No. 101892-4

SUPREME COURT
OF THE STATE OF WASHINGTON

THE GARDENS CONDOMINIUM, a Washington non-profit corporation,

Respondent,

v.

FARMERS INSURANCE EXCHANGE, a California company,

Petitioner.

ANSWER TO PETITION FOR REVIEW

HOUSER LAW, PLLC

By: Daniel S. Houser
WSBA No. 32327

1325 4th Avenue, Suite 1650
Seattle, WA 98101 2506
(206) 427-9172

SMITH GOODFRIEND, P.S.

By: Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

RULES AND REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

The Court of Appeals faithfully followed this Court's seminal resulting loss case, *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012), in interpreting the policy petitioner Farmers Insurance Exchange (Farmers) issued to respondent The Gardens Condominium (the Gardens). Because the Court of Appeals' decision rigorously adhered to *Vision One* and other Washington precedent it presents no grounds for review under RAP 13.4(b)(1)-(2). Farmers' arguments to the contrary distort *Vision One* and ask this Court to overrule *Vision One* in favor of out-of-state cases that conflict with Washington law. This Court should deny review.

II. RESTATEMENT OF THE ISSUE RAISED BY PETITIONER

In *Vision One*, this Court held that under a resulting loss clause in a faulty workmanship exclusion "damages

resulting from faulty workmanship are covered if they are caused by an otherwise covered event." 174 Wn.2d at 517, ¶ 35. Does the Court of Appeals' reliance on *Vision One* to hold that Farmers' resulting loss clause requires it "to pay for any loss or damage caused by a covered peril resulting from faulty construction" present any grounds for review? (*See* § IV.A, *infra*)[1]

III. RESTATEMENT OF THE CASE

A. The Court of Appeals held that the resulting loss clause in Farmers' faulty workmanship exclusion preserves coverage for damage or loss caused by an otherwise covered peril that is the result of faulty workmanship.

In 2003-04, the Gardens contracted for repairs to its roof. (CP 267-68) Unbeknownst to the Gardens, 2x2 "sleepers" installed during the repairs did not achieve their "goal of . . . add[ing] space to the joist cavities beneath the roof to increase ventilation and eliminate condensation."

[1] The Court of Appeals slip opinion is cited as "Op. ___" and attached as Appendix A.

(CP 268) In 2019, the Gardens discovered hidden water damage to parts of its roof caused by condensation and humidity within the roof. (CP 269)

The Gardens held an all-risk insurance policy from Farmers that covered all "direct physical loss or damage" to its building not specifically excluded by the policy and submitted a claim to Farmers for damage to the non-defective portions of its roof, *e.g.*, sheathing, fire board, and joists. (CP 22-47) Farmers denied the claim, alleging that even if condensation and humidity were covered events its faulty workmanship exclusion barred coverage for the entire sequence of events because an introductory paragraph to the exclusion states it applies if faulty workmanship "initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence." (CP 43, 160)[2]

[2] Farmers' faulty workmanship exclusion is attached as Appendix B.

Farmers rejected the Gardens' contention that a resulting loss exception to its faulty workmanship exclusion stating "[b]ut if loss or damage by a Covered Cause of Loss results [from faulty workmanship], we will pay for that resulting loss or damage," preserved coverage for any resulting damage caused by a covered event and that condensation and humidity were covered causes of loss. (CP 43, 204)[3]

The Gardens filed suit for breach of contract and sought a declaratory judgment of coverage, alleging that the resulting loss clause preserved coverage for damage caused by condensation and humidity that resulted from faulty workmanship. (CP 1-8) The Gardens acknowledged that Farmers' policy "would not cover the cost of correcting the inadequately designed sleepers" but sought coverage for the damage to the non-defective portions of its roof

[3] As this Court has explained, the terms "ensuing loss" and "resulting loss" are interchangeable. *See Vision One*, 174 Wn.2d at 513 n.6, ¶ 21. This Answer uses the term "resulting loss" as that is the language of Farmers' policy.

under the resulting loss clause. (CP 214; *see also* CP 471 n.11)

The parties filed cross-motions for summary judgment on stipulated facts, agreeing that "[t]he damage was caused by condensation and/or excess humidity resulting from inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs and/or redesign." (CP 269; *see also* CP 268: "repeated exposure to water vapor resulted in damage"; "water vapor . . . could not ventilate to avoid damaging the sheathing, fire board, and/or joists") The parties' further agreed that condensation and humidity acted as "independent cause[s] of distressed and decayed building components" that "did not occur at the same time as the" faulty workmanship. (CP 269) The trial court granted Farmers summary judgment. (CP 659-60; *see also* RP 37-42)

The Court of Appeals reversed. Relying on *Vision One*, the court held that although Farmers' policy excludes coverage for faulty construction, "the resulting loss clause narrows that exclusion" and that under the resulting loss clause "Farmers agreed to pay for any loss or damage caused by a covered peril resulting from faulty construction." (Op. 6) The Court of Appeals rejected Farmers' argument that the "initiates a sequence of events" language in its exclusion precluded application of the resulting loss clause, explaining that while Farmers drafted policy language that "denies coverage when an excluded peril initiates an unbroken causal chain," it then "limited the scope of that exclusion" by including a resulting loss exception. (Op. 7 n.4)

The Court of Appeals then remanded the case to the trial court to resolve whether condensation and humidity are covered perils under Farmers' policy, an issue the trial court declined to address. (Op. 10) After the Court of

Appeals denied Farmers' motion for reconsideration, Farmers sought review in this Court.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' holding that Farmers' resulting loss clause preserves coverage for damage caused by a covered event that results from an excluded peril is consistent with *Vision One* and other Washington precedent.

The Court of Appeals' decision is consistent with Washington law and controlled by this Court's seminal resulting loss decision, *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 276 P.3d 300 (2012). Farmers' arguments to the contrary distort long-standing Washington precedent, render the resulting loss clause meaningless, and impermissibly add language to the policy. Because the Court of Appeals' decision is entirely consistent with Washington law it presents no grounds for review under RAP 13.4(b)(1)-(2).

