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STATE OF WASHINGTON

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Case No. 85350-9
Court of Appeals Case No. 38411-6-II

**IN THE SUPREME COURT FOR THE STATE OF
WASHINGTON**

FILED
JAN 23 2011

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

VISION ONE, LLC and VISION TACOMA, INC.,
Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE CO.,
Respondent,

**BRIEF OF CONSTRUCTION CONTRACTOR INDUSTRY AMICAE
IN SUPPORT OF PETITION FOR REVIEW**

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ORIGINAL

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I. Identity of construction contractor industry amicae.

Five Washington state construction contractor associations submit this amicus brief in support of the pending Petition for Review. The five amicae are:

1. The Associated General Contractors of Washington.
2. The Associated Builders & Contractors of Western Washington.
3. The National Electrical Contractors Association.
4. The Utility Contractor's Association of Washington.
5. The Mechanical Contractor's Association of Western Washington.

Formed in 1922, the **AGC of Washington** is the state's largest non-residential construction industry trade organization. Its membership in Washington encompasses more than 600 general contractors, subcontractors, and associates, including construction industry suppliers and other service providers.

The **Associated Builders & Contractors of Western Washington** is a 501c6 non-profit trade association representing employers engaged in all facets of the construction industry. Established in 1982, the ABC of Western Washington currently has

nearly 400 members, consisting of general contractors, subcontractors, industry professionals and suppliers.

The **National Electrical Contractors Association** is the largest electrical contractors' association in Washington, and has 168 contractor members (57 in the Chapter), and has been in business since 1901 (NECA National) or 1949 (Puget Sound Chapter, NECA). NECA contractors perform specialized construction work related to the design, installation, and maintenance of electrical systems.

The **Utility Contractors Association of Washington** is an independent chapter of the National Utility Contractors Association. UCAW was founded in 1978 and is the largest utility contractors association in Washington state. The association represents over 53 utility contractors, as well as other large and small construction contractors, material suppliers, bonding companies, equipment companies, engineering, graphic design companies, and other construction industry related firms.

The **Mechanical Contractor's Association of Western Washington**, in existence since 1986, represents 52 contractor members who provide construction services to major commercial, industrial and public institutions throughout Western Washington.

Contractor members employ over 6,000 plumbers and pipefitters who perform the majority of plumbing and pipefitting work in the non residential market.

II. The insurance coverage issue in this case is of substantial public interest.

Builders Risk insurance is ubiquitous to the construction industry. It is purchased for most new construction projects, whether public or private. Washington insurers almost always sell Builders Risk coverage based on standard insurance forms, rather than as custom drafted contracts. Judicial interpretation of one carrier's standard insurance form therefore tends to directly implicate the scope of coverage under other carriers' policies.

Because Builders Risk coverage is a routinely used mechanism for risk allocation on construction projects, radical changes to established norms of policy interpretation are a substantial shock to a large and vital part of the state's commerce. According to an annual University of Washington study done in 2009, Washington contractors, construction services and material suppliers employ more than 216,000 workers in this state, representing 9.4 percent of our private workforce. The total payroll

for construction industry jobs exceeds \$11.4 billion, which represents 10.5 percent of the state's non-government payroll.

In 2008, in-state business activity in the construction industry exceeded \$35 billion, comprising 18.2 percent of all in-state sales. Construction industry businesses paid \$1.9 billion in state sales and B&O taxes, amounting to 21.5 percent of all sales and B&O tax receipts.

The appellate court's opinion in this case is directly at odds with long-established, black letter law on how insurance policies are to be interpreted. Because insurers are the only ones writing the terms of their policies they have the ability to craft policy language saying precisely what coverage they intend. Interpreting policy language is thus a matter of enforcing what an insured could reasonably understand policy language to cover, regardless of whether the insurer intended otherwise. See *Shotwell v. Transamerica Title Insurance Co.*, 91 Wn.2d 161, 167, 588 P.2d 208 (1978) ("Where a provision of a policy of insurance is capable of two constructions, the meaning and construction most favorable to the insured must be employed, even though the insurer may have intended otherwise."). Consequently, insurance provisions

extending coverage are to be read broadly, while exclusionary terms must be construed narrowly.

If the portion of the policy being considered is an *inclusionary clause* in the insurance policy, the ambiguity should be liberally construed to provide coverage whenever possible. However, the basic principle that applies to *exclusionary clauses* in insurance contracts is that any ambiguity should be "most strictly construed against the insurer."

Ross v. State Farm, 132 Wn.2d 507, 515-16, 940 P.2d 252 (1997)
(Emphasis in original) (citations omitted).

Division Two's opinion turns those construction rules on their head. Following the close of discovery the trial court entered an order *in limine* restricting the exclusions Philadelphia could invoke to subsection (1) of the deficient design and the defective materials or workmanship exclusions. CP 5723 § P. Exclusion subsection (1) recites that it applies where the excluded peril "directly and solely" results in the loss. The order *in limine* prohibited Philadelphia from excluding coverage on other grounds, such as the sequence-of-events provision in subsection (2) of the same exclusions. Philadelphia never appealed from that order *in limine*.

No dispute ever existed over the fact that neither defective design nor defective work or materials "directly and solely" caused Vision's loss. Philadelphia itself asserted that defective equipment

(a non-excluded peril under the policy) was a cause of the loss. CP 13070, 13072 (Philadelphia's expert admits defective shoring equipment was a cause of the collapse. The shoring equipment was, in fact, equipment. CP 6588(¶1)).

