

63933-1

63933-1

NO. 63933-1-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

MAX B. SPRAGUE and KRISTA SPRAGUE,

Appellants

v.

SAFECO INSURANCE COMPANY OF AMERICA

Respondent

**BRIEF OF RESPONDENT SAFECO INSURANCE COMPANY OF
AMERICA**

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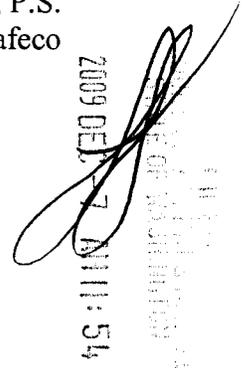
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1. INTRODUCTION

This case presents an insurance coverage question under the Appellant Spragues' Homeowner's policy with Respondent Safeco Insurance Company of America.

Construction defects in the Spragues' decking system allowed water to seep through the wood framing, resulting in rot, deterioration, and the growth of fungi. The Spragues' homeowner's policies with Safeco excluded damage resulting from defective construction, fungi, insects, rot, water damage, weather, and deterioration. The trial court granted Safeco summary judgment, finding that there is no coverage for the Spragues' claim for damage to their decks, and no breach of contract. The court did not err in this holding.

The Spragues' loss was proximately caused by a specifically excluded peril, construction defects, and all ensuing causes of loss were also specifically excluded. Their attempt to re-characterize the cause of loss as a collapse does not change this fact, and does not create coverage. The trial court correctly granted summary judgment in favor of Safeco.

2. RESPONSE TO ASSIGNMENT OF ERROR

The Honorable James D. Cayce correctly ruled that the Spragues' insurance claims were not covered under the Safeco Washington Quality

Plus Homeowners Policies because both the efficient proximate cause and all ensuing causes of loss were specifically excluded from coverage.¹

3. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The Spragues' arguments fail and summary judgment in favor of Safeco was properly granted when:

1. Construction defects in the Spragues' decking system allowed surface water intrusion which resulted in bug infestation and rot. Where the Safeco policy excludes loss caused directly or indirectly by construction defects, surface water, insects and rot, there is no coverage for the deck damage.
2. The ensuing loss clauses do not create coverage for "collapse".
3. The Safeco policy excludes loss arising out of construction defects and does not provide coverage for structural impairment or imminent collapse, unless arising out of a non-excluded peril.

4. STATEMENT OF THE CASE

A. Background Facts

The Spragues have owned a beachfront home in Burien since about 1988.² In 1995 and 1996, Spragues hired M.F. Williams Construction to complete a major remodel to their home, which included the curved decking system at issue in this matter. The curved decking system was

¹ See, CP 355-358.

² CP 200-201; CP 214. See also, CP 197, at ¶¶3-4.

constructed primarily with wood and Dryvit (a brand name for Exterior Insulation and Finishing System, EIFS, which is a stucco-like product).³

As early as 1998 or 1999, Max Sprague discovered that the face plates on the exterior lights of the decking system were heavily corroded. As a result, he contacted the architect who provided specifications for the face plates, and also the manufacturer of the face plates. When he removed one of the face plates, he found mushrooms growing inside. Mr. Sprague reinstalled all of the face plates himself, and used caulking to seal them.⁴ Because the manufacturer advised Mr. Sprague the corrosion was unusual, he kept an eye on the new face plates.⁵ Around 2002, Mr. Sprague noticed that the face plates were again corroding.⁶

The problems with the Sprague home continued when in 2003 or 2004 their sewer line backed up all the way from the beach into the basement of their house.⁷ The backed-up sewer line flooded the Spragues' basement. The Spragues hired a contractor, John Breyer, to repair the damage. According to Mr. Sprague, Breyer found water damage under a door, water damage to the plywood subfloor in the basement, and water damage to the corner of a column on the west side of the house that runs

³ CP 12-13; CP 201-03; CP 208; CP 214.

⁴ CP 202-03

⁵ CP 207

⁶ CP 207-208

⁷ CP 203.

from the ground up three floors. The deck at issue in this matter abuts up to the house on the same walls where the column is located.⁸

In 2004 or 2005, the Spragues again noticed problems with water damage to the column, found that their basement carpet was soaked, and discovered that the baseboard in the room was warping.⁹ Mr. Sprague discovered what he described as a “major bug infestation” behind the wall.¹⁰ As a result, the Spragues once again brought in a contractor.

This time, they hired Steve Peterson. According to Mr. Sprague, Mr. Peterson advised that the problems with the walls more than likely stemmed from the remodel. Peterson’s construction team had to brace the entire column, and replace a structural beam and related members to repair the damage that had been caused by water getting into the beam, followed by the bugs. They also installed new flashing along the entire outside of the house where the decks are located.¹¹ Peterson’s work took most of a year, and it was during this time that he advised Mr. Sprague that there were problems with the fin walls supporting the decks.¹²

⁸ CP 203-05.

⁹ CP 206

¹⁰ Id.

¹¹ CP 206-07.

¹² Id.

According to Mr. Sprague, Peterson told them that the flashing for the entire decking system was “very, very inadequate”.¹³ The Spragues had Peterson make openings in the fin walls, and Peterson found that water had been getting into the fin walls for years.¹⁴ The Spragues filed a claim with Safeco in April 2008.¹⁵

B. Safeco’s Investigation / Pacific Engineering Technologies

Safeco Senior Claims Analyst Deborah Lee was assigned to investigate the claim and made every attempt to find coverage for the Spragues’ loss.¹⁶ Spagues reference notations from the Safeco claim file entered by Ms. Lee confirming that fact.¹⁷

Safeco retained Pacific Engineering Technologies, Inc., (“PET”) to inspect the decks and determine the cause of the damage.¹⁸ PET’s first inspection occurred on June 13, 2008, and PET provided a written report dated June 30, 2008.¹⁹ It was PET’s opinion that the decayed wood framing in the deck fin walls/piers constituted substantial impairment of the deck’s structural integrity and a state of imminent collapse resulting

¹³ CP 209.