1. *Vision One* holds that under a resulting loss clause "damages resulting from faulty workmanship are covered if they are caused by an otherwise covered event."

Property insurance policies generally fall into two categories: "named-peril" and "all-risk." *Vision One*, 174 Wn.2d at 513, ¶ 22. While "named peril" policies cover only the specific risks enumerated in the policy, "all-risk" policies "provide coverage for all risks unless the specific risk is excluded." *Vision One*, 174 Wn.2d at 513, ¶ 23 (quoted source omitted). Accordingly, "[a]ll-risk policies generally allocate risk to the insurer, while specific peril policies place more risk on the insured." *Vision One*, 174 Wn.2d at 514, ¶ 24.

Exclusions in all-risk policies often contain an "ensuing" or "resulting" loss clause that provides "if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered." *Vision One*, 174 Wn.2d at 515, ¶ 27 (quoting

McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 734, 837 P.2d 1000 (1992)). Resulting loss clauses thus "carve out an exception to [a] policy exclusion" that "limit[s] the scope of what is otherwise excluded under the policy." *Vision One*, 174 Wn.2d at 514-15, ¶¶ 26-27. "'The uncovered event itself, however, is never covered.'" *Vision One*, 174 Wn.2d at 515, ¶ 27 (quoting *McDonald*, 119 Wn.2d at 734).

As with any policy provision, Washington courts interpret a resulting loss clause "as the average person purchasing insurance would, giving the language a fair, reasonable, and sensible construction." *Vision One*, 174 Wn.2d at 512, ¶ 20 (internal quotation and quoted source omitted). Moreover, "[b]ecause exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance," Washington courts "construe exclusions strictly against the insurer" and "will not extend exclusions beyond their clear and unequivocal meaning."

Vision One, 174 Wn.2d at 512, ¶ 20 (internal quotations, alterations, and quoted source omitted).

Vision One considered the application of a resulting loss exception virtually identical to the one in this case to the collapse of a concrete floor. This Court held that because "collapse" was a covered peril, damages caused by the collapse of the concrete floor were covered even if defective design and faulty construction of the shoring for the floor, two excluded perils, caused the collapse. 174 Wn.2d at 517-18, ¶¶ 35-38.[4] The cost of repairing the flawed shoring, however, was not covered. 174 Wn.2d at 511, 518, ¶¶ 16, 38. As explained below, the Court of Appeals adhered to *Vision One* in rejecting Farmers' contention that damage from humidity and condensation could not be a resulting loss.

---

[4] The resulting loss clause in *Vision One* provided that "if loss or damage by a Covered Cause of Loss results, [the insurer] will pay for the loss or damage caused by that Covered Cause of Loss." 174 Wn.2d at 507, ¶ 7.

2. Consistent with *Vision One* and other Washington precedent, the Court of Appeals interpreted Farmers' resulting loss clause as preserving coverage for loss or damage caused by a covered peril resulting from faulty workmanship.

The Court of Appeals construed Farmers' resulting loss clause as a promise "to pay for any loss or damage caused by a covered peril resulting from faulty construction." (Op. 6) That is precisely how this Court held resulting loss clauses should be interpreted in *Vision One*. *See* 174 Wn.2d at 517, ¶ 35 ("Under the ensuing loss clause, damages resulting from faulty workmanship are covered if they are caused by an otherwise covered event"). Farmers' assertion that this Court should accept review under RAP 13.4(b)(1) to "restore consistency" with *Vision One* is thus meritless. (Pet. 19)

Farmers' attempt to establish a basis for review under RAP 13.4(b)(1) based on other cases that do not address resulting loss clauses, but turn on much different

policy language, is likewise meritless. For example, *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 515 P.3d 525 (2022) (Pet. 11, 20-21) did not involve a resulting loss clause.[5] Likewise, *Seattle Tunnel Partners v. Great Lakes Reinsurance (UK) PLC*, 200 Wn.2d 315, 516 P.3d 796 (2022) (Pet. 9, 18), did not interpret a resulting loss clause but addressed whether an exclusion for loss or damage to "any item" damaged "by its own failure" excluded design defects. 200 Wn.2d at 323-32, ¶¶ 14-32. This Court's interpretation of distinct policy language is irrelevant to this case because—as this Court stressed in *Seattle Tunnel Partners*—"differences in policy wording indicate differences in intended meaning." 200 Wn.2d at 331, ¶ 31; *see also Vision One*, 174 Wn.2d at 516-17, ¶ 32

[5] *Hill & Stout* nowhere mentions a resulting loss clause and its clerk's papers confirm the relevant exclusion did not have one. (*See Hill & Stout* CP 76)

(courts "look to the language of the policy to ensure that the parties contemplated coverage for the ensuing loss").

The other Washington cases cited by Farmers as justifying review under RAP 13.4(b)(1)-(2) are all distinguishable either because the purported resulting loss was subject to another exclusion or because a resulting loss did not actually occur. For example, as the Court of Appeals recognized, in *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d 524, 276 P.3d 1270 (2012) (Pet. 11-13), this Court held that a resulting loss clause did not apply "because the only loss resulted from rot caused by construction defects" and both rot and construction defects were excluded perils. (Op. 9-10, citing 174 Wn.2d at 530-31) And in *Windcrest Owners Ass'n v. Allstate Ins. Co.*, 24 Wn. App. 2d 866, 524 P.3d 683 (2022) (Pet. 21-22), the resulting loss clause only preserved coverage for specified events such as "collapse" and "water damage" and there was no collapse or water damage—and thus no resulting loss coverage. 24 Wn.

