

85350-9

NO. 38411-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RSUI,
Intervenor and Appellant,

v.

VISION ONE, LLC, and VISION TACOMA, INC.,
Plaintiffs and Respondents,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant and Appellant,

and

D&D CONSTRUCTION, INC.;
Defendant, Third-Party Plaintiff, and Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC.,
Third-Party Defendant and Respondent.

VISION RESPONDENTS' BRIEF
IN RESPONSE TO PHILADELPHIA INDEMNITY'S APPEAL
AND IN SUPPORT OF THEIR CROSS-APPEAL

Jerry B. Edmonds, WSBA #05601
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondents Vision One, LLC
and Vision Tacoma, Inc. and D&D, Inc.

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98111-3926
(206) 628-6600

STATE OF WASHINGTON
DIVISION II
NOV 23 PM 2:03
COPY OF APPEALS
DIVISION II

TABLE OF CONTENTS

I. SUMMARY.....1

II. COUNTERSTATEMENT OF CERTAIN ISSUES
PRESENTED FOR REVIEW BY PHILADELPHIA’S
APPEAL4

III. COUNTERSTATEMENT OF THE CASE.....5

 A. Concrete Slab Collapse; Denial by Philadelphia of
 Vision’s Claim.....5

 B. Post-Discovery Hearings Concerning Insurance
 Coverage Issues.....10

 1. April 3, 2008 order in limine10

 2. May 15, 2008 hearing14

 3. July 18, 2008 hearing.....15

 4. August 22, 2008 hearing.....16

 5. September 12, 2008 ruling that the concrete slab
 collapse is a “resulting loss” and thus covered17

 C. Settlement Between Vision and Berg.....18

 D. Trial; Jury Instructions18

 E. Verdict; Fees Award; Judgment Against Philadelphia19

IV. ARGUMENT IN RESPONSE TO PHILADELPHIA’S
APPEAL22

 A. Vision Did Not Forfeit Its Coverage By Releasing
 Berg22

 B. The Trial Court Correctly Ruled that Philadelphia’s
 Policy Covers Vision’s Slab-Collapse Losses, and
 Did Not Erroneously Take the Issue of Collapse
 Causation Away from the Jury.....24

1. The trial court’s coverage-related rulings were correct	25
a. The policy covers all slab-collapse losses unless (a) an exclusionary clause applies and (b) an exception does not “give back” coverage.....	25
b. Philadelphia asked the court to interpret the policy and decide coverage as a matter of law	26
c. Because the concrete slab and the faultily assembled shoring were separate things, the slab’s collapse was a “resulting loss” and was covered	26
d. Collapse causation ceased to be a jury issue after the court ruled that the collapse was a “resulting loss”	32
e. There is coverage because defective design and faulty workmanship were not the collapse’s only causes; faulty shoring equipment was a cause, too	33
2. Philadelphia’s assignments of error with respect to coverage-related rulings are without merit	33
a. Philadelphia fails to acknowledge or address under the correct standard of review the discretionary order in limine that precluded it from making “efficient proximate cause” or “sequence of events” arguments	33
b. Philadelphia was not entitled to demand that the court see how the jury resolved a dispute between “competing experts” over “predominant cause”	38

c.	Philadelphia proposed to use efficient proximate cause analysis inappropriately.....	42
d.	Philadelphia does not claim ever to have said what it contends the “efficient proximate” (or “predominant”) cause was	44
e.	An argument based on “sequence of events” language likewise was precluded by the April 3 order in limine, and Philadelphia has never said what its position under that policy clause is, either	45
f.	Philadelphia should not be permitted to make, in reply, arguments that belonged in its opening brief.....	46
3.	Philadelphia’s “90 day period” argument was waived and is contrary to the terms of the extra expenses endorsement.....	46
C.	The Trial Court Had Authority to Award Vision \$50,000 for the Five CPA Violations Philadelphia Committed.....	48
D.	Philadelphia’s Objections to the Trial Court’s Fee Award Are Without Merit, Particularly in Light of Philadelphia’s Bad Faith	49
E.	Vision Is Entitled to An Award of Fees and Expenses for Appeal.....	53
V.	VISION’S CROSS-APPEAL ASSIGNMENTS OF ERROR.....	54
VI.	ISSUES PERTAINING TO CROSS-APPEAL ASSIGNMENTS OF ERROR.....	54