¹⁴ CP 207.

¹⁵ CP 15.

¹⁶ CP 121

¹⁷ Appellant’s Brief p. 10; CP 168-169

¹⁸ CP 197, at ¶4; CP 213-234. It should be noted that the PET reports located at CP 213-234 were inadvertently intermingled by the Superior Court Clerk with the first page of the two respective reports being followed by the remaining pages from the other report. *Compare*, CP 106-115, *with*, CP 213-34.

¹⁹ CP 214; CP226-34.

from a combination of the following: 1) inadequate flashing between the beams of the deck and the deck piers; 2) possible inadequate flashing between the deck piers and the decks' guardrails; and 3) inadequate deck pier ventilation.²⁰ Pacific's report discussed the resultant water intrusion as follows:

Water drained through the gaps between the spaced decking boards and onto the deck beams below. The water then seeped through the cracks along the sides of the deck beams and under the small metal flashings over the deck beams into the pier assembly. Once inside the pier assembly, the water came in contact with the wood framing. The absence of ventilation in the deck piers prevented the framing from drying. The moist conditions were conducive to the growth of fungi in the wood that causes decay and, over time, resulted in the gradual deterioration of the wood framing.

It is also possible that water is entering the deck piers at the guardrail wall-to-pier connection. However, we were not able to determine whether there is a properly installed flashing assembly at the joint during our visit.²¹

Ms. Lee's initial coverage analysis suggested that a determination of when the Spragues' decks reached a level of significant structural impairment may impact coverage.²² She followed up and requested that PET conduct a supplemental site visit.²³ PET conducted that subsequent

²⁰ CP 226; CP 168.

²¹ CP 227.

²² CP 169.

²³ CP 197, at ¶4; CP 225; CP 215-23.

inspection and provided a written report dated October 14, 2008. PET concluded that the decayed wood posts in the fin walls/piers that supported the deck were decayed sufficiently to make the decks be in a state of imminent collapse and were in a state of substantial impairment of structural integrity before September 2003.²⁴ PET again confirmed that the cause of the decayed wood in the piers/fin walls was a combination of the following: 1) inadequate flashing between the beams of the deck and the deck piers; 2) possible inadequate flashing between the deck piers and the decks' guardrails; and 3) inadequate deck pier ventilation.²⁵

Ms. Lee also requested review by coverage counsel.²⁶ After a complete investigation which sought to find coverage, Ms. Lee ultimately concluded there was no coverage and explained her conclusion in a thorough letter to Spragues dated February 26, 2009.²⁷ In that letter, she clarified the discussions where she shared her hopes of finding coverage:

I would like to take the opportunity to also clarify some of the talking points I have made with you over the last few months in hope of finding coverage for your claim. I have discussed the possibility of whether imminent collapse conditions would trigger coverage. It turns out that this issue does not apply to the policies in place over the years for your property. Some forms offered collapse coverage and did not define it. In your case, where the collapse

²⁴ CP 225.

²⁵ CP 217

²⁶ CP 169

²⁷ CP 121-135

coverage has been provided, it has been clearly defined as outlined above.²⁸

C. Pertinent Policy Provisions

From September 1, 1992, until September 1, 1999, the Spragues' residence was insured under a Washington Quality Plus Homeowners Policy form CHO-4033/WAEP R1 (6/92).²⁹ The policy form provides, in pertinent part, as follows:

SECTION I – PROPERTY COVERAGES

BUILDING PROPERTY WE COVER

COVERAGE A – DWELLING

We cover:

1. The dwelling on the **residence premises** shown in the Declarations used principally as a private residence, including structures attached to the dwelling; and
2. materials and supplies located on or next to the **residence premises** used to construct, alter or repair the dwelling or other structures on the **residence premises**.

...

BUILDING LOSSES WE COVER

We insure for accidental direct physical loss to property described in **Building Property We Cover** except as limited or excluded.

²⁸ CP 135

²⁹ CP 197, at ¶¶ 5-6; CP 235-62.

BUILDING LOSSES WE DO NOT COVER

We do not insure or cover loss caused directly or indirectly by any of the following excluded perils:

...

- 5. loss caused by:
 - a. wear and tear, marring, deterioration;
...
 - c. smog, rust, mold, wet or dry rot.
...
 - g. birds, vermin, rodents, insects or domestic animals.
...

Under item 1. thru 5., any ensuing loss not excluded is covered.

...

- 7. **Water Damage**, meaning:
 - a. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these whether or not driven by the wind;
...
- ...
- 14. **Weather Conditions**. A weather condition which results in:
 - c. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these whether or not driven by wind;
...
- 15. **Planning, Construction or Maintenance**, meaning faulty, inadequate or defective:

- a. planning, zoning, development, surveying, siting;
- b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. materials used in repair, construction, renovation or remodeling; or
- d. maintenance;

of property whether on or off **the insured location** by any person or organization. However, any ensuing loss not excluded or excepted in this policy is covered.³⁰

With respect to personal property losses, the policy form states, in pertinent part, as follows:

PERSONAL PROPERTY LOSSES WE COVER

We insure for accidental direct physical loss to property described in **Coverage C – Personal Property** caused by a peril listed below except as limited or excluded.

...

12. Collapse of a building or any part of a building.

This peril does not include settling, cracking, shrinking, bulging or expansion.³¹

³⁰ CP 242-43.

³¹ CP 245.

While the policy provides coverage for accidental direct physical loss to personal property caused by collapse, there is no mention of collapse in connection with the dwelling or structures themselves. From September 1, 1999, until September 1, 2008, the applicable Washington Quality Plus Homeowners Policy consisted primarily of form CHO-6033/EP R1 (5/98).³² This policy contains the following pertinent provisions:

SECTION I – PROPERTY COVERAGES

BUILDING PROPERTY WE COVER

COVERAGE A – DWELLING

We cover:

1. the dwelling on the *residence premises* shown in the Declarations used principally as a private residence, including structures attached to the dwelling other than fences, driveways or walkways; and
2. materials and supplies located on or next to the *residence premises* used to construct, alter or repair the dwelling or other structures on the *residence premises*.