App. 2d at 883-84, ¶¶ 35-36 ("Windcrest has not demonstrated collapse"; "Windcrest does not allege water damage that meets [the policy's] definition."); *see also Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 913, 48 P.3d 334 (2002) (Pet. 26) (resulting loss clause did not apply because "[t]he *only* peril suffered . . . was the excluded inherent vice"; emphasis added).[6]

Farmers argues that its resulting loss clause applies only when "faulty construction results in damage to

---

[6] Farmers cites out-of-state cases that are distinguishable for similar reasons and, even if they were not, they would present no grounds for review under RAP 13.4(b). *See, e.g.*, *Aetna Casualty and Surety Co. v. Yates*, 344 F.2d 939, 941 (5th Cir. 1965) (Pet. 16) (ensuing loss clause only preserved coverage for loss "caused by . . . water damage" and loss did not ensue "from water damage"); *Rocky Mountain Prestress, LLC v. Liberty Mut. Fire Ins. Co.*, 960 F.3d 1255, 1263 (10th Cir. 2020) (Pet. 16) (insured presented no evidence anything other than defective workmanship "caused [the insured] to incur an actual loss"); *H.P. Hood LLC v. Allianz Glob. Risks U.S. Ins. Co.*, 39 N.E.3d 769, 774 (Mass. App. Ct. 2015) (Pet. 14-15) (only evidence was that loss was "directly caused by, and completely bound up in" faulty workmanship), *rev. denied*, 473 Mass. 1109 (2016).

property *other* than the defectively built structure." (Pet. 25, emphasis added; *see also* Pet. 2: "a resulting loss exception applies only when there is loss to other property") This interpretation ignores the language of Farmers' policy. Nothing in Farmers' resulting loss clause requires damage to "other" property. Rather, Farmers' resulting loss clause requires only that "*loss or damage* by a Covered Cause of Loss result[]" from faulty workmanship. (CP 43; emphasis added) "It is the duty of the court to declare the meaning of what is written, and not what was intended to be written." *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 683-84, 871 P.2d 146 (1994) (quoted source omitted). If Farmers wanted to limit its resulting loss clause to "other" property it could have easily said so in its policy.

Regardless, as the Court of Appeals explained, the Gardens conceded that "the resulting loss clause [does] not preserve coverage for correcting the defective sleepers"

installed in its otherwise non-defective roof. (Op. 4 n.3; *see also* App. Br. 20; CP 214) The Gardens thus does not seek coverage for replacing the defective sleepers, but "other" non-defective property, *e.g.*, the fireboard, sheathing, and joists within its roof. Farmers' contention, throughout its petition, that the Gardens sought coverage for the entire "roof assembly" (Pet. 3-5, 22-23, 26) misstates the Court of Appeals' decision and ignores the Gardens' concession.[7]

Farmers misconstrues this Court's discussion of *Allianz Insurance Co. v. Impero*, 654 F. Supp. 16 (E.D. Wash. 1986) in *Vision One* as support for its "other" property interpretation. (*See* Pet. 12, 25, citing *Vision One*, 174 Wn.2d at 506, 515-16) As this Court noted in *Vision One*, *Impero* ruled the resulting loss clause did not apply

[7] As it noted in the trial court (CP 471 n.11), the Gardens conceded the resulting loss clause did not preserve coverage for the cost of correcting the defective sleepers to streamline this dispute despite the fact the sleepers suffered condensation and water damage that was potentially a covered resulting loss.

because the only claim was "for the cost of repairing poorly constructed concrete walls." 174 Wn.2d at 516, ¶ 30. Because "the sole claim [was] for the cost of correcting the deficiencies" the loss was excluded. *Impero*, 654 F. Supp. at 18. Stated differently, there was neither any resulting damage nor any covered cause of loss.

Farmers also mischaracterizes *Sprague* as rejecting resulting loss coverage on the ground that "[t]he only loss was to the deck system itself." (Pet. 12) In fact, however, *Sprague* held there was no coverage because there was no "separate loss apart from th[e] *perils*" of defective workmanship and rot, both of which were expressly excluded. 174 Wn.2d at 529, ¶ 13 (emphasis added).

By contrast, the hypothetical example offered in *Vision One* explains that resulting loss coverage turns on whether there is resulting damage caused by a covered peril, not the location of that damage. As this Court explained, if a faulty wire causes a fire, then an "ensuing

loss clause would preserve coverage for damages *caused by* the fire." 174 Wn.2d at 515, ¶ 28 (emphasis added). In other words, fire damage is covered whether it burned only the one wood stud touching the defective wire or if the fire also spread to other parts of the building. Indeed, below Farmers agreed with this Court's observation in *Sprague* that "a (covered) fire loss resulting from (excluded) defective wiring" is the "classic example" of a resulting loss. (*See* Resp. Br. 21 n.8, citing 174 Wn.2d at 529, ¶ 14)

Likewise, here the damage to sheathing, fireboard, and joists caused by condensation and humidity is covered damage regardless of whether located one inch, six feet away, or 20 feet away from the defective sleepers. Farmers' own cases confirm as much. *See Eagle W. Ins. Co. v. SAT, 2400, LLC*, 187 F. Supp. 3d 1231, 1237 (W.D. Wash. 2016) (cited at Pet. 12-13) (while the insured could not "recover for the elements of the roof that themselves were inadequately maintained," it could "recover for damage to

portions of the roof that were adequately maintained and subsequently damaged by rainwater infiltration"); *see also Blaine Const. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 350 (6th Cir. 1999) (insulation within a roof cavity damaged by water intrusion was a resulting loss despite being "adjacent material" to defectively installed vapor barrier; applying Tennessee law).

Because the parties stipulated that the Gardens suffered loss or damage caused by potentially covered perils—condensation and humidity—resulting from faulty workmanship, the Court of Appeals correctly recognized that coverage in this case turns on whether condensation and humidity are covered perils and remanded for a determination of that issue. (Op. 10) Its decision is entirely consistent with *Vision One*. *See* 174 Wn.2d at 516, ¶ 31 ("if the policy covers the peril or loss that results from the excluded event, then the ensuing loss clause provides coverage").

