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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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RECEIVED BY E-MAIL

Bayview Heights Owners Association, Appellant,

v.

Travelers Indemnity Company, Respondent/Cross-Appellant,

and

Philadelphia Indemnity Insurance Company, Defendant

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APPELLANT'S REPLY BRIEF / OPPOSITION TO TRAVELERS'  
CROSS-APPEAL

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## I. INTRODUCTION

Travelers admits that, of the two possible “material impairment” standards of collapse, “substantial impairment of structural integrity” is correct, *Resp. Br.* at 11, and “imminent collapse” is not. *Resp. Br.* at 26-30. Therefore, Bayview should prevail on its appeal, where it asks this Court to interpret “collapse” as SSI.

In Travelers’ cross-appeal, Travelers asks the Court to further define SSI by imposing an additional legal requirement that a building change shape before SSI or “material impairment” occurs. Travelers did not assert this argument below, and makes this new argument because there can be no dispute that SSI has a long history of acceptance under Washington law. However, Travelers’ cross-appeal effectively asks this Court to substitute its judgment regarding life/safety hazards for those of professional structural engineers. The Court should decline to do so, and Travelers’ cross-appeal should be dismissed.

## II. REPLY TO BAYVIEW’S APPEAL

The sole relief sought in Bayview’s appeal is a ruling interpreting “collapse” in an insurance policy as a “substantial impairment of structural integrity,” or SSI.<sup>1</sup> Although Travelers debates how SSI, alternatively

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<sup>1</sup> Travelers’ brief, at 12, interjects an extraneous legal issue that may unnecessarily confuse matters: Travelers cites the rule in *Sprague v. Safeco*, as follows: “decay alone...is not covered.” *Resp. Br.* at 12; *Sprague v. Safeco Ins. Co. of Am.*, 174 Wn.2d

phrased as a “material impairment standard,” should be interpreted (as discussed in response to Travelers’ cross-appeal below), SSI is the correct standard for “collapse.”

**A. Travelers Admits SSI Is The Correct Standard For “Collapse.”**

In the two summary judgment motions that are the subject of this appeal, Travelers argued that “collapse” should not mean SSI, and that it should instead mean either: (1) “actual collapse,” which Travelers defined as “a structural condition posing a life/safety hazard;” or (2) “imminent collapse.” CP 997-98, 1014. Now, Travelers admits that defining collapse as SSI provides “a result [that] is correct.” *Resp. Br.* at 11. Therefore, “collapse” in the Travelers policies should mean SSI.<sup>2</sup>

**B. Travelers Admits “Imminent Collapse” And “Rubble On The Ground” Are Not The Correct Standards For “Collapse.”**

Travelers further agrees that “imminent collapse” is not the correct standard for “collapse,” explaining a myriad of problems this term presents. *Resp. Br.* at 26-30. In addition to the issues Travelers raises, additional problems with an “imminent collapse” standard are: (1) the

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524, 276 P.3d 1270 (2012). The rule in *Sprague* is not an issue in this case, because in *Sprague*, the policies “did not...explicitly address ‘collapse’ as a covered or excluded loss.” *Id.* at 527. Therefore, there was no “resulting loss” from decay, regardless of how advanced the decay was. *See id.* Here, all the Travelers policies expressly provide coverage for “collapse of a building or any part of a building... if the collapse is caused by...Hidden decay.” CP 988, 991, 994. Travelers admits Bayview’s resulting collapse loss is covered (*see Resp. Br.* at 12), and the issue in this case is the point at which “collapse” occurs.

<sup>2</sup> Travelers’ ever-changing interpretation of this term in its own policies underscores the ambiguity of “collapse,” and as discussed in the opening brief, this ambiguity must be resolved in favor of the insured, Bayview. *See Appellant’s Br.* at 9, 18-20.

term “imminent collapse” as a standard for “collapse” is circular, so any meaning it provides is illusory; (2) the term “imminent” in the context of a building designed to last decades (or more) is vague, because it is a relative term that could mean tomorrow, or it could mean five, or even 10 years from now; and (3) the term “imminent” is made further vague where buildings are designed to withstand varying degrees of seismic and other dynamic forces, and those forces could affect the building tomorrow, or they may not ever affect the building.

Nor is “rubble on the ground” the appropriate standard, as such a standard would exclude legitimate collapse. *See Resp. Br.* at 13. Bayview agrees. Again, this further confirms that SSI is the appropriate standard for “collapse.”

