No. 100168-1

SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE TUNNEL PARTNERS, *Petitioner*,

v.

GREAT LAKES REINSURANCE (UK) PLC, et al.,
Respondents.

RESPONDENTS' RESPONSE TO *AMICUS CURIAE* MEMORANDUM

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A. INTRODUCTION

Vulcan Inc. ("Vulcan") filed an *amicus* brief in this matter and asserts that it is "uniquely situated to describe to this Court the broader implications and ramifications of the Court of Appeals' decision on Washington policyholders." Motion for Leave to File *Amicus Curiae* Br. at 1. However, Vulcan has been less than forthcoming as to its interest. Vulcan is currently represented by Gordon Tilden Thomas & Cordell LLC in a coverage litigation against its first party property insurers regarding its COVID-19 insurance claim. Gordon Tilden is also petitioner STP's counsel of record. Vulcan's counsel has a direct interest in the outcome of the instant litigation and is essentially using Vulcan as a strawman to bolster STP's arguments regarding the Machinery Breakdown Exclusion. Vulcan is also using this *amicus* brief as an opportunity to address unrelated COVID-19 issues regarding loss of use.

With respect to substance, there is nothing in Vulcan's *amicus* brief that warrants this Court granting STP/WSDOT

review. Vulcan merely reiterates failed arguments previously asserted by STP/WSDOT. Insurers, therefore, refer this Court to Insurers' answer for a full analysis of why this Court should deny STP/WSDOT's petition for review. Insurers also address a few additional points below.

B. ARGUMENT

(1) Division I Correctly Determined that the Tunnel Did Not Sustain any Physical Loss or Damage and WSDOT's Claim Arising Out of Its Inability to Use the Tunnel Constitutes an Economic Loss

Vulcan incorrectly asserts that Division I confused the concepts of "loss" and "damage." Division I did no such thing. Rather, Division I correctly upheld the trial court's ruling that Section 1 of the policy does not provide coverage for (1) an inability to use the tunnel while the Tunnel Boring Machine ("TBM") was being repaired, or (2) damage to the tunnel envelope resulting from construction of an access shaft to retrieve the TBM. In doing so, Division I correctly relied on well-established Washington case law and rejected WSDOT's

assertion that loss of use of the tunnel is a type of "physical loss, damage or destruction." *See Prudential Prop. & Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 45 P.2d 418 (1986); *Guelich v. American Prot. Ins. Co.*, 54 Wn. App. 117, 772 P.2d 536 (1989).

Vulcan also asserts that Division I improperly relied on two "small liability" cases. But the size of a claim does not dictate the interpretation of legal issues. The courts in both *Prudential Property* and *Guelich* analyzed the meaning of the phrase "property damage." In both cases, the courts noted that the policies defined "property damage" as "*physical injury* to tangible property." *Prudential Prop.*, 45 Wn. App. at 115; *Guelich*, 54 Wn. App. at 118, 120. Focusing on the word "*physical*," both courts held that the policies were unambiguous and explicitly required physical damage. *Id.*

Vulcan relies on *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012) for the proposition that physical loss means something other than damage. But the *Nautilus* case is factually distinguishable from

the instant case, as well as other relevant cases in Washington. In *Nautilus,* the insured claimed a loss to its accounts receivable. The insurers denied the claim on the basis that there was no physical loss or damage to the property. The court held that the phrase "accounts receivable records" is ambiguous because it is fairly susceptible to two reasonable interpretations. *Id.* at *6. The court also said that the case was factually distinguishable from two Washington cases, *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 985 P.2d 400 (1999) and *Fujii v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 857 P.2d 1051 (1993), *review denied*, 123 Wn.2d 1009 (1994), because, unlike those cases, the insured in *Nautilus* alleged that the insured property was actually lost due to theft. The court ultimately found that "a reasonable person purchasing insurance would understand the contract to cover theft of covered personal property as 'physical loss.'" *Id.* at 7. The instant case is more akin to *Wolstein* and *Fujii* because, as in those cases, the covered property at issue here was not physically lost. It is also undisputed in this case that the tunnel

did not sustain any physical damage.