3. The Court of Appeals gave meaning to all language in the faulty workmanship exclusion.

The Court of Appeals did not, as Farmers argues, nullify its faulty workmanship exclusion by adhering to *Vision One*. By acknowledging that the resulting loss clause did not preserve coverage for the cost of correcting the installation of defective sleepers (Op. 4 n.3), the Court of Appeals heeded this Court's instruction in *Vision One* that the "uncovered event itself" is never covered and gave meaning to the exclusion, contrary to Farmers' allegation the Court of Appeals interpreted the resulting loss clause to "swallow" the exclusion by finding "coverage for defective construction." (Pet. 8, 10)

The Court of Appeals' interpretation of Farmers' resulting loss clause as preserving coverage if damage by a covered event results from faulty workmanship, but not the cost of correcting the faulty workmanship itself, is not only consistent with the actual policy language and *Vision One*,

but also with decisions from numerous other courts. *See, e.g.*, *Blaine*, 171 F.3d at 349-51; *Eagle West,* 187 F. Supp. 3d at 1237; *Arnold v. Cincinnati Ins. Co.*, 276 Wis.2d 762, 688 N.W.2d 708, 718-19 (2004); *Dawson Farms, L.L.C. v. Millers Mut. Fire Ins. Co.*, 794 So.2d 949, 952 (La. App. 2 Cir. 2001), *writ denied*, 803 So.2d 34 (La. 2001), *writ denied* 803 So. 2d 37 (La. 2001); *Cockerham v. Am. Fam. Mut. Ins. Co.*, 561 S.W.3d 862, 866-67 (Mo. Ct. App. 2018); *Bartram, LLC v. Landmark Am. Ins. Co.*, 864 F. Supp. 2d 1229, 1233-35 (N.D. Fla. 2012).[8]

Like the Court of Appeals, these courts have recognized that excluding the cost of remedying faulty workmanship from the scope of a resulting loss clause "avoids an interpretation that renders any provision

[8] Some of these cases also involved damage caused by condensation. *See, e.g., Blaine*, 171 F.3d at 345 (resulting loss clause preserved coverage for "ceiling insulation ruined by water that had condensed within the insulation cavity"); *Dawson Farms*, 794 So.2d at 953-54 (policy "covered resulting water condensation damage").

useless or redundant." *Cockerham*, 561 S.W.3d at 867; *see also Bartram*, 864 F. Supp. 2d at 1234-35 ("no language in the policy . . . would be rendered superfluous by taking it to mean that the policy excludes coverage for fixing the faulty workmanship, but the ensuing loss that resulted from water intrusion is covered").

Farmers' contention that the Court of Appeals interpreted the resulting loss clause to impermissibly "create" coverage confuses what part of its policy creates coverage. (Pet. 10) As this Court explained in *Vision One*, under an all-risk policy, perils are covered "unless the specific risk is excluded." 174 Wn.2d at 513, ¶ 23. The purpose of an exclusion's language, including the language of Farmers' faulty workmanship exclusion stating it applies to any "sequence of events" "initiate[d]" by faulty workmanship (*see* Pet. 19-24), is to define the "specific

risks" that are excluded.[9] And the purpose of a resulting loss clause is "to carve out an exception to [a] policy exclusion" by ensuring that "any ensuing loss which is otherwise covered by the policy will *remain* covered" by the initial grant of coverage for "all risks." *Vision One*, 174 Wn.2d at 514-15, ¶¶ 26-27 (emphasis added); *see also Panfil v. Nautilus Ins. Co.*, 799 F.3d 716, 721 (7th Cir. 2015) ("an exception to an exclusion does not provide coverage" but "*preserve[s]* coverage already granted"; emphasis in original).

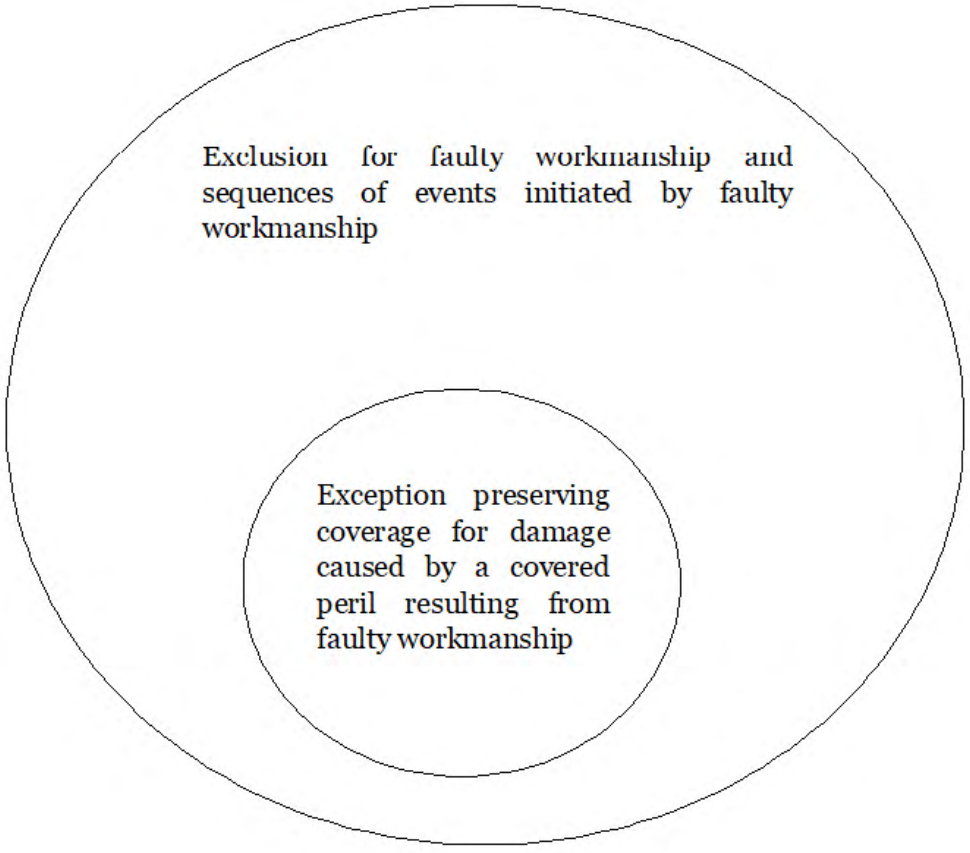
---

[9] As *Vision One* demonstrates, absent this language damage initiated by faulty construction, but also caused by a covered event, would be covered. *See Vision One*, 174 Wn.2d at 509, 521-22, ¶¶ 12, 47 (because insurer could not "rely on the 'sequence of events' causation clause" the trial court correctly ruled loss was covered if "caused by one or more non-excluded event(s) in combination with one or more excluded event(s)"). Similarly, here without the "initiates a sequence" language, the faulty workmanship exclusion would not have applied because it would have only excluded losses caused "directly and solely" by faulty workmanship and Farmers stipulated condensation and humidity acted as "independent cause[s] of distressed and decayed building components." (CP 43, 269)