...

BUILDING PROPERTY LOSSES WE COVER

³² CP 197, at ¶7; CP 263-89.

We cover accidental direct physical loss to property described in **Building Property We Cover** except as limited or excluded.

BUILDING PROPERTY LOSSES WE DO NOT COVER

We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:

...

- 6. a. wear and tear, marring, scratching, deterioration;

...

- c. smog, rust, corrosion, electrolysis, mold, fungus, wet or dry rot;

...

However, we do insure for any resulting loss from items 1. through 6. unless the loss itself is a Loss Not Insured by this Section.

...

- 9. **Water Damage**, meaning:

- a. flood, surface water, waves, tidal waves, tsunami, overflow of a body of water or spray from any of these, whether or not driven by wind;

...

- 16. Weather that contributes in any way with a cause or event excluded in this section to produce a loss. However, any ensuing loss not excluded is covered.

17. Planning, Construction or Maintenance,
meaning faulty, inadequate or defective:

...

- b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. materials used in repair, construction, renovation or remodeling; or
- d. maintenance;

of property whether on or off the *insured location* by any person or organization. However, any ensuing loss not excluded is covered.³³

In addition, the policy provides as follows with respect to personal property losses:

PERSONAL PROPERTY LOSSES WE COVER

We cover accidental direct physical loss to property described in **Coverage C – Personal Property** caused by a peril listed below except as limited or excluded.

...

12. Collapse of a building or any part of a building.

This peril does not include settling, cracking, shrinking, bulging or expansion.³⁴

³³ CP 268-70.

³⁴ CP 272-73.

Effective September 1, 2003, Endorsement CHO-6133/WAEP (04/02) SPECIAL PROVISIONS-EXTENDED DWELLING COVERAGE was added to the Spragues' policy.³⁵ Effective September 1, 2007, the policy included Endorsement CHO-6133/WAEP (10/04) G1 SPECIAL PROVISIONS - EXTENDED DWELLING COVERAGE.³⁶ These endorsements both include the same language and applied to all policy renewals through September 1, 2008:

SPECIAL PROVISIONS – COLLAPSE

SECTION I – PROPERTY COVERAGES

BUILDING PROPERTY LOSSES WE DO NOT COVER

The following is added:

19. **Collapse**, except as provided in item 12. **Collapse** under **Section I – Property Coverages, Additional Coverages**. However, we do insure for any resulting loss unless the resulting loss is itself a loss not insured under this section.

...

ADDITIONAL PROPERTY COVERAGES

The following is added:

12. **Collapse**.
 - a. We insure for direct physical loss to covered property involving collapse

³⁵ CP 44; CP 97-103; CP 198.

³⁶ CP 198; CP 291-98.

of the dwelling or any part of the dwelling if the collapse was caused by one or more of the following:

...

- (2) Decay that is hidden from view, unless the presence of the decay is known to an *insured* prior to the collapse;
- (3) Insect or vermin damage that is hidden from view, unless the presence of such damage is known to an *insured* prior to the collapse;
- (4) Weight of contents, equipment, animals or people;
- (5) Weight of rain which collects on a roof; or
- (6) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

- b. Loss to an awning, fence, patio, deck, pavement, swimming pool, hot tub or spa, including their filtration and circulation systems, landscape sprinkler system, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under a.(2) through (6) above, unless the loss is a direct result of the collapse of the dwelling or any part

of the dwelling to which it is attached.

c. With respect to this coverage:

- (1) Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose.
- (2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.
- (3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.
- (4) A building or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.³⁷

5. LEGAL ARGUMENT

A. Standard on Review

³⁷ CP 198; CP 98-99; CP 292-93

When reviewing an order on summary judgment, the Court of Appeals makes the same inquiry as the trial court, and considers all legal questions de novo.³⁸ The trial court should be affirmed because: 1) the efficient proximate cause of the loss, construction defects, and all ensuing losses were specifically excluded; 2) the Spragues' attempts to re-characterize the cause of loss as collapse necessarily fails because ensuing loss provisions do not create coverage, the Safeco policies do not provide coverage for collapse, and collapse was not the cause of loss; and 3) even if collapse were a covered cause of loss, there would be no coverage in this matter because the decks have not actually fallen to the ground.

B. Interpretation of Insurance Policies

Interpretation of an insurance contract is a matter of law.³⁹ Determining whether coverage exists is a two step process. The insured must first show that the loss falls within the insuring agreement contained in the policy.⁴⁰ If the insured meets this burden, the insurer must then prove that coverage for the loss is excluded by specific policy language.⁴¹

³⁸ *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006) (internal citations omitted).

³⁹ *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 730, 837 P.2d 1000, (1992) (internal citation omitted).

⁴⁰ *Id.*, 119 Wn.2d at 731

⁴¹ *Id.*

Washington courts construe insurance policies as contracts.⁴² The policy is considered as a whole, and given a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.”⁴³ Where the policy is clear and unambiguous, the court is prohibited from modifying the language or creating ambiguity where none is present.⁴⁴ A court will apply the definitions set forth in the policy,⁴⁵ but undefined terms are to be given their “plain, ordinary, and popular” meaning as defined in a standard English dictionary.⁴⁶

Insurance policies do not provide an endless source of protection for every contingency. An insurer may limit its liability under a policy as long as the exclusionary language is clear.⁴⁷ While exclusionary clauses are strictly construed against an insurer, Washington courts “...will not override the clear intent of the parties.”⁴⁸ The clear and unambiguous policy language at issue excludes the losses claimed by the Spragues.

