach* stand for the proposition that damage similar to that here could qualify as the “substantial impairment of structural integrity” that either *Forest Lynn* or *Beach* contemplated. *Forest Lynn* and *Beach* could not have contemplated that

¹*Thornwell v. Indiana Lumhermens Mut. Ins. Co.*, 33 Wis.2d 344, 147 N.W.2d 317, 321 (1967) (no “collapse” where two walls bowed up to 2.5 inches because they “had not fallen, and there was no evidence they were in any immediate danger of falling”); *Employers Mut. Cas. Co. v. Nelson*, 361 S.W.2d 704, 709 (Tex. 1962) (insurer entitled to new trial because “partial collapse” means “a sinking, bulging, breaking or pulling away of the foundation or walls or other supports so as materially to impair their function **and to render the house unfit for habitation**” (emphasis added)).

² *Auto Owners Ins. Co. v. Allen*, 362 So.2d 176, 177 (Fla. Dist. Ct. App. 1978) (roof kept from falling only by resting on interior walls; roof and house was in imminent danger of falling); *Nationwide Mut. Ins. Co. v. Tomlin*, 181 Ga. App. 413, 352 S.E.2d 612, 614 (1986) (supports needed to prevent cracked walls that had pulled away from building from falling); *Rogers v. Md. Cas. Co.*, 252 Iowa 1096, 109 N.W.2d 435, 437-38 (1961) (entire basement wall in danger of falling in); *Gov't Employees Ins. Co. v. DeJames*, 256 Md. 717, 261A.2d 747, 748-50 (1970) (unsafe house where floor joists had to be supported and walls shored up); *Vormelker v. Oleksinski*, 40 Mich. App. 618, 199 N.W.2d 287, 289, 292 (1972) (unspecified damage allegedly rendered home uninhabitable); *Morton v. Travelers Indem. Co.*, 171 Neb. 433, 449, 106 N.W.2d 710, 715, 716, 719 (1960) (severely bulging and leaning walls could collapse in foreseeable future); *Morton v. Great Am. Ins. Co.*, 77 N.M. 35, 419 P.2d 239, 240 (1966) (home rendered unsafe by supporting piers tilting up to 10 degrees).

anyone would ever claim that buildings still standing without any deflection, dropping, or falling, let alone substantial deflection, dropping or falling could have “collapsed” 16 years before.

2. Washington Appellate Cases Do Not Support Amicus.

To the extent amicus Bayview cites to the *dissent* in *Panorama Village Condo. Owners Ass’n v. Allstate Ins. Co.*, 144 Wn.2d 130, 149, 26 P.3d 910 (2001), the citation is hardly persuasive. To the extent amicus Bayview cites to the majority in that case, the citation is not persuasive because the issue before this Court was the running of the suit limitation clause, not the definition of “collapse.” 144 Wn.2d at 133.

Although some courts—including the dissent in *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 276 P.3d 1270 (2012)—have read the *Panorama Village* majority decision as implicitly adopting “substantial impairment of structural integrity,” the facts and procedure in that case demonstrate that the majority could not have done so, at least without an imminency requirement. Specifically, the trial court in *Panorama Village* had ruled that “collapse” does not require that “the structure actually fall down” *Id.* at 149 & n.3. Whether this meant the trial court was rejecting the strict rubble-on-the-ground standard as opposed to the broader actual collapse standard or vice versa is unclear from this statement alone. (Brief of Appellee 12-13) What is clear is that no one appealed that ruling, so the

issue of what “collapse” means was never an issue on appeal. See *Panorama Village*, 144 Wn.2d at 149 n.3 (dissent).

Perhaps even more significantly, the Court of Appeals in *Panorama Village* later clarified what in fact the trial court meant:

Left for resolution at trial were ... the scope of Allstate’s repair obligation, which the trial court viewed as requiring a determination of “what is subject to collapse and what is hidden ...”. ...