**C. This Court Should Overturn The Trial Court, And Hold That “Collapse” In The Travelers Policies Means SSI.**

Although the parties disagree on details regarding application of SSI as a factual issue, both Bayview and Travelers agree that SSI is the correct standard for “collapse” in the policies at issue. The parties also agree that “rubble on the ground” and “imminent collapse” are not appropriate standards for “collapse.” Therefore, the trial court rulings that require: (1) SSI plus an imminent threat of collapse (*see* CP 1358); and (2) SSI plus “[exhaustion of] the reserve strength due to the safety factors

built into the building code allowable capacities” (CP 1478) are error, and should be reversed and remanded for further proceedings with “collapse” meaning SSI.

### **III. OPPOSITION TO TRAVELERS’ CROSS-APPEAL**

Travelers’ cross-appeal asks this Court to hold that “collapse,” defined as SSI or alternatively a “material impairment,” does not occur until there is some change in the building’s shape. This argument was not raised below, and for that reason alone Travelers’ cross-appeal should be dismissed. Even if Travelers’ argument regarding interpretation of SSI were proper, it should not prevail because it would have the effect of replacing engineers’ judgment with that of the courts, inappropriately turning an issue of fact into one of law; and Travelers’ interpretation of SSI also directly contradicts the express language of the policies.

#### **A. Travelers’ Assertion That SSI Requires A Change In Shape Was Not Raised Below, And Should Be Disregarded.**

In reviewing orders on summary judgment, an appellate court “will consider only evidence and issues called to the attention of the trial court.” RAP 9.12; *accord* 2.5(a). In arguing this issue to the trial court, Travelers asserted that “actual collapse” was the appropriate standard, and “actual collapse” required “a structural condition constituting an actual life/safety hazard.” CP 1014:19-21. Alternatively, Travelers argued that “imminent collapse” should apply. CP 1014:22-23, 1460:13-14. Nowhere in the trial

court briefing did Travelers assert that a building must change shape in order to be in a state of collapse or SSI.

It is true that Travelers alleged, in the fact section of one of its briefs, “no part of [the Condominium] has deflected, sagged, fallen, or otherwise exhibited any sign of structural distress.” CP 999:25-26. However, this passing reference in the fact section of the brief – where the issue was never raised in connection with Travelers’ legal argument – is not sufficient to support an appeal. *See In re Pers. Restraint of Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (on appeal from lower court, a party “may not create a different ground [for relief] by alleging different facts, asserting different legal theories, or couching his argument in different language”). Nor was it sufficient to put the trial court or Bayview on notice that the allegation of a change in shape was in any way a “material” fact warranting further development of the record.<sup>3</sup> *See* RAP 2.5(a) (errors raised for first time on review permitted where record is sufficiently developed to fairly consider the ground, and only to affirm trial court); *see also Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 861, 93 P.3d 108 (2004) (“A material fact is one upon which the outcome of the litigation depends, in whole or in part.”). This was a passing factual

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<sup>3</sup> The stipulation giving rise to this appeal does not state that there is no change in shape at the building, so even if a change in shape were required, fact issues remain.

allegation without legal significance, and it does not support an independent appeal of an issue of law.

This Court should refuse to consider Travelers' new argument that "collapse" requires a change in building shape, and dismiss Travelers' cross-appeal.

**B. Travelers' Assertion That SSI Requires A Change In Shape Asks The Court To Substitute Its Judgment For That Of Professional Engineers.**

Travelers argued below that "collapse" ought to require "a structural failure or a structural condition posing a life/safety hazard." CP 997. Now on appeal, Travelers asserts for the first time that a change in shape evidences such a hazard. It is true that a change in a building's shape may evidence a life/safety hazard, and a "collapse;" but "evidence" a hazard is all a change in shape may do, and it does not conclusively establish a hazard or collapse in fact or as a matter of law.

Had this issue been raised below, Bayview could have and would have submitted evidence illustrating situations where a life/safety hazard and SSI existed without a change in building shape, and other situations where SSI did not exist, despite a change in building shape. Moreover, the "visible" change in shape Travelers proposes (*see Resp. Br.* at 20) evidences a potential hazard only with respect to static, gravity loads; hazards relating to dynamic lateral loading, such as loads created by winds

or earthquakes, would not necessarily result in a change in building shape, particularly when the dynamic load is not applied (i.e., on a calm day). This is significant, because at the Bayview Condominium, “the majority of exterior walls are understood to be shearwalls; that is, vertical elements designed to support loads due to wind and seismic forces.” CP 701.