Farmers' argument that its resulting loss clause cannot apply to any "individual links in [a] causal chain" "initiated" by faulty workmanship is thus absurd and ignores that the very purpose of a resulting loss clause is to preserve coverage for losses that would otherwise be excluded. *Cf. State v. Wanrow*, 88 Wn.2d 221, 230-31, 559 P.2d 548 (1977) ("To conclude that a statutory exception is not to be given effect because to do so renders superfluous a portion of the general language which the exception is designed to restrict, would result in a conclusion that nearly all exceptions . . . are of no force and effect"). It also ignores the ordinary meaning of "result." *Bartram*, 864 F. Supp. 2d at 1235 ("the policies in this case plainly provide that if an excluded cause of loss 'results' in a covered cause of loss, then 'we will pay'"); *Cockerham*, 561 S.W.3d at 867 ("an ordinary purchaser of insurance would conclude that where one loss *results* from another loss caused by faulty

construction, such resulting loss is covered"; emphasis in original).

The Venn diagram below provides a useful way of conceptualizing the interaction between a faulty workmanship exclusion, represented by the outer circle, and a resulting loss clause, represented by the inner circle:



Although the resulting loss clause preserves coverage for some losses that would otherwise be excluded, language defining the initial scope of the faulty workmanship exclusion still has meaning in determining the universe of excluded losses that do *not* result in an otherwise covered peril.

The diagram also demonstrates how the resulting loss clause would be rendered meaningless by Farmers' interpretation. As the diagram underscores, a resulting loss clause can *only* apply to loss or damage within the scope of the underlying exclusion because resulting loss clauses are, by their very nature, exceptions to exclusions. Accordingly, if, as Farmers argues, a resulting loss clause does not apply to damage within the initial scope of the exclusion, then a resulting loss clause will *never* apply.

The Court of Appeals correctly "g[a]ve effect to *each* provision in the policy." *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 272, ¶ 10, 267 P.3d 998 (2011)

(emphasis in original; quoted source omitted); *see also Cockerham*, 561 S.W.3d at 867 (rejecting argument "exclusion for losses 'caused by' faulty construction" precluded application of resulting loss clause because "such a reading would render useless or redundant the resulting loss clause"); *Dawson Farms*, 794 So.2d at 952 ("The [resulting loss clause] is meaningless unless . . . any damage resulting from [poor workmanship and design] is covered."); *Sixty-01 Ass'n of Apartment Owners v. Pub. Serv. Ins. Co.*, No. C22-1373-JCC, 2023 WL 2079215, at *2 (W.D. Wash. Feb. 17, 2023) (unpublished, cited per GR 14.1) (citing Court of Appeals' decision to reject insurer's argument that court should ignore its promise to pay for "resulting loss or damage").

Farmers' argument the Court of Appeals' decision will require insurers to "re-exclude" in a resulting loss clause "every link in the already-excluded causal chain" is also meritless. (Pet. 7; *see also* Pet. 24) If Farmers wished

to preclude without exception coverage for resulting losses initiated by faulty workmanship, then it could have, like the insurer in *Hill & Stout*, simply not included a resulting loss clause in its exclusion. Or it could have, like the insurer in *Windcrest*, limited the perils covered by its resulting loss clause, thereby excluding all others. Indeed, Farmers' policy demonstrates that it knows how to vary the scope of a resulting loss clause. (*See, e.g.*, CP 34: earth movement exclusion stating only covered resulting losses are explosion and fire; CP 35: nuclear hazard exclusion stating only covered resulting loss is fire; CP 35: war exclusion not subject to any resulting loss exception)

Farmers also erroneously argues that the Court of Appeals' interpretation might result in coverage for losses caused by "gravity" or other connived perils. (Pet. 18) Farmers does not—and has never—denied that its policy contemplates coverage for condensation and humidity, as confirmed by the fact that it excluded these same perils in

later policy years (CP 148, 152), that it excluded water under certain circumstances not applicable here (CP 35), and that in later policy years it simply excluded all water damage. (CP 142-43, 146, 151) *See also Vision One*, 174 Wn.2d at 517, ¶ 36 (noting the insurer "does not argue that collapse was a risk beyond the reasonable contemplation of the policy").

The "limitation" (Pet. 24) Farmers seeks is the language it could have—but did not—include in its policy. The Court of Appeals correctly recognized that "nothing precludes an insurance company from drafting policy language" that would have excluded the coverage that its resulting loss clause preserves. (Op. 7 n.5) *See also Lynott*, 123 Wn.2d at 688 ("'In evaluating the insurer's claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'") (quoting 13 John A. Appleman & Jean Appleman,

Insurance Law & Practice § 7403 (1976)). The Court of Appeals—consistent with Washington precedent—credited Farmers' choice to include a broad resulting loss clause in its policy. This Court should deny review.

4. Farmers' arguments premised on out-of-state authority that conflicts with *Vision One* present no grounds for review.

The Court of Appeals also correctly rejected Farmers' argument based on *TMW Enterprises, Inc. v. Fed. Ins. Co.*, 619 F.3d 574 (6th Cir. 2010) (Pet. 27-30) that a resulting loss clause applies only to "independent, unforeseen covered perils." (Op. 9)[10] In *TMW*, a divided decision, the majority held that damage caused by water that seeped through improperly constructed walls was not covered under the policy's resulting loss clause "because defective

[10] As with its "other" property interpretation, even if correct, this interpretation would not be a basis for reversal since Farmers stipulated that condensation and humidity were independent causes of the damage. (CP 269)

wall construction naturally and foreseeably leads to water infiltration." 619 F.3d at 579. According to the majority, a resulting loss clause only preserves coverage for "independent, non-foreseeable losses caused by faulty construction." 619 F.3d at 578.