Following the “scope of repair” bench trial, the court issued two orders, one ... requiring Allstate to “replace or repair all structural members that are affected by hidden decay to the extent that they are in *imminent danger of collapse*”

....

Panorama Village Condo. Owners Ass’n Bd. Of Directors v. Allstate Ins. Co., 99 Wn. App. 271, 275-76, 992 P.2d 1047 (2000), *rev’d*, 144 Wn.2d 130, 149, 26 P.3d 910 (2001). By affirming the trial court, 144 Wn.2d at 145, this Court necessarily left intact the trial court’s order basing the collapse coverage on imminent collapse.

Thus, the *Panorama Village* majority could not have adopted “substantial impairment of structural integrity” without an imminency requirement. Amicus Bayview is wrong in claiming otherwise. And to the extent, if at all, the *Sprague* dissent believed that *Panorama Village* adopted the substantial impairment standard without an imminency requirement, it too was mistaken. See *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 534, 276 P.3d 1270 (2012) (dissent).

Indeed, in *Sprague* what “collapse” means was not fully briefed to this Court, as it is here, so the dissent was never informed that *Panorama Village* involved imminent collapse. As discussed at pages 32-39 of Brief of Appellee, incorporated by reference herein, if the *Sprague* dissent meant to approve “substantial impairment of structural integrity” without imminency, it was also mistaken in the other factors it cited in support of that standard. Further, *Sprague*, like *Panorama Village*, involved damage so bad that collapse was imminent. 174 Wn.2d at 527.

Amicus Bayview also cites *Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 17 P.3d 626 (2000), *rev. denied*, 143 Wn.2d 1023 (2001), and *Ellis Ct. Apts. v. State Farm Fire & Cas. Co.*, 117 Wn. App. 807, 72 P.3d 1086 (2003). In neither was the meaning of “collapse” at issue. *Mercer Place* expressly stated, “Washington has not decided the meaning of “collapse” as used in first party insurance policies, and *this case does not require us to do so.*” *Id.* at 602 & n.1 (emphasis added). In *Ellis Ct.*, the insurer denied the claim because the collapse coverage had not been triggered during its policy period. Moreover, neither *Mercer Place* nor *Ellis Court* involved a building that had supposedly collapsed 12 years before the claim was made but was still standing without any deflection, falling, or dropping. *See* 104 Wn. App. at 600; 117 Wn. App. at 810.

3. Other Federal District Court Decisions Purporting To Apply Washington Law Are Not Persuasive.

Amicus Bayview also relies heavily on two unpublished federal district court decisions, *Dally Props., LLC v. Truck Ins. Exch.*, No. C05-0254L, 2006 U.S. Dis. LEXIS 30524 (W. D. Wash., Apr. 5, 2006), and *Houston Gen'l Ins. Co. v. St. Paul Fire Marine Ins. Co.* No. C11-2093MJP (W.D. Wash., Mar. 19, 2013). Both relied heavily on *Forest Lynn* and *Mercer Place*. *Houston Gen'l* also relied on *Panorama Village* and the *Sprague dissent*. But as discussed earlier, *Forest Lynn*, *Mercer Place*, and *Panorama Village* do not support amicus Bayview's position. And, as discussed at pages 32-39 of Brief of Appellee, the *Sprague* dissent's approval of the substantial impairment standard was mistaken, to the extent, if at all, it did not include an imminency requirement.

4. Assurance Co. v. Wall Supports State Farm's Position.

Amicus Bayview's attempt to discount *Assurance Co. of Am. v. Wall & Assocs., LLC*, 379 F.3d 557 (9th Cir. 2004), must fail. In that case, decay and deterioration in a building's sheathing was so bad that the exterior paneling would fall off at the touch of a finger. *Id.* at 558-59. The policy covered "risks of direct physical loss involving collapse," rather than "direct physical loss . . . involving collapse," as provided in the State Farm policies. (Emphasis added.) Applying Washington law, the Court of

Appeals for the Ninth Circuit held that such language provided coverage for both actual and imminent collapse. *Id.* at 563.