VII. ARGUMENT WITH RESPECT TO VISION'S CROSS-
APPEAL54

A. The Trial Court Erred in Ruling that The Policy's
Extra Expenses Endorsement Operates to Exclude
Coverage For Consequential Delay Losses Other
Than The Types Listed in That Endorsement54

B. The Trial Court Erred in Not Awarding \$128,817 in
Prejudgment Interest on the Jury's Award for Extra
Construction Loan Interest Expense and Extra
Advertising/Promotional Expense.....56

C. Request for Fee Award if Vision Prevails on Its
Cross-Appeal.....57

VIII. CONCLUSION.....58

TABLE OF AUTHORITIES

CASES

Allianz Insurance Co. v. Impero,
654 F. Supp. 16 (E.D. Wash. 1986).....28

Allstate Insurance Co. v. Bowen,
121 Wn. App. 879, 91 P.3d 897 (2004).....42

Allstate Insurance Co. v. Smith,
929 F.2d 447 (9th Cir. 1991)29

Alton Ochsner Medical Fund v. Allendale Mutual Insurance Co.,
219 F.3d 501 (5th Cir. 2000)30

America Motorists Insurance Co. v. Superior Court,
68 Cal. App. 4th 864 (Ct. App. Cal. 1998) 50-51

Arnold v. Cincinnati Insurance Co.,
688 N.W.2d 708 (Wis. Supr. Ct. 2004)29

Boeing Co. v. Aetna Casualty & Surety Co.,
113 Wn.2d 869, 784 P.2d 507 (1990).....55

Bosko v. Pitts & Still, Inc.,
75 Wn.2d 856, 454 P.2d 229 (1969).....36, 38

Clapp v. Olympic View Public Co., L.L.C.,
137 Wn. App. 470, 154 P.3d 230 (2007), *rev. denied*,
162 Wn.2d 1013 (2008)45

Community Title Co. v. Safeco Insurance Co.,
795 S.W.2d 453 (Mo. Ct. App. 1990).....23

Coventry Associates v. America States Insurance Co.,
136 Wn.2d 269, 961 P.2d 933 (1998).....24

Drake v. Smersh,
122 Wn. App. 147, 89 P.3d 726 (2004).....35

<i>Equilon Enterprises, LLC v. Great America Alliance Insurance Co.</i> , 132 Wn. App. 430, 132 P.3d 758 (2006).....	53
<i>Fenimore v. Donald M. Drake Const. Co.</i> , 87 Wn.2d 85, 549 P.2d 483 (1976).....	34
<i>Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp.</i> , 790 F. Supp. 1339 (E.D. Mich 1992).....	50
<i>Frank Coluccio Const. Co., Inc. v. King County</i> , 136 Wn. App. 751, 150 P.3d 1147 (2007).....	25, 54-55
<i>Graham v. Public Employees Mutual Insurance Co.</i> , 98 Wn.2d 533, 656 P.2d 1077 (1983).....	42
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 144 Wn.2d 907, 32 P.3d 250 (2001).....	47
<i>Hansen v. Rothaus</i> , 107 Wn.2d 468, 730 P.2d 662 (1986).....	56
<i>Hayden v. Mutual of Enumclaw Insurance Co.</i> , 141 Wn.2d 55, 1 P.3d 1167 (2000).....	36, 37, 38
<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290, <i>rev. denied</i> , 136 Wn.2d 1015 (1998).....	31
<i>Jaeger v. Cleaver Const., Inc.</i> , 148 Wn. App. 698, 201 P.3d 1028, <i>rev. denied</i> , 166 Wn.2d 1020 (2009).....	50
<i>Kalamazoo Acquis. LLC v. Westfield Insurance Co.</i> , 395 F.3d 338 (6th Cir. 2005).....	23
<i>Kish v. Insurance Co. of North America</i> , 125 Wn.2d 164, 883 P.2d 308 (1994).....	42
<i>Kottler v. State</i> , 136 Wn.2d 437, 963 P.2d 834 (1998).....	22