This Court expressly rejected the importation of independence and non-foreseeability requirements into a resulting loss clause in *Vision One* by reversing Division One's holding that the resulting loss clause did not apply because "[t]here was no *independent* covered peril." *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 158 Wn. App. 91, 107, ¶ 32, 241 P.3d 429 (2010) (emphasis added). Indeed, the *TMW* interpretation would invert the result in *Vision One*—collapse is the foreseeable, if not inevitable, result of

supporting a massive concrete floor with defectively designed and installed shoring.[11]

The Court of Appeals correctly rejected Farmers' request to abandon Washington precedent in favor of Sixth Circuit precedent that directly conflicts with *Vision One*. Its decision presents no grounds for review under RAP 13.4(b).

V. CONCLUSION

This Court should deny review.

---

[11] Cases that have followed *TMW* recognize it conflicts with *Vision One*. *See Taja Invs. LLC v. Peerless Ins. Co.*, 717 F. App'x 190, 192 n.2 (4th Cir. 2017) (Pet. 17 n.2) (explaining that requiring "an independent or fortuitous intervening cause" contradicts the statement in *Vision One* that "the dispositive question in analyzing ensuing loss clauses is whether the loss that ensues from the excluded event is covered or excluded"); *see also Friedberg v. Chubb & Son, Inc.*, 691 F.3d 948, 953-54 (8th Cir. 2012) (Pet. 17 n.2) (cited with approval in *Taja*); *Russell v. NGM Ins. Co.*, 170 N.H. 424, 176 A.3d 196, 204 (2017) (Pet. 17 n.2) (citing *Taja* with approval).

I certify that this answer is in 14-point Georgia font and contains 4,983 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 26th day of May, 2023.

HOUSER LAW, PLLC

By: */s/ Daniel S. Houser*
Daniel S. Houser
WSBA No. 32327

SMITH GOODFRIEND, P.S.

By: */s/ Ian C. Cairns*
Ian C. Cairns
WSBA No. 43210
Howard M. Goodfriend
WSBA No. 14355

Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 26, 2023, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	____ Facsimile ____ Messenger ____ U.S. Mail __x__ E-File
Daniel S. Houser Houser Law, PLLC 1325 4th Avenue Suite 1650 Seattle, WA 98101 dan@dhouserlaw.com shelly@dhouserlaw.com	____ Facsimile ____ Messenger ____ U.S. Mail __x__ E-Mail

Timothy W. Snider Margarita V. Latsinova Jenna M. Poligo Stoel Rives LLP 760 SW 9th Avenue Suite 3000 Portland, OR 97205 timothy.snider@stoel.com rita.latsinova@stoel.com jenna.poligo@stoel.com	____ Facsimile ____ Messenger ____ U.S. Mail _x_ E-Mail

DATED at Brooklyn, New York this 26th day of May, 2023.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

FILED
12/19/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE GARDENS CONDOMINIUM, a Washington non-profit corporation, Appellant, v. FARMERS INSURANCE EXCHANGE, a reciprocal company, Respondent.	No. 83678-1-I PUBLISHED OPINION

BOWMAN, J. — Faulty design and construction of the Gardens Condominium roof assembly led to inadequate ventilation, which trapped condensation and excess humidity, damaging the roof. Gardens held an "all-risk" insurance policy issued by Farmers Insurance Exchange. The policy excludes coverage for faulty construction, but "if loss or damage by a Covered Cause of Loss results, [Farmers] will pay for that resulting loss or damage." Farmers denied coverage for the roof repairs and Gardens sued. The trial court granted summary judgment for Farmers. Because the trial court misinterpreted the resulting loss clause in Farmers' policy, we reverse and remand for further proceedings consistent with this opinion.

FACTS

Gardens is a 26-unit condominium building in Shoreline. In 2002, Gardens discovered water damage to its roof fireboard and sheathing. The

damage resulted from a faulty design of the roof assembly, which did not have adequate ventilation. An engineer redesigned the roof to improve ventilation by adding "2x2 sleepers" above the roof's structural joists. Gardens completed its roof repairs in 2004.

In 2019, Gardens discovered the 2004 repairs were defective because the sleepers did not add enough space in the roof to vent moisture. So, the roof joist cavities continued to trap water vapor emitted from inside the units and allowed condensation to form during cool weather and overnight temperature drops. That repeated exposure to moisture damaged the sheathing, fireboard, joists, and sleepers.

Gardens sought coverage from Farmers for repairs. Gardens held an all-risk insurance policy from Farmers, which covered all "direct physical loss or damage" to the building not specifically excluded by the policy.[1] But the policy excluded coverage for damage caused by faulty design or repair. The policy provides:

> We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event directly or solely results in loss or damage or initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.
>
> . . . .
>
> **b.** Faulty, inadequate or defective:
>
> **(1)** Planning, zoning, development, surveying, siting;

[1] Gardens has held insurance policies from Farmers since 2002. This appeal involves language from only the 2003 to 2004 policy.

> **(2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> **(3)** Materials used in repair, construction, renovation or remodeling; or
>
> **(4)** Maintenance;
>
> of part or all of any property on or off the described premises. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

The last sentence of the provision is known as a "resulting loss" clause.[2]

Farmers investigated Gardens' claim and determined that the claimed damage "was independently caused by lack of ventilation in the roof assembly caused by faulty, inadequate and defective construction." Farmers then denied coverage because the faulty construction "initiated a sequence of events resulting in the loss or damage." Gardens objected to Farmers' denial of coverage, contending that the resulting loss clause narrowed the faulty workmanship exclusion, preserving coverage for damage caused by a resulting covered peril, and that the policy covers the perils of humidity and condensation. Farmers still denied coverage.