Citing *Dally Props., LLC v. Truck Ins. Exch.*, 2006 U.S. Dist. LEXIS 30524 (W.D. Wash., Apr. 5, 2006), amicus Bayview claims *Wall* did not limit “collapse” to either actual or imminent collapse. Amicus’ and *Dally’s* reading of *Wall* is wrong.

Wall held that “risks of direct physical loss . . . involving collapse” contemplated a situation **broader** than actual collapse because of the words “risks of.” 379 F.3d at 562-63. Quoting *Doheny W. Homeowners’ Ass’n v. American Guar. & Liab. Ins. Co.*, 60 Cal. App.4th 400, 70 Cal. Rptr.2d 260 (1997), *Wall* noted that the addition of “risks of” “**broadens** coverage **beyond actual collapse.**” 379 F.3d at 563 (emphasis added). Thus, the State Farm policy’s “direct physical loss . . . involving collapse” cannot provide a broader coverage—i.e., substantial impairment of structural integrity with no imminency requirement—than “risks of direct physical loss.” Yet that is what amicus Bayview and *Dally* claim.

In fact, *Dally* is the **only** court that has read *Wall* as adopting or otherwise approving the substantial impairment test. Every other court citing *Wall* for its collapse holding has recognized that *Wall* adopted the imminency test. See *KAAPA Ethanol v. Affiliated FM Ins. Co.*, 660 F.3d 299, 306 (8th Cir. 2011); *Schray v. Fireman’s Fund Ins. Co.*, 402 F. Supp.

2d 1212, 1217-18 (D. Or. 2005); *401 Fourth St., Inc. v. Investors Ins. Group*, 583 Pa. 445, 879 A.2d 166, 173-74 (2005); *Zoo Props., LLP v. Midwest Family Mut. Ins. Co.*, 797 N.W.2d 779, 782 n.2 (S.D. 2011). The *Wall* case supports State Farm's position, not amicus Bayview's.

5. Amicus Bayview's Claim that Insureds Reasonably Believed They Had Coverage for Substantial Impairment of Structural Integrity Has NO Basis.

At page 6 of its brief, Bayview claims Bayview and insureds like it "reasonably believed they had," or had "good reason to understand," that there was collapse coverage for substantial impairment of structural integrity. *This is sheer speculation.* Nothing in the record supports it. No dictionary defines "collapse" as "substantial impairment of structural integrity," a term the average purchaser of insurance has never heard of.

6. Judge Zilly Applied a Commonsense Approach to "Collapse."

Amicus Bayview criticizes Judge Zilly's decision in this case. For example, amicus claims that he relied on the two-justice dissent in *Sprague*. As Judge Pechman said, that "two justices do not a majority make." *Houston Gen'l Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, C11-2093MJP (W.D. Wash., Mar. 19, 2013) (cited at Brief of Amicus Bayview 8-9). But it is equally true that four justices do not a majority make, so amicus Bayview's reliance on the *Sprague* dissent is equally improper.

Amicus Bayview also criticizes Judge Zilly for “lump[ing]” together the imminent collapse and substantial impairment standards. (Brief of Amicus Curiae Bayview 7) But as will be discussed in section C, pp. 11-14, so does the preminent authority of first-party property coverage. Judge Zilly and 1 INSURING REAL PROPERTY § 2.02[3][b][i][B] (S. Cozen ed. 2014) implicitly recognize that the “substantial impairment of structural integrity” utilized by most courts purporting to adopt that standard requires far more than the insured’s expert in the instant case recognized.

Finally, claiming it is “geographically [and] chronologically remote,” amicus Bayview criticizes Judge Zilly for relying on, among others, *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002), (Brief of Amicus Curiae Bayview 8) There is no reason why a federal district court judge cannot rely on a then 10-year old case from another state when—as here—there is no controlling Washington case law.