⁴² *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (quoting, *Amer. Nat. Fire Ins. Co. v. B&L Trucking & Const. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting, *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201(1994))(citations omitted)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998).

⁴⁶ *Id.* (quoting, *Boeing v. Atena Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990)).

⁴⁷ *Teague Motor v. Federated Serv. Ins.*, 73 Wn.App. 479, 484, 869 P.2d 1130 (1994) (citing, *McVey v. Nationwide Mut. Ins. Co.*, 58 Wn. App. 288, 291, 792 P.2d 1272 (1990)).

⁴⁸ *Teague*, 73 Wn. App., at 484 (citing, *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983), *modified in part*, 101 Wn.2d 830, 683 P.2d 186 (1984)).

C. There Is No Coverage Because The Efficient Proximate Cause Of The Spragues' Loss Was A Specifically Excluded Peril And All Ensuing Losses Were Also Excluded.

The policies at issue do not provide coverage for losses caused by construction defects, water damage, weather, mold, insects, rot, or deterioration because all such causes of loss are specifically excluded.

Under Washington law, the efficient proximate cause of a loss is the cause that, "...sets into motion the chain of events producing the loss..."⁴⁹ Ensuing losses that are themselves covered will remain covered despite the efficient proximate cause of the loss.⁵⁰ However, an ensuing loss provision does not create coverage.⁵¹

There is no dispute that the efficient proximate cause of the Spragues' loss was construction defects, which were specifically and unambiguously excluded from the policy. Similarly, the resulting surface water intrusion, causing rot, is excluded. Just like the insured's claims in *Wright v. Safeco Insurance Company of America*⁵², the efficient proximate cause and all ensuing causes of loss are excluded in this matter.

⁴⁹ See, *Graham v. Pub. Empl. Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077(1983).

⁵⁰ See, *McDonald*, 119 Wn.2d, at 734-35; *Wright v. Safeco Insurance Company of America*, 124 Wn. App. 263, 274, 109 P.3d 1 (2004).

⁵¹ *McDonald*, 119 Wn.2d, at 734-36; *Wright*, 124 Wn. App. at 274-75 (citing *Capelouto v. Valley Forge Ins. Co.*, 98 Wn.App. 7, 16, 990 P.2d 414 (1999)).

⁵² *Wright*, 124 Wn. App. 263.

In *Wright*, the insured made a claim for water and mold damage to her condominium.⁵³ Ms. Wright hired an engineering firm to investigate the cause of the mold and water damage, and the expert concluded that the mold and water damage were caused by construction defects.⁵⁴ The Safeco policy excluded coverage for losses caused directly or indirectly by faulty, inadequate, or defective construction, renovation, or remodeling.⁵⁵ Similar to the construction defect exclusion in this matter, the Safeco policy in *Wright* included an ensuing loss provision that stated “...**any ensuing loss not excluded or excepted in this policy is covered.**”⁵⁶ Safeco denied Ms. Wright’s claims based upon this exclusion and on the policy’s mold exclusion.⁵⁷ Ms. Wright brought suit against Safeco, and her coverage claims were dismissed on summary judgment. Ms. Wright appealed.⁵⁸

On appeal, Ms. Wright argued that the mold damage was proximately caused by water leaks, and that the efficient proximate cause rule when coupled with the ensuing loss exception to the construction defects exclusion would provide coverage for her mold claim.⁵⁹ This

⁵³ *Id.*, at 269.

⁵⁴ *Id.*

⁵⁵ *Id.*, at 273.

⁵⁶ *Id.*, (emphasis added by Court of Appeals) (internal citation omitted).

⁵⁷ *Id.*, at 269.

⁵⁸ *Id.*, at 270.

⁵⁹ *Id.*, at 273.

Court rejected her argument, and specifically noted that ensuing loss provisions are exceptions to policy provisions and that a court should not interpret them to create coverage.⁶⁰ In reaching its conclusion, this Court held as follows:

Under the ensuing loss exception to the defective construction exclusion, where defective construction causes water damage that in turn causes mold, the mold damage is covered if it is not specifically excluded by some other provision of the policy. Because Wright's policy contains a provision that specifically excludes damages caused by mold, the ensuing loss provision of the exclusion in Wright's policy does not cover mold damages.⁶¹

The Court found that Ms. Wright was attempting to avoid that conclusion by focusing on the water leaks and ignoring that the leaks were caused by construction defects.⁶² The Court then stated:

The efficient proximate cause rule does not allow a claimant to focus on one covered cause out of a causal chain. The efficient proximate cause is that which "in an unbroken sequence and connection between the act and final loss, produce[s] the result for which recovery is sought." [Internal citation omitted.] Wright has not introduced any evidence of a supervening cause that broke the causal connection between the construction defect and the mold damage. WJE's report establishes that construction defects were the efficient proximate causes of the water and mold damage... The trial court did not err when it granted summary judgment

⁶⁰ *Id.*, at 274-75 (citing *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 16, 990 P.2d 414 (1999)).

⁶¹ *Wright*, 124 Wn. App. at 274-75 (footnote omitted).

⁶² *Id.*, at 275.

dismissing Wright's coverage claims because they were excluded under the construction defect exclusion.⁶³

Both the Safeco policy analyzed in *Wright*, and the Spragues' Safeco policies, exclude coverage for loss arising directly and indirectly from faulty, inadequate or defective construction, renovation, or remodeling. The PET reports and Mr. Sprague's own recorded statement support the conclusion that the deterioration of the decks' fin walls was the direct result of improper construction. The Safeco policies also expressly exclude coverage for the ensuing losses of mold, insects, water damage, and weather conditions, which led to the excluded losses of rot and deterioration.⁶⁴ The June 30, 2008, PET report determined that the faulty construction allowed surface water (that drained from the decks above) to enter the deck fins, which promoted growth of fungi, and allowed for the decay and deterioration of the decks' fin walls.