1. SSI Is A Legal Standard, And Application Of SSI Is An Issue Of Fact.

When evaluating undefined terms in insurance policies, courts provide those terms a legal standard, and juries apply that legal standard to the facts to determine whether coverage exists. *See, e.g., State Farm Fire & Cas. Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 17, 174 P.3d 1175 (2007) (where “accident” not defined in an insurance policy, court set a legal standard – whether damage reasonably foreseeable – and jury was to determine whether “accident” occurred under that standard). Here, SSI is the legal standard by which juries evaluate whether “collapse” coverage exists.

The SSI standard can be analogized to a professional negligence standard in tort law. Professionals must perform in accordance with a certain standard of care. *See, e.g., Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, 257 P.3d 532 (2011) (discussing standard of care for design professionals). Courts have determined what that legal standard of

care is: for example, design professionals have a duty to exercise the degree of skill, care, and learning possessed by members of their profession in the community. *Id.* Based on that legal standard, expert witnesses provide evidence of the specific steps a design or other professional should have and would have taken under the circumstances, and the jury weighs the testimony to determine whether that standard was met. *See, e.g., Brown v. Dahl*, 41 Wn. App. 565, 575, 705 P.2d 781 (1985) (jury question as to whether physician's failure to disclose certain facts breached professional standard).

Similarly, Travelers provides coverage for "collapse." Washington courts have a long history of accepting SSI as the legal standard for "collapse." *See Appellant's Br.* at 10-13. Based on that legal standard, it is up to professional expert engineers to determine whether a particular building or part of a building is in a state of SSI, and the jury weighs the testimony to determine whether the policies provide coverage. *See Hill v. Great N. Life Ins. Co.*, 186 Wash. 167, 178, 57 P.2d 405 (1936) (expert testimony necessary where the conclusions to be drawn from facts depend on professional and scientific knowledge or skill). In other words, the Court establishes the standard for "collapse," but the jury applies that standard to the facts.

2. Expert Testimony Provides Evidence for the Jury To Determine Whether A Particular Loss Amounts to SSI.

In this case, Bayview's expert professional structural engineer, Lee Dunham, measures SSI by "the loss of capacity of a structural member or element to support code-prescribed loads due to gravity, occupancy, wind, or seismic forces." CP 702. Travelers' witness failed to provide any measure of SSI at all, instead explaining why he disagreed with Mr. Dunham's measure. *See gen.* CP 1097-1103. Based on this information, it is up to the jury to weigh the experts' testimony and determine, based on all the circumstances, whether a building or any part of the building reached a state of SSI, thus triggering coverage for "collapse." *See State v. Golladay*, 78 Wn.2d 121, 144-45, 470 P.2d 191 (1970) (jury appropriately weighed identification expert's testimony that claimed hair samples were "microscopically identical," based on all the circumstances, where "microscopically identical" was a term of art).

Giving the jury the opportunity to receive and weigh the evidence is extremely important in cases of SSI, because as Travelers recognizes: "Context is key." *Resp. Br.* at 19. The design of every building is unique, and Travelers' own witness recognizes this. For example, Travelers' witness explains why he believes Mr. Dunham's measure of SSI does not apply to a "properly designed building" (CP 1098 at ¶ 4); but what if a

building is not properly designed? Similarly, Travelers' witness admits: "Capacities of wood members are highly variable," going on to discuss average versus actual wood strengths. CP 1098-1101 at ¶ 5-10. Travelers' witness also recognizes the importance of redundancy and load transfer in structural engineering, and his example of redundancy – where extra studs support building sheathing and incidentally provide additional structural capacity – illustrates that structural redundancy manifests differently in different buildings, depending on the placement of all the various framing members. See CP 1101 at ¶ 11. Despite these many variables, Travelers asks this Court to bypass structural engineering analysis, and apply a one-size-fits-all "change in shape" standard to all buildings. Unfortunately for Travelers' argument, this is not a one-size-fits-all issue.