C. SUBSTANTIAL IMPAIRMENT OF STRUCTURAL INTEGRITY ABSENT IMMINENCY IS NOT THE MAJORITY OR “TRENDING” RULE.

Amicus Bayview claims the majority rule is substantial impairment of structural integrity and that if any rule is trending, it is that standard. As discussed at pages 37-38 of the Brief of Appellee and incorporated by

reference herein, substantial impairment of structural integrity without an imminency requirement is neither the majority nor trending rule.

Indeed, the preeminent treatise on first-party property insurance has explained:

Over the years, courts have adopted two significantly different interpretations of the meaning of the term “collapse” and these may usefully be labeled as the conservative definition and the liberal definition. ...

Both lines of authority arose at approximately the same point in time some thirty years ago, and *it cannot be said that either predominates, even today. There is, in other words, no discernable trend towards the adoption of one definition or the other. Indeed, courts disagree not only on the proper definition of “collapse” but even on the question of whether or not the conservative interpretation or the liberal interpretation represents the majority rule.*

1 INSURING REAL PROPERTY § 2.02[3][b] (S. Cozen ed. 2014) (emphasis added).

Perhaps even more significantly, this treatise says the substantial impairment and imminent collapse standards are one and the same:

The liberal school holds that a collapse has occurred when a wall or foundation is so fundamentally weakened that *collapse is more or less imminent.*” This is frequently referred to as the “substantial impairment” rule.

Id. § 2.02[3][b][ii] (footnote omitted) (emphasis added). The treatise further explains:

Key to the coverage determination in these cases [under the liberal standard] is the court’s finding that the collapse is inevitable. *Implicit, is the recognition that the collapse*

will occur in a short time rather than at some distant time in the future. Some courts utilize the term “imminent” to combine requirements that the collapse is inevitable and will occur in a short time.

Id. § 2.02[3][b][ii][A] (emphasis added).

The treatise makes perfect sense given the nature of damage qualifying as “collapse” in almost all substantial impairment cases. See cases discussed at pages 22-28 of Brief of Appellee. The cases amicus Bayview cites to support its mistaken claim that “the ‘trend’ is to define ‘collapse’ as SSI” are illustrative:

The significant damage involved in many cases cited in amicus Bayview’s brief, p. 10 n.4, has been discussed herein at pages 3-5.³

Cases cited at p. 10 n.4 of amicus Bayview’s brief involving damage not discussed in State Farm’s brief are mainly similar. In *Macheca Transp. Co. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661 (8th Cir. 2011), a pipe fell onto pallets due to weight of ice. Not surprisingly, the court reversed the carrier’s summary judgment on whether there was collapse.

United Nuclear Corp. v. Allendale Mut. Ins. Co., 103 N.M. 480,

³ *American Concept Ins. Co. v. Jones*, 935 F. Supp. 1220, 1224 (D. Utah 1996); *Beach v. Middlesex Mut. Assur. Co.*, 205 Conn. 246, 532 A.2d 1297 (1987); *Auto Owners Ins. Co. v. Allen*, 362 So.2d 176 (Fla. Dist. App. 1978); *Rogers v. Maryland Cas. Co.*, 252 Iowa 1096, 109 N.W.2d 435 (1961); *Government Employees Ins. Co. v. DeJames*, 256 Md. 717, 261 A.2d 747 (1970); *Morton v. Travelers Indem. Co.*, 171 Neb. 433, 106 N.W.2d 710 (1960); *Morton v. Great Am. Ins. Co.*, 77 N.M. 35, 419 P.2d 239 (1966); *Rankin ex rel. Rankin v. Generali-U.S. Branch*, 986 S.W.2d 237 (Tenn. 1998).

709 P.2d 649 (1985), involved an earthen tailings dam failure that was so bad that it resulted in the release of 94 million gallons of tailings.

John Akridge Co. v. Travelers Cos. 876 F. Supp. 1, 3 (D.D.C. 1995), denied both the insured and the insurer summary judgment where there were factual questions whether there was a “collapse” given that the parties’ experts disagreed whether there was a safety issue.