The efficient proximate cause (construction defects) is excluded from coverage, as are all ensuing losses. As a result, the trial court did not err when it granted summary judgment to Safeco. The Spragues attempt

⁶³ *Id.*, at 275 (footnote and internal citation omitted).

⁶⁴ The Spragues argue that the water damage exclusion does not apply. *See*, Appellants' Opening Brief, at 27-28. However, they ignore the plain language of the exclusions that define Water Damage to include surface water, waves, tidal water, or spray from any of these whether or not driven by rain. *See*, CP 242-43; CP 28-70. Given that water seeped down through the spaces between the decks and that the decks faced tidal water, there can be no legitimate dispute that at least some of the water was either from surface water (from rain) or spray/wind driven water from the waves/tidal water. *See*, CP 214; CP 229.

to avoid this conclusion by asserting that their claim is covered as an ensuing loss because they characterize it as a collapse, which they argue is a separate cause of loss. This argument necessarily fails.

The Spragues claim that their position is supported by two *Mercer Place Condominium Assoc. v. State Farm Fire & Cas. Co.*⁶⁵, and *Dickson v. United States Fidelity and Guaranty Co.*⁶⁶ Neither case supports their argument.

The *Mercer* case involved interpretation of a State Farm commercial policy provision that explicitly included coverage for collapse resulting from hidden decay.⁶⁷ There, State Farm stipulated that collapse meant “substantial impairment of structural integrity”, where the term was not defined.⁶⁸ In that case, the court was asked to rule when collapse commenced when decay had not progressed to the point of substantial impairment.⁶⁹ The court declined to do so.⁷⁰ The policy provision interpreted is similar to Safeco’s 2003 endorsement, except that Safeco’s endorsement defines collapse to mean actually falling down.⁷¹ Plaintiffs

⁶⁵ 104 Wn. App. 597, 17 P.3d 626 (2000).

⁶⁶ 77 Wn.2d 785, 466 P.2d 515 (1970).

⁶⁷ *Mercer*, 104 Wn. App., at 603.

⁶⁸ *Id.*, at 600.

⁶⁹ *Id.*, at 604.

⁷⁰ *Id.*, at 604-06.

⁷¹ CP 98-99. *See also*, CP 292-293.

here make no argument for coverage under their Safeco policy after the endorsement went into effect in 2003.

Accordingly, the *Mercer* court's interpretation of a policy of insurance that had a specific grant of coverage for collapse that was an exception to the exclusions as to hidden decay and other excluded losses in no way impacts or applies to this claim.

Dickson is a case arising out of a contractor's equipment floater policy.⁷² The insured brought a claim for damage to a crane when a boom collapsed while pulling beams from the ground on a highway project.⁷³ It was determined that there was a defective weld on a cross member of the boom.⁷⁴ The policy covered damage to the crane "from any external cause", but contained an exclusion for latent defects.⁷⁵ The 1970 Washington Supreme Court affirmed the trial court's conclusions that the earth collapsing onto the beam created a sudden external force on the boom which then failed at its weakest point.⁷⁶ The latent defective weld may have been a contributing cause, but the efficient proximate cause was

⁷² *Dickson*, 77 Wn.2d at 786.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*, at 789.

⁷⁶ *Id.*, at 790-92.

the external force.⁷⁷ Thus, as long as the loss was caused by an external cause as required by the grant of coverage, the loss was covered.

Spragues ignore this basis for the *Dickson* court's decision and attempt to take language out of context even though the missing USF & G policy language that was dispositive: "caused by or resulting from"⁷⁸ is present in Safeco's exclusionary claims in an even stronger phrase "caused directly or indirectly by", in the language in effect until 1999⁷⁹ and then additional language has been in effect from 1999 to present:

We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.⁸⁰

The Spragues' Safeco policies specifically exclude loss caused directly or indirectly by construction defects, rot, mold, insects, water damage, weather, and deterioration. In other words, the policies exclude the very losses at issue.

The *Dickson* court did not find coverage because the crane's collapse was a covered loss. It was the external force that caused the collapse that resulted in coverage. Just as here, it is the construction defects that resulted in the water intrusion that caused the rot. The

⁷⁷ *Id.*, at 791-92.

⁷⁸ *Id.*, at 789-90.

⁷⁹ CP 242

⁸⁰ CP 268.

difference in the coverage outcome in *Dickson* is that the damage to the crane was caused by a covered external force and the damage to the Spragues' decks was caused by excluded construction defects and the excluded ensuing losses.

There is no Washington law supporting the Spragues attempt to create coverage by characterizing their loss as a substantial impairment of structural integrity or state of imminent collapse, ignoring the efficient proximate cause of the damage, and claiming that the ensuing loss provisions thereby provide coverage.

D. There Is No Coverage for the Spragues Loss Because Collapse Of A Dwelling Or Structure Is Not Covered Under The Policies

The pre-2003 Safeco policies do not provide coverage for collapse. In 2003, a collapse endorsement was added to the Spragues' homeowner's policy.⁸¹ Without that endorsement, there is no exception to the exclusion for construction defects that would provide coverage for the Spragues' loss.

The Spragues argue against this conclusion by referring to the history of collapse coverage in policies other than those at issue in this matter. That discussion is not relevant to the issues before this Court. The issue before the Court is whether the Spragues' Safeco Homeowner's

⁸¹ CP 44; CP 198; CP 97-103. *See also*, CP 291-98.

policies provide coverage for the Spragues' loss.⁸² Further, none of the Washington or non-Washington cases cited by the Spragues support their argument that collapse (defined broadly to include substantial impairment of structural integrity) is a covered peril in their policies.

The Safeco policies at issue do not provide coverage for collapse of a structure or dwelling. Moreover, even if collapse were somehow covered under the pre-2003 Safeco policies, collapse would necessarily mean an actual falling down of the structure. There is no dispute that Spragues' decks are still standing.

i. None of the Washington Authority Relied Upon By The Spragues Support Their Position that Collapse is Covered Under The Safeco Policies.