Ostensibly interpreting the policy (apparently including exclusionary provisions barred by the trial court's unappealed order *in limine*), Division Two rewrote the deficient design and defective workmanship exclusions. Regardless of whether either excluded peril was (as required by the actual language of the policy) "directly and solely" the cause of the loss, the appellate court declared those exclusions would apply if either peril was ultimately determined to be the efficient proximate cause of the loss.

Never in the history of Washington caselaw has an appellate court used rules of construction to construe the language of an insurance policy exclusion more broadly than the way it was actually written. Division Two's opinion is not only the first to do that, it construes the relevant language of Philadelphia's exclusions even more broadly than what any reasonable person could ever have read them to mean. The appellate court's opinion does violence to the established law of this state:

If the language in an insurance contract is clear and unambiguous, the court must enforce it as written and may not modify the contract or create ambiguity where none exists.

Transcontinental Insurance Co. v. Washington PUD Utilities' System, 111 Wn.2d 452, 456, 760 P.2d 337 (1988); see *Washington PUD v. PUD No. 1*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989) ("[I]f the language on its face is fairly susceptible to two different but reasonable interpretations, the contract is ambiguous, and the court must attempt to discern and enforce the contract as the parties intended. In the event of an ambiguity, the contract will be construed in favor of the insured.") (Citations omitted).

Vision's petition for review presents an issue of substantial public interest, meriting acceptance under RAP 13.4(b)(4).

III. Division Two's opinion directly conflicts with Division One's opinion in *Sprague*.

Two weeks after publication of the decision below, Division One published *Sprague v. Safeco Insurance Co.*, 158 Wn. App. 336, 241 P.3d 1276 (2010). These two decisions address the same coverage issue, under functionally identical insurance provisions, yet they come to opposite results.

Both cases involve insurance coverage for property damage resulting at least in part from defective work, hinge on resulting loss provisions in each policy, and as is typical of resulting loss clauses, include provisions drafted by the insurer as inclusionary clauses – literally, as exceptions to an exclusionary clause. Further, both *Vision One* and *Sprague* involve all-risk insurance, promising coverage for direct physical loss from all perils except for excluded perils, and involve a collapse, which in both policies was a non-excluded (and therefore covered) peril.¹

The policies in both cases listed defective design and defective workmanship as exclusions. These exclusions were qualified by an exception: That coverage would exist if the excluded peril of defective design or workmanship resulted in loss not otherwise excluded. The resulting loss language in Philadelphia's exclusions for defective design and workmanship reads: "But if '**loss**' by any of the Covered Causes of Loss results, we will pay for that resulting '**loss**'." The resulting loss language in

¹ *Sprague*, 158 Wn. App. at 341 ("Safeco's policy did not exclude collapse as a peril."). Collapse is likewise not an excluded peril in the Philadelphia policy. See *Villella v. Public Employees Mutual Insurance Co.*, 106 Wn.2d 806, 816, 725 P.2d 957 (1986) (Under all risk insurance, "the peril insured against would be any peril that is not specifically excluded.")

Sprague is functionally the same: "However, any ensuing loss not excluded or excepted in this policy is covered."

The *Sprague* court read the policy the way any reasonable insured would have read it: If collapse (a non-excluded peril) resulted from defective workmanship (an excluded peril), the policy covered the collapse. Division Two came to the opposite conclusion by rewriting the resulting loss exception so that it could never apply to afford coverage for collapse (or any other non-excluded peril) unless that peril was (in Division Two's words) "separate and independent" from the excluded peril. 158 Wn. App. at 107 ("The [resulting loss] provision applies when an excluded peril causes a *separate and independent* covered peril.") (Emphasis added). Philadelphia, however, did not write its policy to provide coverage for resulting loss only when it resulted from a "separate and independent" non-excluded peril. Rather, Philadelphia wrote and sold its policy to provide (as other carriers' policies routinely provide) for coverage where the excluded peril results in *any* non-excluded loss or peril.

Despite the virtually identical facts of *Vision One* and *Sprague*, the *Sprague* court properly declined to interfere with the bargained for exchange between insured and insurer. In contrast,

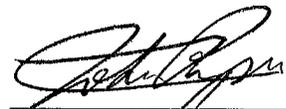
Division Two has stepped in and interfered with the contractual relations of Philadelphia and Vision. By effectively rewriting the policy, the Court absolved Philadelphia from providing coverage that the insured's premiums had paid for.

Insureds buying Philadelphia's coverage were never supposed to have been left wondering whether, in hindsight, their non-excluded loss resulting from excluded perils such as defective workmanship would be deemed "separate" or "independent" from that workmanship. With the publication of Division Two's decision, *all* insureds who bought promised coverage for loss resulting from the same excluded perils must now worry that their policies will be interpreted much more narrowly than the way they were written.

The court of appeals decision below directly conflicts with Division One's decision in *Sprague*. This Court should accept review under RAP 13.4(b)(2).

RESPECTFULLY SUBMITTED this 13th day of January,
2011.

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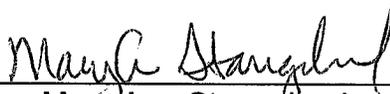
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On this 13th day of January, 2011, a true and correct copy of the foregoing was caused to be served via delivery to the following:

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