In contrast is *Indiana Ins. Co. v. Liaskos*, 297 Ill. App.3d 569, 697 N.E.2d 398 (1998). Although cited in amicus Bayview’s brief at p. 10 n.4., this case does not support its position. The court there equated “substantial impairment of structural integrity” with situations similar to where a house had become uninhabitable (*Campbell v. Norfolk & Dedham Mut. Fire Ins. Co.*, 682 A.2d 933 (R.I. 1996), a roof was in immediate danger of collapse (*Whispering Creek Cond. Owner Ass’n v. Alaska Nat’l Ins. Co.*, 774 P.2d 176 (Alaska 1989), a foundation was so damaged, the house would have fallen into the basement (*Beach*, 532 A.2d at 1298-99), or where parts of a house would not support a person’s weight (*Fidelity & Cas. Co. v. Mitchell*, 503 So.2d 870 (Ala. App. 1987). 697 N.E.2d at 405-06.

D. THE PARTIES TO THIS APPEAL AGREE THAT PUBLIC POLICY DOES NOT ENTER INTO THE QUESTION.

Amicus Bayview recognizes the insured in this case, Queen Anne Park Homeowners Association (QAP), and State Farm have agreed public

policy should play no part in this Court's decision. (Brief of Amicus Curiae Bayview 11) This is because this Court has said many times that public policy will not be used to disregard a clear insurance policy provision absent legislation or precedential court decision, neither of which exist in this case. *See, e.g., Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 432, 932 P.2d 1244 (1977). By injecting public policy into this case, amicus Bayview is improperly raising a new issue on appeal. *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (quoting *Lorentzen v. Deere Mfg. Co.*, 245 Iowa 1317, 66 N.W.2d 499, 503 (1954)).

Further, on each one of pages 12-15, amicus Bayview attempts to support its improper public policy argument with statements that it purports to support with citations to QAP's expert's declaration. That declaration does not support any of statements for which they are cited.⁴ Therefore, these statements should be disregarded.

In any event, the economic waste argument that some courts have used in adopting the substantial impairment standard should not be used to modify clear and unambiguous policy language. Interpretation of an insurance policy must not only be reasonable, but must also take into

⁴ Originally, amicus Bayview submitted an amicus brief that appended declarations from its own collapse coverage case with another insurer. When State Farm objected, this Court refused to accept the amicus brief but permitted amicus Bayview to submit a revised one. Now amicus Bayview is attempting to get before this Court the statements that were in its original brief even though the record that it cites does not support them.

account the policy's purpose. *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994). Preventing covered loss is not the purpose of a first-party insurance policy.

Indeed, the logical end of applying the economic waste argument to a first-party property insurance policy would, for example, result in insurers being required to cut down dangerously leaning trees before they actually fell and caused physical loss to a structure, despite the fact that such policies typically require direct physical loss. But this would be contrary to Washington law. See *Fujii v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 857 P.2d 1051 (1993) (no first-party property coverage where house was not yet physically damaged even though its lateral support had been undermined). And even if the economic waste argument had any validity, the imminent collapse standard would address that argument, as discussed at page 30 of Brief of Appellee, which are incorporated by reference herein. See, e.g., *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 444 (Del. Super. Ct. 2002).

Amicus Bayview is wrong when it says public policy is invoked by stating that adopting 'substantial impairment of structural integrity' would convert a first-party property insurance into a maintenance policy. An insurance policy must be viewed in light of its general purpose. See *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 474, 209 P.3d 859

(2009). As discussed at page 32 of Brief of Appellee, courts that have made this statement have simply been interpreting insurance policies in light of their general purpose. *See, e.g., Doheny*, 70 Cal. Rptr.2d at 264.

Moreover, amicus Bayview's claim that the "maintenance agreement" argument is "merely a straw argument" since an engineer would still have to opine whether there is "collapse" misses the point. (Brief of Amicus Bayview 12) The point is that the policy's collapse coverage requires "collapse." The definition of "collapse" is to be determined by how the average purchaser of insurance would read that word. The average purchaser of insurance would never read "collapse" to mean "substantial impairment of structural integrity." And the average purchaser of insurance would certainly never think that the buildings in the instant case "collapsed" 16 years ago, even though an engineer has said that they suffer from substantial impairment of structural integrity.