The Spragues' argue that collapse is a covered peril under the Safeco policies. While they cite to several Washington cases, those cases do not resolve whether collapse is covered under Safeco's policy language.⁸³ Unlike here, those cases involved policies of insurance that contained specific provisions covering collapse.⁸⁴ Not only do those cases

⁸² Similarly, the Spragues' argument that Safeco had policy forms in existence that excluded collapse before 2003 is also not at issue. *See*, Appellants' Opening Brief, at 20. The policy that the Spragues cite to is actually a business policy, not a homeowners' policy. *See*, Appellants' Opening Brief, at 20n.63; CP 158; CP 160-66.

⁸³ Appellants' Opening Brief, at 15-16; 15n.55; 19-20.

⁸⁴ *See*, *Allstate Ins. Co. v. Forest Lynn Homeowners Assoc.*, 892 F.Supp. 1310, 1316-17 (W.D. Wash. 1995), *opinion withdrawn by*, 914 F.Supp. 408 (W.D. Wash. 1996); *Assurance Co. of America v. Wall & Associates of Olympia*, 379 F.3d 557, 559, (2004); *Panorama Village Condo. Owners Assoc. Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 134-35, 26 P.3d 910 (2001); and *Mercer*, 104 Wn. App at 603.

not resolve the issue of whether coverage for collapse should be read into a policy that does not specifically include collapse coverage, they do not apply to the discussion. Moreover, the Spragues' reliance on *Allstate Ins. Co. v. Forest Lynn Homeowners Association*,⁸⁵ which is a federal district trial court opinion that was specifically withdrawn and is neither precedential nor published, is misplaced.⁸⁶

Forest Lynn involved interpretation of an Allstate policy issued to a condominium association. The damages at issue in *Forest Lynn* were rot, deterioration, and hidden decay to wooden walkways caused by water damage.⁸⁷ The Allstate policy actually contained a specific grant of coverage for losses involving collapse caused by certain enumerated causes including hidden decay, hidden insect damage, and defective construction.⁸⁸ The court recognized that collapse coverage was something specifically added to the policy.⁸⁹ However, in *Forest Lynn*, the coverage was added without defining "collapse". There, coverage was

⁸⁵ *Forest Lynn*, 892 F.Supp. 1310 (W.D. Wash. 1995), *opinion withdrawn by*, 914 F.Supp. 408 (W.D. Wash. 1996).

⁸⁶ GR 14.1 forbids citation to unpublished Washington Court of Appeals decision, but allows citation to unpublished opinions from other jurisdictions when allowed by that forum. An unpublished, non-precedential and withdrawn federal trial court decision should have no weight with this court. However, since Spragues devoted substantial argument based upon the *Forest Lynn* case, Safeco will respond.

⁸⁷ *Forest Lynn*, 892 F.Supp., at 1311-12.

⁸⁸ *Id.*, at 1316.

⁸⁹ *Id.*, at 1314.

not the issue so much as what constituted “collapse” under the explicit grant of collapse coverage.

The Coverage A language in the Allstate policy at issue in *Forest Lynn* is similar to the pre-2003 policy language at issue in this matter.⁹⁰

The federal court concluded that there was no coverage under Coverage A of the Allstate policy:

In addition to its arguments that the Collapse provision does not provide coverage for the claimed damage, Allstate has moved for partial summary judgment on the Coverage A provision of the Policy. The court finds that the Association has not presented any evidence which creates a material dispute of fact on the issue of coverage under the Coverage A provision. The causes of damage identified by the Association are either unsupported by the evidence, and therefore insufficient to survive summary judgment, or specifically excluded under the Coverage A provision of the policy. Therefore, the court finds that there is no coverage for the claimed damage under the Coverage A provision of the policy.⁹¹

Just as the *Forest Lynn* court correctly determined as a matter of law that there was no coverage for the claimed damages under Coverage A of the Allstate policy, the trial court in this matter correctly determined as a matter of law that there was no coverage under Safeco’s similar policy language.

ii. Out of State Authority Does Not Support Spragues’ Contention that Safeco’s Policy Should Be Interpreted to Cover Excluded Losses.

⁹⁰ Compare, *Forest Lynn*, 892 F.Supp. at 1316-17, with CP 242-43; CP 268-70.

⁹¹ *Forest Lynn*, 892 F.Supp., at 1315-16.

The Spragues primarily rely upon *Barash v. Ins. Co. of North America*⁹² for their argument that Safeco's policy should be interpreted to cover excluded losses. In *Barash*, the insureds' basement floor actually collapsed into a void caused by the deterioration of unsuitable fill under the house.⁹³ The insureds filed a claim that was denied by the homeowners' insurer based upon exclusions for "settling in foundations" and "earth movement".⁹⁴

The Supreme Court of Nassau County, New York, found that the exclusions did not apply to the sudden collapse due to deteriorated organic material and an average person would not interpret the exclusions at issue to exclude the loss.⁹⁵

Barash does not support the Spragues' assertion that collapse is covered by the ensuing loss provisions when collapse is not excluded. *Barash* found the exclusions did not apply under the unusual facts of that case. Collapse was what happened, not what caused the loss. The Spragues' reliance on other cases they believe implicitly support their contention is also misplaced.

⁹² 114 Misc.2d 325, 451 N.Y.S.2d 603 (N.Y. S.Ct. 1982).

⁹³ *Id.*, at 326.

⁹⁴ *Id.*

⁹⁵ *Id.*, at 329-30.