Although Vulcan does not expressly acknowledge it, its interest in this case arises from similar, but fundamentally different, issues being litigated in the COVID-19 context. Those cases are being litigated in state and federal trial courts, with some on appeal. Many of those COVID-19 insurance cases turn on the question of whether the presence of COVID-19 on or at an insured property causes physical loss of or damage to the property. The instant case, however, is fundamentally distinct in that it does not involve any COVID-19 claims and—significantly—does not present the issue of whether COVID-19 causes physical loss of or damage to property, the fundamental issue in the COVID-19 context. Here, WSDOT does not point to *any* force or substance that impacted the tunnel physically. It simply alleges that it temporarily lost the ability to use the tunnel. Under Washington law, this temporary loss of use does not constitute an insured physical loss. More critically, this case with its unique facts, is a poor one for making a highly significant

COVID-19 insurance coverage analysis.

Vulcan asserts that keeping the distinction between "loss" and "damage" alive is critical for Washington policyholders. But Division I's decision is based on the policy's plain language, which requires "direct physical loss" of property. Moreover, it is well established in Washington that property insurance policies do not cover purely economic losses caused by a loss of use of property that has not been physically lost or damaged. *See Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 522-53, 276 P.3d 300 (2012) (rejecting the insured's argument that financial losses resulting from a floor collapse could be considered "physical" loss or damage). As the tunnel in this case did not sustain any such physical loss, injury, or damage, this Court should deny WSDOT's petition for review.

(2) Division I Correctly Determined the Scope of the Machinery Breakdown Exclusion

Vulcan's assertions that Division I erred in interpreting the Policy's Machinery Breakdown Exclusion, ("MBE") lack support for the two main reasons discussed below.

(a) Division I's Ruling that the MBE in the STP Policy Precludes Coverage for Damage from Design Defects Rests Soundly on Established Principles of Washington Law

Arguing that Division I's analysis departs from several settled principles of Washington law, Vulcan mischaracterizes Division I's decision and misconstrues fundamental principles of insurance policy interpretation. Division I held that the trial court properly determined on partial summary judgment that the Policy's Section 2 MBE excludes coverage for property damage to the TBM caused by a breakdown from design defects. Op. at 12. Division I correctly reasoned that the phrase "by its own" in the MBE indicates that the MBE precludes coverage for internal causes of damage and that "a design defect is an internal cause, since design defects are inherent to the insured subject matter." Op. at 12. Because Washington courts have not addressed the issue, Division I properly considered decisions from courts in other jurisdictions. Significantly, neither Vulcan nor petitioners have cited a single case decided under Washington law that

involves exclusionary language for machinery or mechanical breakdowns, design defects, or similar perils. The Division I ruling on the MBE does not depart from settled Washington law, nor does it recast the reasonable expectations of insureds.

Vulcan argues that Division's I's analysis disregards the reasonable expectations of insureds that an insurance policy "(i) means what it says and nothing more, and (ii) any uncertainty in what the policy says will be resolved in favor of coverage." *Amicus* Br. 6. Division I's conclusion that the MBE encompasses mechanical breakdowns caused by design defect does not ignore these requirements. In fact, Division I's conclusion is premised on the very language of the MBE, as Washington law requires. The MBE contained in Section 2 of the Policy excludes indemnification for "Loss of or Damage in respect of any item *by its own* explosion *mechanical* or electrical *breakdown*, failure breakage or derangement." (emphasis added). Division I reasoned that the language excluding from coverage damage to the TBM "*by its own* . . . mechanical . . . breakdown" "*as written*"

excludes coverage for mechanical breakdown from design defect, because a TBM that breaks down due to design defect has necessarily suffered an excluded breakdown. Op. at 13-14 (emphasis added). Division I's analysis comports with the expectations of the parties to the insurance contract, as reflected in the MBE's language.[1] *See Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005) ("[I]n Washington, the expectations of the insured cannot override the plain language of the contract.").