E. COURTS THAT HAVE ADOPTED THE ACTUAL OR IMMINENT COLLAPSE STANDARDS DO NOT EVIDENCE ANY CONFUSION.

Finally, without citation to any authority, amicus Bayview claims that State Farm's proposed standards of collapse will create more confusion. But the many courts that have adopted the actual collapse or imminent collapse standards show no signs of confusion.

For example, amicus Bayview complains, “what would qualify as a ‘falling or caving in’ that is not ‘structurally significant?’” (Brief of Amicus Curiae Bayview 14) A counter could fall or cave in and not be structurally significant. A cabinet could fall or cave in and not be structurally significant. *Baker v. Whitley*, 87 N.C. App. 619, 361 S.E.2d 766 (1987) (no “collapse” where built-in cabinet dropped several inches to rest on window sill, but wall remained intact).

As to Bayview’s question, “[h]ow imminent must imminent be?” (Brief of Amicus 14), the California courts have answered this. “Imminent” means “likely to happen without delay; it impending, threatening”... or “likely to occur at any moment, intending.” *Doheny West Homeowners Ass’n v. American Guar. & Liab. Ins. Co.*, 60 Cal. App. 4th 400, 406, 70 Cal. Rptr.2d 260 (1997). Indeed, although amicus Bayview argues an earthquake could happen at any moment,⁵ courts have already held that weather or seismic events that might possibly trigger collapse do not make collapse imminent. *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Ins. Co.*, 241 F. Supp.2d 572, 576 (D.S.C. 2002); see *Buczek v. Cont’l Cas. Ins. Co.*, 378 F.3d 284 (3d Cir. 2004)

⁵ It is well known that several windstorms and earthquakes, including the Nisqually Earthquake, have occurred in the Greater Seattle area since the buildings at issue were built in the mid-1980’s.

(heavy winds estimated to occur only every 20 years not imminent). No court of which the undersigned is aware has held to the contrary.

Thus, amicus Bayview's complaint that "imminence" fails to consider lateral forces misses the mark. Courts adopting the "imminent collapse" standard have already decided that regardless whether lateral or vertical forces are involved, the test is whether actual falling down is imminent.

Ultimately, amicus Bayview's complaints ignore the function of the jury. This Court has shown great faith in the jury system: "We must and do assume, in support of our jury system, that jurors are men and women of reasonable intelligence; that it is their desire to return verdicts supported by evidence and according to the court's instructions" *State v. Whetstone*, 30 Wn.2d 301, 340, 191 P.2d 818 (1948). In the event a collapse coverage case must go to a jury, there is no reason why a properly instructed jury could not reach an appropriate result. After all, juries generally consist of average purchasers of insurance.

What is confusing and ambiguous is the "substantial impairment of structural integrity" standard. Only that standard—when, not paired with an express imminency requirement—permits an expert to testify under oath that buildings that remain standing without deflection, falling, or

dropping somehow are substantially structurally impaired and thus collapsed 16 years ago.

II. CONCLUSION

Amicus Bayview has said nothing that should cause this Court to rule that “collapse” means “substantial impairment of structural integrity” without an imminency requirement. A term that allows an expert to testify that buildings still standing without any evidence of deflection, dropping, or falling somehow collapsed more than a decade earlier is a far too vague and malleable standard and does not comport with the average insurance purchaser’s understanding of “collapse.”

This Court should adopt the actual collapse standard, or alternatively, the imminent collapse standard.

Dated this 29th day of December 2014.

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SIGNED AND SWORN to before me on December 29, 2014, by

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Attached for filing please find the following:

- Appellee's Answer to Brief of Amicus Curiae Bayview Heights Owners Association
- Affidavit of Service

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