In *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*⁹⁶, the insured filed suit asserting that its all-risk policy covered damage to an underground storage cavern that collapsed in the middle of the night, when no one was in it, with no obvious cause.⁹⁷ The matter was tried to a jury with the carrier relying upon evidence that the cause of the collapse was defective design (an excluded cause) and the insured relying on evidence that design was similar to 31 others built by the same contractor which had operated without any problems.⁹⁸ The jury found the collapse was due to a fortuitous event, not excluded design defect.⁹⁹ The 10th Circuit Court of Appeals found that the parties' intent was to insure against collapse under the specific circumstances of the case.¹⁰⁰

The *Texas Eastern* decision does not support the Spragues' argument. *Texas Eastern* supports the argument that a deficiency in design exclusion does not apply when the loss was not caused by a deficient design. The three cases that the *Texas Eastern* court found analogous also do not support the Spragues' contention.¹⁰¹

⁹⁶ 579 F.2d 561(10th Cir. 1978).

⁹⁷ *Id.*, at 563.

⁹⁸ *Id.*, at 563-64

⁹⁹ *Id.*, at 563.

¹⁰⁰ *Id.*, at 565.

¹⁰¹ *Id.*, at 565-66 (discussing, *General American Transportation Corp. v. Sun Insurance Office, Ltd.*, 369 F.2d 906 (6th Cir. 1966); *Essex House v. St. Paul Fire and Marine Ins. Co.*, 404 F.Supp. 978 (S.D.Ohio 1975); and *Millers Mut. Fire. Ins. Co. v. Murrell*, 362 S.W.2d 868 (Tex.Civ.App. 1962)). See also, Appellants' Opening Brief, at 17.

Both the 1966 6th Circuit case of *General American Transportation Corp. v. Sun Insurance Office, Ltd.*,¹⁰² and the 1975 Southern District of Ohio case of *Essex House v. St. Paul Fire & Marine Ins. Co.*,¹⁰³ also involved disputes over whether a loss was caused by an excluded latent defect or some other covered cause. Both cases concluded the loss was the result of a covered cause. Neither case found the covered cause to be collapse. These cases provide no guidance for this court.

Finally, the third case mentioned by the *Texas Eastern* Court, *Millers Mutual Fire Ins. Co. v. Murrell*,¹⁰⁴ also does not support the Spragues' contention.

The policy at issue in that 1962 Texas Appellate court case expressly added back coverage for total or partial collapse.¹⁰⁵ This fact alone makes *Millers* completely distinguishable from this case and does not support the Spragues argument that "collapse" should be added to the Safeco policies. Moreover, the *Millers* court explicitly noted that collapse was not the cause of loss; instead:

The partial collapse was alleged and found to be a result, and not the cause, of the damage occasioned by the earth movement.

...

¹⁰² *General*, 369 F.2d 906. (6th Cir 1966)

¹⁰³ *Essex*, 404 F.Supp. 978 (S.D. Ohio 1975)

¹⁰⁴ *Millers* 362 S.W.2d 868. (Tex. App. 1962)

¹⁰⁵ *Id.*, at 869.

In view of the finding that earth movement caused the damage, we think it immaterial whether the damage resulted in partial collapse of the structure.¹⁰⁶

The foregoing non-Washington cases do not support the Spragues' contention that "collapse" is a covered cause of loss in the policies at issue because "collapse" was not the cause of loss in any of these cases. Instead, actual collapse was the end result.

iii. The Efficient Proximate Cause of the Spragues' Loss Was Excluded Construction Defects.

The Spragues fail to acknowledge that the cause of the loss is the focus of first party coverage analysis, which was recognized by our Supreme Court in *Findlay v. United Pac. Ins. Co.*¹⁰⁷:

If the efficient proximate cause, the cause that triggers other causes to result in a loss, is a specifically named, unambiguous excluded peril in the policy, we will not mandate coverage.¹⁰⁸

The efficient proximate cause of the Spragues' loss was the unambiguous excluded peril of construction defects. The Spragues' attempt to re-characterize their loss by describing it only in terms of the damages incurred is utterly unavailing. "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate

¹⁰⁶ *Id.*, at 870.

¹⁰⁷ *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 917 P.2d 116 (1996).

¹⁰⁸ *Id.*, at 380.

characterization to the act or event causing the loss.”¹⁰⁹ To allow such a re-characterization would render exclusions meaningless as the California Court explained in *Chadwick v. Fire Insurance Exchange*¹¹⁰:

[I]f every possible characterization of an action or event were counted an additional peril, the exclusions in all-risk insurance contracts would be largely meaningless. An earthquake, it could be said, was merely the immediate cause of the loss and was itself the result of ‘changing tectonic forces,’ a nonexcluded peril. Wear and tear on floorboards would be covered as the result of nonexcluded ‘friction.’ An exclusion for freezing plumbing could be avoided by the simple observation the pipes would not have frozen absent ‘very low temperature,’ a nonexcluded and, hence, covered peril.”¹¹¹

The Spragues cannot provide any Washington or non-Washington authority to support their position. In contrast, Washington courts have rejected efforts to re-characterize losses to avoid policy provisions. Moreover, Washington authority on ensuing loss provisions is very clear: ensuing loss provisions are exceptions to policy provisions and cannot be interpreted to create coverage.¹¹²

iv. Nothing In The Safeco Policies Expresses An Intent To Cover Collapse Of A Building Or Structure And The

¹⁰⁹ *Kish v. Ins. Co. of N. Amer.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994) (quoting, *Chadwick v. Fire Ins. Exchange*, 17 Cal.App.4th 1112, 1117, 21 Cal.Rptr.2d 871, (1993)).

¹¹⁰ *Chadwick*, 17 Cal.App. 4th 1112 (1993).

¹¹¹ *Chadwick v. Fire Ins. Exchange*, 17 Cal.App.4th at 1118 (footnote omitted).

¹¹² *McDonald*, 119 Wn.2d, at 734-36; *Wright*, 124 Wn. App. at 274-75 (citing *Capelouto v. Valley Forge Ins. Co.*, 98 Wn.App. 7, 16, 990 P.2d 414 (1999)).

Ensuing Loss Provisions Cannot Be Used To Create Coverage.