Vulcan argues that Division I departed from the principles of Washington law that exclusions must be narrowly construed and that an unwritten exclusion may not be implied. *Amicus* Br. 6-8. Vulcan's argument advances the same flawed premise as

[1] Vulcan asserts that it has paid millions of dollars in insurance premiums as a policyholder. Vulcan is not a party to the Policy and paid *no* premium for any exclusion at issue here. Division I's ruling concerned a single bespoke exclusion applicable to the custom-designed TBM and written specifically for STP's policy to meet the requirements of STP's contract with WSDOT. Contrary to Vulcan's fears, Division I's decision does not "recast" the settled expectations of any insured.

petitioners' that because the words "design defect" do not appear in the MBE, the MBE does not encompass breakdowns caused by design defects. *Amicus* Br. 7-8; STP Pet. 7-8. Also similar to petitioners, Vulcan fundamentally mischaracterizes the nature of a machinery breakdown, an argument that runs afoul of Washington's prohibition against an insured avoiding a contractual exclusion merely by differently characterizing the causative event at issue. *See* Insurers Opp. to Pet. 12-14; *Kish v. Insurance Co. of N. Am.*, 125 Wn.2d 165, 170, 883 P.2d 308 (1994); *Eide v. State Farm Fire & Cas. Co.*, 79 Wn. App. 346, 351, 353, 901 P.2d 1980 (1995); *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 15-16, 990 P.2d 414 (1999). Vulcan cannot characterize the cause as design defect and ignore the fact that the loss event was a machine's mechanical breakdown, which is expressly excluded. The TBM failed because it could not withstand anticipated forces on the drive and was not fit for its intended function or purpose. To give effect to the MBE, Division I properly held that the exclusion includes mechanical

breakdowns stemming from the machine's own defective or deficient design. To construe the MBE otherwise would render it meaningless. *See Quadrant Corp.*, 154 Wn.2d at 171-72.

The MBE excludes loss or damage to the TBM from a specific type of damage: mechanical breakdown. To construe a breakdown as a peril distinct from the design defect that causes the breakdown disregards the fact that every machinery breakdown has a source or cause (typically a defect of some kind). Indeed, Vulcan acknowledges that machinery breakdowns have underlying causes when it states that a "well-designed machine can break down due to improper maintenance, overuse, or operator error." *Amicus* Br. 10. *Vision One* does not require that the exclusion list every way that a machine can sustain machinery breakdown damage for the exclusion to be effective.

Vulcan's argument that Division I's ruling undermined the "average consumer of insurance" rule also fails. *Amicus* Br. 7-8. Division I did not add words to or rewrite the MBE. Rather, it correctly interpreted the *clear and unequivocal language*.

Division I concluded that "the MBE *as written* excludes coverage for damage from design defects." Op. at 13 (emphasis added). Division I correctly recognized that machinery breakdown and design defect are not distinct perils, because an inherent or internal defect that causes a failure constitutes a machinery breakdown. *See* Op. at 14-17. Therefore, the clear and explicit terms of the MBE encompass and exclude a machine's mechanical breakdown caused by design defect, even though the words "design defect" are not listed in the MBE.

Citing the principle that policies must be interpreted as a lay person would, Vulcan argues that "design defect" and "mechanical breakdown" do not mean the same thing. *Amicus* Br. 8. A "mechanical breakdown" does not need to mean the same thing as "design defect" in common parlance or practice for a design defect that causes a mechanical breakdown to be encompassed by the MBE, as Vulcan urges. Once again, Vulcan's own argument acknowledges that a machine can breakdown for myriad reasons, one of which is design defect.