3. The *Frye* Standard Protects Against "Convenient," Unsupportable Interpretations of SSI.

Travelers accuses Bayview's expert of defining SSI "to his personal liking." *Resp. Br.* at 2. Implicit in this statement is a concern that engineers could define SSI in any way favorable to their clients, so courts should provide the interpretation instead. However, the *Frye* standard, in which the court serves as a gatekeeper to "assess[] the reliability and relevance of all scientific evidence," *Reese v. Stroh*, 128

Wn.2d 300, 315, 907 P.2d 282 (1995), prevents an engineer from interpreting SSI merely “to his personal liking.” Under *Frye v. United States*, 293 F. 1013 (1923), an interpretation of SSI that is not: (1) generally accepted in the relevant scientific community; and (2) applied in a manner generally accepted to be capable of producing reliable results, will never get to the jury. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 862, 260 P.3d 857 (2011) (explaining the elements of the *Frye* standard). In this case, Mr. Dunham’s interpretation of SSI was subjected to a *Frye* test, and passed. CP 975-76. Travelers’ implication that professional engineers cannot be trusted to interpret SSI is moot where the *Frye* standard ensures only legitimate science reaches the jury.

4. Leaving SSI To The Engineers Does Not Convert An Insurance Policy Into A Maintenance Policy.

Travelers next complains that, although SSI as “a legal term of art ...[is] justifiable,” it may provide broader coverage than what the parties contracted for. *Resp. Br.* at 22. In Washington, with its long history of courts accepting “collapse” as SSI – even absent a definitive ruling from the highest Court – Travelers cannot legitimately claim that it never contemplated coverage for SSI under the collapse provisions of the policies issued to Bayview, or that coverage for SSI is broader than any coverage it could have ever anticipated. Interpreting “collapse” as SSI

also does not convert an insurance policy into a maintenance policy because not just any impairment is enough to trigger coverage; only impairment that is both: (1) structural; and (2) substantial, qualifies as SSI. The insurers' cries of injustice that SSI somehow broadens their coverage simply do not support such a conclusion in the context of Washington law.

In addition to the "substantial" and "structural" elements of a collapse loss, an insurance policy's fortuity requirement (which in Washington is called the known risk principle, *see Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 878, 998 P.2d 856 (2000) ("*ALCOA*"),) also prevents an insurance policy from becoming a maintenance policy. "Implicit in the concept of insurance is that the loss occur as a result of a fortuitous event[,] not one planned, intended, or anticipated." *ALCOA*, 140 Wn.2d at 879. Here, the SSI was the result of fortuitous water intrusion. *See* CP 1447 at ¶ 3, 702 at ¶ 7. It is not a condition that Bayview "allowed to happen," *see Resp. Br.* at 29, nor was it "planned, intended, or anticipated," *ALCOA*, 140 Wn.2d at 879, because Bayview did not even know of the condition until it opened up the building with the assistance of a professional structural engineer. *See* CP 705 at ¶ 3-4, 1447 at ¶ 3. Similarly, interpreting "collapse" as SSI does not allow an owner to sit on building decay that is not yet in a state of collapse and then make an insurance claim once SSI is achieved, because

under these conditions, the collapse (no matter how interpreted) would not be fortuitous. Instead, the fortuity requirement – like the “substantial” and “structural” requirements – provides a separate, independent standard in insurance policies that prevents an insurance policy from becoming a maintenance policy regardless of whether “collapse” is interpreted as a change in shape or as SSI.

5. Structural Engineering Analysis – And Not A Change In Shape – Is The Defining Factor In The Cases Travelers Relies On.

Travelers’ reading of “collapse” case law as requiring a change in shape confuses fact-specific situations with a legal standard. It is true that many of the cases where “collapse” was found involve buildings that experienced a change in shape. However, the change in shape was not the determining factor; it was the structural impairment that determined “collapse.”

For example, Travelers cites *Sherman v. Safeco Insurance Company of America, Inc.*, 716 P.2d 475, 476 (Colo. App. 1986), as a “correct application” of the collapse standard. There, the court found collapse as a matter of law when a roof fell more than 2.5 feet, the upper tiers of bricks fell out, and the walls were bowed. *Id.* The court did not find collapse because of the change in shape; instead, the particulars of how the change in shape manifested provided clear evidence that the

building was substantially structurally impaired, and no additional expert analysis was necessary to make that determination.