In January 2021, Gardens sued Farmers for breach of contract and declaratory relief. Gardens and Farmers cross-moved for summary judgment. Both motions relied on stipulated facts, including that the damage to the roofing assembly "was caused by condensation and/or excess humidity resulting from

[2] It is also known as an "ensuing loss" clause. The terms "resulting loss" and "ensuing loss" are interchangeable. See Vision One, LLC v. Phila. Indem. Ins. Co., 174 Wn.2d 501, 514, 276 P.3d 300 (2012). We use "resulting loss" because that is the language of Farmers' policy.

inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs, and/or redesign."[3]

The court granted summary judgment for Farmers. It concluded that the policy excludes coverage because faulty construction began a sequence of events that resulted in the damage, and the resulting loss clause exception did not "somehow resurrect[ ]" coverage.

Gardens appeals.

ANALYSIS

Gardens argues the trial court misinterpreted the resulting loss clause and erred by granting summary judgment for Farmers. We agree.

We review rulings on summary judgment de novo, performing the same inquiry as the trial court. Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). We will grant summary judgment only if, from all the evidence, reasonable persons could reach but one conclusion. Ellis, 142 Wn.2d at 458.

We interpret language from an insurance policy de novo. Vision One, LLC v. Phila. Indem. Ins. Co., 174 Wn.2d 501, 512, 276 P.3d 300 (2012). We "construe insurance policies as the average person purchasing insurance would." Id. That is, we give the language a fair, reasonable, and sensible construction. Id. We construe ambiguities in a policy against the drafter-insurer. Id. And

[3] Gardens concedes that the resulting loss clause did not preserve coverage for correcting the defective sleepers.

because coverage exclusions " 'are contrary to the fundamental protective purpose of insurance,' " we strictly construe exclusions against the insurer, not extending them " 'beyond their clear and unequivocal meaning.' " Id. (quoting State Farm Fire & Cas. Co. v. Ham & Rye, LLC, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007)).

Citing Vision One, Gardens argues that the "trial court failed to properly consider the nature of Farmers' obligation" under the policy. According to Gardens, under Washington law, "a resulting loss clause preserves coverage for damage caused by a covered event . . . that results from an excluded peril."

In Vision One, our Supreme Court explained how resulting loss clauses operate in all-risk insurance policies. 174 Wn.2d at 513-17. There, an all-risk building policy excluded from coverage losses caused by faulty workmanship, but it covered losses from resulting covered perils such as collapse. Id. at 506-07. During construction, a floor slab collapsed when shoring gave way because of defective workmanship, leading to the loss of the slab and the need to clean up debris and hardened cement from the floor below. Id. at 506. The building owner sought coverage for the damage caused by the collapse, which the insurer denied. Id. at 507. The trial court ruled for the building owner, citing the policy's resulting loss clause. Id. at 510-11. Division Two reversed. Id. at 511. But our Supreme Court reinstated the trial court judgment. Id. at 523.

The Supreme Court explained that all-risk policies cover all risks unless explicitly excluded. Vision One, 174 Wn.2d at 513. But if an exclusion has a resulting loss clause, it "carve[s] out an exception to the policy exclusion." Id. at

514. That is, resulting loss clauses "limit the scope of what is otherwise excluded under the policy." Id. at 515. They ensure " 'that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered,' " but " '[t]he uncovered event itself . . . is never covered.' " Id. at 515 (quoting McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 734, 837 P.2d 1000 (1992)).

> [T]he dispositive question in analyzing [resulting] loss clauses is whether the loss that ensues from the excluded event is covered or excluded. If the ensuing loss is also an excluded peril or an excluded loss under the policy, there is no coverage. But if the policy covers the peril or loss that results from the excluded event, then the [resulting] loss clause provides coverage.

Id. at 516.[4] Applying those rules, the Supreme Court held that the policy's faulty workmanship provision excluded coverage for the faultily assembled shoring. Id. at 518. But the policy covered losses from the collapse because it was a covered peril resulting from the faulty workmanship. Id.

Here, Gardens' policy excludes coverage of faulty construction. That exclusion limits Gardens' coverage. But the resulting loss clause narrows that exclusion. In the resulting loss clause, Farmers agreed to pay for any loss or damage caused by a covered peril resulting from faulty construction. The parties stipulated that "[t]he damage was caused by condensation and/or excess humidity resulting from inadequate ventilation of the roof assembly due to the faulty, inadequate, or defective construction, repairs and/or redesign." So, if the policy covers the perils of condensation and excess humidity, it covers the loss or damage from those perils.

[4] Citations omitted.

Farmers argues that we should apply the "efficient proximate cause rule" to determine whether the damage at issue flows from an excluded event preventing coverage. See McDonald, 119 Wn.2d at 732. Citing Vision One, 174 Wn.2d at 521, Farmers says, "This concept is known as 'inverse efficient proximate cause.' " But the efficient proximate cause rule mandates coverage when two or more perils combine in sequence to cause a loss, and a covered peril is the predominant or efficient cause of the loss. Id. at 519. We do not apply the rule in reverse. Id. In other words, when an excluded peril sets in motion a causal chain that includes covered perils, the efficient proximate cause rule does not mandate exclusion of the loss. Id.

And Farmers' reference to the term "inverse efficient proximate cause" in Vision One is taken out of context. In Vision One, the insurer denied coverage under two policy exclusions—one for faulty workmanship and one for defective design. 174 Wn.2d at 508. The faulty workmanship exclusion in that policy contained a resulting loss clause, but the defective design exclusion did not. Id. The insurance company argued the resulting loss clause applied only if application of the efficient proximate cause rule showed that "faulty workmanship was the efficient proximate cause of the loss." Id. at 518. The Supreme Court made clear that we do not use the efficient proximate cause rule when "an excluded peril sets in motion a causal chain that includes covered perils."[5] Id.

[5] Farmers argues that even if the efficient proximate clause rule does not apply, nothing precludes an insurance company from drafting policy language that, as here, denies coverage when an excluded peril initiates an unbroken causal chain. See Vision One, 174 Wn.2d at 519. This is true. But here, Farmers also drafted a resulting loss clause, which limited the scope of that exclusion.