Amicus Br. 10. When a machine sustains damage from a breakdown due to a condition such as an internal defect, the defect is indistinct from the breakdown of the machine. The average consumer—and certainly a sophisticated purchaser of insurance policies like STP— is capable of understanding that a defectively designed machine that breaks down because of its own inherently faulty design is damaged "by its own" breakdown.

Finally, Vulcan argues that the drafter bears the consequences of imprecise drafting and ambiguities should be construed against the Insurers. This argument is not properly before this Court, because no party argued to the trial court that the exclusion is ambiguous, as the trial court noted. CP 5794. Indeed, STP argued in support of its affirmative motion for summary judgment that the policy is *not* ambiguous. *See, e.g.*, CP 1389-90. Even if the argument were properly raised, the principle does not apply here both because the MBE is not

ambiguous and because Insurers did not draft the policy. Insurers Opp. to Pet. 4; CP 724-29.

"Language in an insurance contract is ambiguous if it is susceptible to two different but reasonable interpretations." *Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 712, 375 P.3d 596 (2016); *see also, Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998) ("An ambiguity in an insurance policy is present if the language used is fairly susceptible to two different reasonable interpretations."). When policy language is clear and unambiguous the court "'must enforce it as written and may not "modify it or create ambiguity where none exists.'" *Id.* (quoting *Quadrant Corp.*, 154 Wn.2d at 171). And although "exclusions should be strictly construed against the drafter, a strict application should not trump the plain, clear language of an exclusion such that a strained or forced construction results." *Quadrant Corp.*, 154 Wn.2d at 171-72. Moreover, the court must decline to read ambiguity into a contract "where it can reasonably

be avoided." *Martin v. Smith*, 192 Wn. App. 527, 533, 368 P.3d 227, *review denied*, 186 Wn.2d 1011 (2016).

The construction of the plain language of the MBE advanced by Vulcan and petitioners is not reasonable because it ignores the plain language of the MBE and causes the MBE to become superfluous. *See Kut Suen Lui*, 185 Wn.2d at 716 (holding interpretation is unreasonable when it ignores the policy's plan language and renders the language superfluous). Under Vulcan and petitioners' view, the MBE would never apply, because the exclusion for the event of machinery breakdown does not specify which causes of breakdown are implicated. This renders the MBE meaningless and is inconsistent with the plain wording and the parties' expressed expectations and understanding that the policy would not insure the TBM if it sustained a machinery breakdown. *See* Insurers Opp. to Pet. 4-5. Neither Vulcan nor the petitioners identify any alternative construction that gives the MBE meaning. The plain language is not subject to multiple reasonable interpretations;

petitioners (and Vulcan) just don't like the result of the MBE exclusion.

Even if there were any ambiguity, the extrinsic evidence of the parties' intent when entering the insurance contract demonstrates not only the parties' clear intent to exclude machinery breakdown from a design defect in the prototype TBM, but also that STP is a sophisticated insured whose broker proffered the policy. *See* Insurers Opp. to Pet. 4-5. The principle that insurers must bear the consequences of imprecise language simply is not applicable here.

(b) Division I Properly Relied on Authority Outside of Washington for Guidance when It Determined that Design Defect Is an Internal Cause of Damage Excluded by the MBE

Vulcan also argues that Division I erred by ruling that a design error is an internal peril excluded by the MBE. Recognizing the parties' agreement that the MBE prevents recovery for internal causes of breakdown, Division I reasoned that "a product's design is something inherent to it and

inseparable from it" and, therefore the MBE encompasses and excludes loss or damage caused by a defect in design. In reaching this decision, Division I properly considered cases from other jurisdictions that have addressed the issue of whether a design defect is an internal or external cause of damage. Op. at 15-16. In doing so, Division I did not ignore the cases petitioners cited (which were also out-of-state decisions) or "cherry pick" decisions that were exclusively favorable to Insurers, as Vulcan contends. Rather, Division I explained why it found the cases petitioners cited unpersuasive and why it found other decisions more persuasive and relevant to interpreting the MBE language.