As discussed above, an ensuing loss provision is an exception to policy exclusions, and Washington courts do not interpret ensuing loss provisions in such a way so as to create coverage.¹¹³ It cannot be disputed that the pre-2003 policies exclude loss or damage caused directly or indirectly by construction defects, water intrusion, weather, rot, mold, and deterioration.

The Spragues' deck structures were directly damaged by these excluded causes of loss as evidenced by Mr. Sprague's own statements and by the PET reports. Despite clear Washington law and unambiguous policy language, the Spragues attempt to avoid the conclusion that there is no coverage for their loss by claiming that their loss is actually a "collapse" which they assert is covered because it is not excluded.

Because Coverage C—Personal Property provides coverage for damaged personal property caused by a collapse of a building or a part of a building, Spragues claim collapse is a peril that Safeco intended to cover. No such intent can be inferred by a reading of the policy.¹¹⁴ There is no dispute that the Spragues' decks have not actually fallen down. Therefore, the Spragues jump to the conclusion that "collapse" means

¹¹³ *Wright*, 124 Wn.App. at 274 (citing *Capelouto v. Valley Forge Ins. Co.*, 98 Wn.App. 7, 16, 990 P.2d 414 (1999)).

¹¹⁴ *See, e.g.*, Appellants' Opening Brief, at 14-15.

“substantial impairment of structural integrity” or “state of imminent collapse.”¹¹⁵ The Coverage C language is inconsistent with that definition: “Collapse of a building or any part of a building. This peril does not include settling, cracking, shrinking, bulging or expansion.”¹¹⁶ The Spragues conveniently ignore the second part of this provision by asserting that Safeco did not otherwise limit “collapse” under the personal property coverage.

Yet, that is precisely what was done when Safeco stated in the policies that “collapse” does not include settling, cracking, shrinking, bulging or expansion. By including this section, Safeco clearly provides that a dwelling, or attached structures, is not considered to be in a state of “collapse” when it has “substantial impairment of structural integrity” or when it is in a “state of imminent collapse.” Accordingly, “collapse” under Coverage C must mean that the dwelling or part thereof actually fell down.

Personal property would not be damaged absent an actual falling down. At the trial court level, the Spragues argued against this interpretation by asserting that personal property could be damaged by partial collapse.¹¹⁷ Such an argument fails to take into account that the

¹¹⁵ *See, e.g.,* *Id.*, at 19, 24-25; 29.

¹¹⁶ CP 245; CP 272-73

¹¹⁷ CP 345.

collapse coverage provides coverage for personal property damaged by partial collapse and explicitly does not provide coverage for personal property should it be damaged as a result of cracking, settling, shrinking, bulging, or expansion.

The Safeco policy does not provide collapse coverage for the dwelling or structures, and the Coverage C language does provide any basis to extend coverage or expand the definition of collapse.¹¹⁸

Courts construing Washington law have found a broader definition for “collapse” only when the policy language contains additional modifying terms.¹¹⁹ No such additional modifying terms are present here. The term, “collapse” as used in Coverage C can only be construed to mean an actual falling down and only applies to personal property damages.

v. The Court’s Decision is Limited to Safeco’s Policy Provisions As Applied to the Facts of This Chain.

Spragues suggest that there is some broad significance to this coverage determination. Each coverage determination must be based upon the contract language and the facts involved in the claim presented.¹²⁰ Safeco’s policy language has been upheld in the *Wright* case.¹²¹ The facts

¹¹⁸ CP 245; CP 273-73.

¹¹⁹ See e.g. *Assurance Co. of America*, 379 F.2d 557, 563 (2004).

¹²⁰ See e.g. *Tyrerell v. Farmers Ins. Co. of Washington*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000)

¹²¹ *Wright v. Safeco Insurance Company of America*, 124 Wn. App. 263, 109 P.3d 1 (2004)

here are analogous to that case. The claim that insurers will have *carte blanche* to deny fire losses by pointing to construction defect exclusions is absurd. Insurers and insureds are both bound by the terms of their contract. Under Safeco's policy with the Spragues, if the construction defect resulted in a fire, rather than surface water intrusion and rot, there would be coverage. This court should decline Spragues' invitation to change established law and write new terms and definitions into their insurance contract in order to create coverage for their deck damage caused by excluded construction defects and ensuing uncovered rot.

E. The Spragues Are Not Entitled To Attorney's Fees Because There is No Coverage for Their Claims

Safeco does not dispute that the Spragues would be entitled to attorney's fees under *Olympic Steamship Company v. Centennial Insurance Company*¹²² if they were entitled to coverage under the Safeco policies. However, there is no coverage for the Spragues' claims. As a result, they are not entitled to any award of fees.

5. CONCLUSION

The efficient proximate cause of the damage to the Spragues' decking system was construction defects that allowed surface water to seep into the framing resulting in decay, rot, deterioration, mold growth,

¹²² *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 800 P.2d 673 (1991).

and bug infestation. The construction defects and these ensuing losses are all specifically excluded from the policies. While the Spragues have attempted to re-characterize their loss as a collapse, this argument cannot create coverage. First, the ensuing loss provisions in the pre-2003 Safeco policies do not create coverage where none exists and the Safeco policies do not provide coverage for collapse, no matter how it is defined.

Second, even if the policies could be construed to cover collapse, the interpretation of "collapse" under the policy would require that the decks actually fall down. This had not happened. Third, Washington law does not allow the Spragues to re-characterize their loss as a collapse and ignore the efficient proximate cause (and ensuing causes) of the loss. The trial court correctly granted summary judgment in favor of Safeco. For the reasons set forth above, Safeco respectfully asks this Court to affirm the trial court's ruling.

Respectfully submitted this 4th day of December, 2009.

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the Brief of Respondent Safeco Insurance Company of America to be served via the methods below on the 11th day of December, 2009 on the following counsel/party of record:

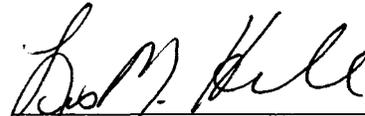
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