But it determined that even if it were to apply that "sort of inverse efficient proximate cause analysis," it would show that faulty design and faulty workmanship were concurrent causes of the covered peril of collapse, so the resulting loss clause applied. Id. at 521-22.

Citing TMW Enterprises, Inc. v. Federal Insurance Co., 619 F.3d 574 (6th Cir. 2010), Farmers next urges us to interpret its resulting loss clause to apply to losses from only unforeseen covered events, occurring independent of the excluded peril. According to Farmers, if we do not restrict the resulting loss clause to nonexcluded, unforeseen intervening events, it "[w]ould [s]wallow the [f]aulty [w]orkmanship [e]xclusion [w]hole."

In TMW, the Sixth Circuit considered the scope of a similar resulting loss exception to a faulty workmanship exclusion. 619 F.3d at 579. It concluded that the "faulty workmanship exclusion applies to loss or damage 'caused by or resulting from' the construction defect" and damage resulting " 'natural[ly] and continuous[ly]' from the faulty workmanship, 'unbroken by any new, independent cause.' " Id.[6] (quoting Mich. Sugar Co. v. Emp'rs Mut. Liab. Ins. Co. of Wis., 107 Mich. App. 9, 14, 308 N.W.2d 684 (1981)). And the court limited the resulting loss clause to "later-in-time loss" that "flows from a non-foreseeable and non-excluded cause." Id.

But our Supreme Court has not restricted resulting loss clauses to independent, unforeseen covered perils. Vision One, 174 Wn.2d at 517; Sprague v. Safeco Ins. Co. of Am., 174 Wn.2d 524, 529, 276 P.3d 1270 (2012).

[6] Alterations in original.

And Farmers' concern about the resulting loss clause swallowing the exclusion does not bear out. The resulting loss clause only limits the scope of the exclusion. See Vision One, 174 Wn.2d at 517. In contrast, if we were to interpret a resulting loss clause to apply to only independent, unforeseen covered perils, the clause would be superfluous. The policy already covers unforeseen independent perils that it does not otherwise exclude. See GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 129, 135, 317 P.3d 1074 (2014) (we favor contract interpretation that does not render language meaningless or ineffective).

Finally, Farmers argues that even if Gardens' interpretation of the resulting loss clause is correct, this case is like Sprague, where the only damage for which Gardens seeks coverage is not an "**ensuing** loss" but "**the loss**" excluded by the policy. But Farmers misconstrues Sprague.

In that case, an all-risk homeowner's insurance policy excluded coverage for rot and defective construction but provided that " 'any ensuing loss not excluded is covered.' " Sprague, 174 Wn.2d at 527. The homeowners discovered rot damage to the fin walls of their deck due to construction defects and sought replacement coverage. Id. Insurance denied the claim. Id. On appeal, our Supreme Court reiterated that the purpose of a resulting loss provision "is to limit the scope of an exclusion from coverage," and that "losses caused by the excluded peril will be covered unless they are subject to their own specific exclusions." Id. at 529. The court determined that there was no coverage for the fin walls because the policy excluded both rot and defective workmanship. Id. at 530. That is, because the only loss resulted from rot caused

by construction defects (both excluded perils), there was no coverage under the resulting loss clause. Id. at 530-31. Here, the parties stipulated that the perils of condensation and excess humidity caused the roof damage, but they dispute whether Farmers' policy covers those perils.[7]

Because the trial court misinterpreted the resulting loss provision in Farmers' all-risk policy, we reverse and remand for further proceedings consistent with this opinion.[8]

Brennan, J.

WE CONCUR:

Birk, J.

Andrus, C.J.

[7] The trial court did not reach the issue of whether water vapor and condensation are covered perils under Farmers' policy.

[8] Because we conclude the plain language of the policy mandates coverage if condensation is a covered peril, we do not address Gardens' alternative argument that the policy is ambiguous.

WASHINGTON CHANGES - EXCLUDED CAUSES OF LOSS

This endorsement modifies insurance provided under the following:

APARTMENT OWNERS PROPERTY COVERAGE FORM
CONDOMINIUM PROPERTY COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the applicable Coverage Form apply unless modified by the endorsement.

A. The first paragraph of items **1.** and **3.** in **B. Exclusions** in the applicable Coverage Form are replaced by the following paragraph:

We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event directly or solely results in loss or damage or initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.

B. Exclusion 3. a. Weather Conditions is deleted and replaced by the following:

a. Weather Conditions - a weather condition which results in:

(1) Landslide, mud slide or mud flow;

(2) Mine subsidence; earth sinking, rising or shifting (other than sinkhole collapse);

(3) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(4) Water backing up from a sewer or drain;

(5) Water under the ground surface pressing on, or flowing or seeping through;

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not; or

(c) Doors, windows or other openings.

b. A weather condition which results in the failure of power or other utility service supplied to the described premises, if the failure originates away from the described premises. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

C 1. Exclusions B.3.b. and **B.3.c.** in the applicable Coverage Form are deleted and replaced by the exclusions in **C. 2.** below:

C. 2. Exclusions:

a. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

b. Faulty, inadequate or defective:

(1) Planning, zoning, development, surveying, siting;

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property on or off the described premises. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or damage.

SMITH GOODFRIEND, PS

May 26, 2023 - 12:36 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,892-4
Appellate Court Case Title:	The Gardens Condominium v. Farmers Insurance Exchange

The following documents have been uploaded:

- 1018924_Answer_Reply_20230526123254SC775470_9687.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was 2023 05 26 Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dan@dhouserlaw.com
- howard@washingtonappeals.com
- jenna.poligo@stoel.com
- karrie.fielder@stoel.com
- leslie.lomax@stoel.com
- rita.latsinova@stoel.com
- shelly@dhouserlaw.com
- timothy.snider@stoel.com

Comments:

Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com
Filing on Behalf of: Ian Christopher Cairns - Email: ian@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20230526123254SC775470