Vulcan implicitly acknowledges that there is no Washington precedent controlling the question of whether a policy exclusion for machinery breakdown encompasses and excludes damage from a breakdown caused by a defect in the machine's design. Yet it proceeds to argue that "in the absence of controlling precedent, the insured—not the insurer—should be given the benefit of the doubt." *Amicus* Br. 12. Vulcan's

argument vastly overstates and misconstrues this Court's precedent. The cases Vulcan cites for this dubious proposition concern actions for bad faith in the third-party liability insurance context, when an insurer declines the duty to defend based on a question of law that is unsettled under Washington law. *See Robbins v. Mason Cnty. Title Ins. Co.*, 195 Wn.2d 618, 633-36, 462, P.3d 430 (2020); *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 408, 229 P.3d 693 (2010); *Webb v. USAA Cas. Ins. Co.*, 12 Wn. App. 2d 433, 444-46, 457 P.3d 1258 (2020). In these cases, the courts held that an insurer must give the insured "the benefit of the doubt" when determining the duty to defend, such that denying the duty to defend based on an arguable, but not conclusive, interpretation of Washington law may subject the insurer to bad faith liability. *Robbins*, 195 Wn.2d at 634-35; *American Best Food*, 168 Wn.2d at 408; *Webb*, 12 Wn. App. 2d at 445. At best, these cases subject liability insurers to penalties for bad faith when they refuse to provide a defense based on a question of law that is not settled by Washington

precedent. None of the cases support the proposition that Vulcan advances, which is that Washington courts must construe a first party property insurance policy exclusion in the insured's favor merely because no Washington court has ruled on that exclusionary term previously. *Amicus* Br. 12-13.

Vulcan's rule would require courts to construe exclusionary language in the insured's favor on every issue of first impression under Washington law and to ignore the policy's plain language if a Washington court has not previously interpreted similar language. That absurd notion is contrary to this Court's precedent recognizing the value of the decisions of courts in other jurisdictions as persuasive authority and specifically requiring that the court interpret unambiguous policy language as written. This Court has acknowledged many times that Washington appellate courts may consider the decisions of federal courts and sister jurisdictions that provide persuasive authority. *See, e.g.*, *State v. Chenowith*, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007). Indeed, in *American Best Food*, one of the

third-party liability insurance cases Vulcan cites, this Court relied on out-of-state decisions as persuasive authority in construing an "assault and battery" exclusion in a liability insurance policy. 168 Wn.2d at 408-11. The Court's determination that there was a legal ambiguity as to whether the exclusionary clause applied to the third-party claims asserted—which it resolved in the insured's favor by requiring the insurer to provide a defense for those claims—was informed by its review of the decisions from other states finding similar claims to be covered. *Id.* Here, there is no duty to defend resting on an uncertain question of law. The operative language is not ambiguous, and the mere fact that a Washington court has not previously considered a similar machinery breakdown exclusion does not require construction of that unambiguous exclusion in petitioners' favor.

Vulcan also argues that Division I misplaced its reliance on *Acme Galvanizing Co. v. Fireman's Fund Insurance Co.*, 270 Cal. Rptr. 405 (Cal. App. 1990) because that case involved an

exclusion for latent defects, which this case does not. Division I cited *Acme* not because it contained an identical exclusion but on the question of whether a design defect is an internal or external cause of damage. In *Acme*, the court held that, when defective design results in a property's failure before the end of its normal life and the defect is not apparent upon reasonable inspection, the loss is caused by a latent defect and was subject to a latent defect exclusion in the policy at issue there. Division I relied on *Acme* and *GTE Corp. v. Allendale Mutual Insurance Co.*, 372 F.3d 598, 601 (3d Cir. 2014), for the principle that "a product's design is something inherent to it and inseparable from it." Op. at 16. Division I correctly reasoned that, if the TBM broke down because of a design defect, that defect is an internal cause of the breakdown and falls within the policy's MBE. Op. at 16.