Similarly, Travelers claims *Beach v. Middlesex Mutual Assurance Co.*, 532 A.2d 1297 (Conn. 1987), supports a “change in shape” definition of “collapse” because there the foundation wall had tipped over, and was no longer supporting the house. *Id.* at 1298-99. Again, the change in shape did not define the “collapse.” Instead, the court found collapse by virtue of the fact that “the foundation failed structurally, and...had become materially impaired, constituting a collapse.” *Id.* at 1299. The court’s reasoning leaves no doubt that the result would have been the same if water seepage over a number of years had eroded the foundation wall away to an extent that it was no longer supporting the house, instead of having tipped over. *See id.*; compare *Cent. Mut. Ins. Co. v. Royal*, 269 Ala. 372, 113 So.2d 680, 683 (1959) (cited in *Resp. Br.* at 14) (no evidence of structural impairment of any degree); *Higgins v. Conn. Fire Ins. Co.*, 430 P.2d 479, 479-80 (Colo. 1967) (cited in *Resp. Br.* at 15) (same). That is exactly what happened at the Bayview Condominium: the structural members decayed over a number of years due to water intrusion, such that they are no longer supporting the building, and have thus “collapsed.” *See, e.g.*, CP 967-68.

Finally, Travelers admits that cases involving small changes in shape do not implicate “collapse.” *Resp. Br.* at 17-18. Why? It all goes back to the structural analysis: “small changes in shape can be too structurally insignificant to implicate the concept of ‘collapse.’” *Resp. Br.* at 17-18; *see cases cited therein at 18*. Travelers’ own briefing demonstrates that “collapse” is measured not by a change in shape, but instead an evaluation of the structural significance to the building. The issue is what degree of structural damage is “significant” enough to trigger collapse coverage? Certainly not minor damage, which may (or may not) be evidenced by various deflections. Structural damage is “significant” enough to trigger collapse coverage only when it reaches a state of SSI, as determined by a professional structural engineer.

6. This Court Should Not Substitute Its Judgment For The Education, Experience, and Judgment of Professional Engineers.

Travelers’ proposal – that SSI requires a change in shape – is an attempt to substitute courts’ judgment for that of professional expert engineers. Travelers would have courts disregard an engineer’s opinion as to whether a particular building in a particular condition is materially impaired and to what degree, and instead simply decide the issue on a cosmetic basis. This Court should reject that invitation.

**C. Requiring A Change In Shape Is Contrary To The Plain Language Of The Policies.**

The policies at issue each expressly state: “Collapse does not include settling, cracking, shrinkage, bulging or expansion.” CP 989, 992, 994. At least four of these five items – settling, shrinkage, bulging, and expansion – typically involve a change in shape. Travelers’ proposed interpretation of SSI would mandate coverage in numerous situations where the policy expressly states collapse coverage does not apply. Even if Travelers’ SSI standard were a proper substitute for professional engineering analysis, this Court still should not accept it because it is directly contradictory to the language of the insurance policies at issue.

**IV. CONCLUSION**

The parties agree that “collapse” should be measured by some kind of “material impairment” standard. “Rubble on the ground” as a standard excludes legitimate collapse, as Travelers illustrates. On the other hand, any standard less than a “material impairment” could result in overly broad coverage.

Of the two “material impairment” standards – SSI or “imminent collapse” – SSI is the better standard. First, SSI is the standard under which Washington parties have been operating since at least 1995. Second, SSI avoids the numerous pitfalls of “imminent collapse” raised by both parties. Finally, SSI ensures that only real “collapse” losses are

covered, where the loss is both “structural” and “substantial” as evaluated by a professional engineer.

Therefore, this Court should overturn the trial court’s two summary judgment rulings interpreting “collapse” other than as SSI. This matter should be remanded to the trial court with instructions that the undefined term “collapse” in Travelers’ insurance policies means SSI.

Respectfully submitted this 24<sup>th</sup> day of March, 2014.

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**APPENDIX A: RAP 2.5(a)**

**RULE 2.5  
CIRCUMSTANCES WHICH MAY AFFECT  
SCOPE OF REVIEW**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

**APPENDIX B: RAP 9.12**

**RULE 9.12  
SPECIAL RULE FOR ORDER ON SUMMARY JUDGMENT**

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

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Bayview Heights Owners Association, Appellant v. Travelers Indemnity Company,  
Respondent/Cross-Appellant - Case No. 89218-I

I am attaching for filing:

1. Appellant's Reply Brief / Opposition To Travelers' Cross-Appeal, and
2. Certificate of Service

Counsel for Appellant and Respondent/Cross-Appellant have agreed to electronic service.

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Thank you,

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