Vulcan argues this analysis is flawed because "latent defect" differs from an inherent vice or design defect under

Washington law.[2] Vulcan's attempt to distinguish latent defects from inherent conditions finds little support in Washington law. Indeed, the Washington and out-of-state cases Vulcan cites are all consistent with Division I's analysis that a design defect is a condition inherent to the machine and encompassed by the exclusion. Ironically, in support of its argument, Vulcan relies on a federal court decision purporting to interpret Washington law, but based only on other federal court decisions. *Amicus* Br. 13 (citing *Babai v. Allstate Ins. Co.*, 2013 WL 6564353 at *3 (W.D. Wash. Dec. 13, 2013)). Moreover, *Babai* does not aid Vulcan here, as the case merely defines "latent defect" in a manner that

[2] Vulcan also argues that the fact that some insurers draft separate exclusions for design defects, latent defects, and inherent vice demonstrates that the phrases are not interchangeable. *Amicus* Br. 14. Section 2 of the policy, which insures the machine at issue here, does not include separate exclusions for these conditions. Rather, Section 2 excludes damage by the TBM's own breakdown; there is not a separate exclusion for design defect, latent defect, and inherent vice, because these conditions are encompassed by the MBE's exclusion for damage when TBM fails "by its own . . . breakdown."

is consistent with Division I's analysis. *Compare Babai*, 2013 WL 6564353 at *3 ("[L]atent defects' are those that would not be discovered by a reasonable inspection.") *with* Op. 15-16 (quoting *Acme* for proposition that latent defects are those that are "'not apparent upon reasonable inspection'").

Vulcan also argues that Division I should have considered *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 790, 466 P.2d 515 (1970), which Vulcan contends holds that an insured external cause can exist even if an excluded latent defect contributed to the loss. (*Amicus* Br. 14-15). In *Dickson*, collapsing earth caused the boom of a construction crane to fail. A defective weld in the boom—characterized in *Dickson* as a "latent defect"—also failed. Although the policy excluded latent defects, the court determined that the collapsing earth, an external cause of loss, was responsible for the loss and, therefore, the exclusion for latent defects did not exclude coverage. Vulcan's reliance on *Dickson* is misplaced. The *Dickson* court distinguished the latent defects excluded by the policy at issue from the "external cause"

of collapsing earth. This supports Division's I's observation that a latent defect is an inherent defect that is internal to the machine. Such defects are distinguishable from external causes of loss. Here, there is no external cause. The TBM broke down because of its inherently defective condition. It is undisputed that the policy would respond to damage to the TBM due to an external peril such as a collapse, fire, flood, or earthquake, because such perils—which are precisely what the parties intended the policy to insure against—would clearly not involve the TBM's "own . . . mechanical or electrical breakdown." *Dickson*'s application to this case is, therefore, limited.[3] Division I's citation of *Acme* and conclusion that a product's design is something inherent to it and inseparable from it such that the MBE

[3] Vulcan's citation of *Ingenco Holdings, LLC v. Ace American Insurance Co.*, 921 F.3d 803, 816 n.5 (9th Cir. 2019) is also unavailing. There, the Ninth Circuit merely acknowledged that this Court suggested in *Dickson* "that an external cause can exist even in circumstances involving latent defects."

encompasses and excludes coverage for breakdown from design defect was proper and consistent with Washington law.

C. CONCLUSION

There is nothing in Vulcan's *amicus* brief that warrants this Court granting petitioners' review. Vulcan merely reiterates flawed arguments previously asserted by petitioners, which for reasons discussed in the response to STP/WSDOT's petition for review as well as in this response should be rejected. Accordingly, this Court should deny STP/WSDOT's petitions for review.

This document contains 4,267 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of December, 2021.

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 15, 2021, at Seattle, Washington.

/s/ Will Cummins
Will Cummins, Legal Assistant
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