<i>Laquila Const., Inc. v. Travelers Indemnity Co. of Illinois</i> , 66 F. Supp. 2d 543 (S.D.N.Y. 1999).....	28
<i>Leader National Insurance Co. v. Torres</i> , 113 Wn.2d 366, 779 P.2d 722 (1989).....	23
<i>Lund v. Benham</i> , 109 Wn. App. 263, 34 P.3d 902 (2001), <i>rev. denied</i> , 146 Wn.2d 1018 (2002).....	35
<i>Malarkey Asphalt Co. v. Wyborney</i> , 62 Wn. App. 495, 814 P.2d 1219 (1991).....	23-24, 49
<i>Mazon v. Krafchick</i> , 158 Wn.2d 440, 144 P.3d 1168 (2006).....	53
<i>McDonald v. State Farm Fire and Casualty Co.</i> , 119 Wn.2d 724, 837 P.2d 1000 (1992).....	30, 41, 44
<i>Mutual of Enumclaw Insurance Co. v. Dan Paulson Const., Inc.</i> , 161 Wn.2d 903, 169 P.3d 1 (2007).....	53
<i>Narob Development Corp. v. Insurance Co. of North America</i> , 631 N.Y.S.2d 155 (1995), <i>leave to appeal denied</i> , 87 N.Y.2d 804 (1995).....	29
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	33
<i>Neer v. Fireman's Fund America Life Insurance Co.</i> , 103 Wn.2d 316, 692 P.2d 830 (1985).....	27
<i>Panorama Village Condominium Owners' Association Board of Directors v. Allstate Insurance Co.</i> , 144 Wn.2d 130, 26 P.3d 910 (2001).....	49, 57
<i>Pham v. City of Seattle</i> , 159 Wn.2d 527, 151 P.3d 976 (2007).....	34

<i>Polygon Northwest Co. v. American National Fire Insurance Co.</i> , 143 Wn. App. 753, 189 P.3d 777, <i>rev. denied</i> , 164 Wn.2d 1033 (2008).....	35
<i>Prudential Lines, Inc. v. Fireman's Insurance Co. of Newark</i> , 457 N.Y.S.2d 272 (1982).....	23
<i>Safeco Insurance Co. of America v. Butler</i> , 118 Wn.2d 383, 823 P.2d 429 (1992).....	53
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 779 P.2d 249 (1989).....	31
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 859 P.2d 1210 (1993).....	51
<i>Sharbono v. Universal Underwriters Insurance Co.</i> , 136 Wn. App. 383, 161 P.3d 406 (2007), <i>rev. denied</i> , 163 Wn.2d 1055 (2008).....	55
<i>Smith v. Safeco Insurance Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	53
<i>Transcontinental Insurance Co. v. Washington Public Utilities Districts' Utility System</i> , 111 Wn.2d 452, 760 P.2d 337 (1988).....	32
<i>Ultra Coachbuilders, Inc. v. General Sec. Insurance Co.</i> , 229 F. Supp. 2d 284 (S.D.N.Y. 2002).....	50
<i>Villas at Harbour Pointe Owners Association v. Mutual of Enumclaw Insurance Co.</i> , 137 Wn. App. 751, 154 P.3d 950 (2007), <i>rev. denied</i> , 163 Wn.2d 1020 (2008).....	23
<i>Weyerhaeuser Co. v. Commercial Union Insurance Co.</i> , 142 Wn.2d 654, 15 P.3d 115 (2000).....	56
<i>Wright v. Safeco Insurance Co. of America</i> , 124 Wn. App. 263, 109 P.3d 1 (2004).....	30

<i>ZDI Gaming, Inc. v. State Gambling Committee</i> , 151 Wn. App. 788, 214 P.3d 938 (2009).....	46
---	----

STATUTES

RCW 4.22.070	52
RCW 4.56.110(4).....	20, 57
RCW ch. 19.86.....	19
RCW 19.86.090	48
RCW 19.86.920	49

RULES

CR 50(b).....	21
CR 59(a).....	21
RAP 2.5(a)	45, 47
RAP 10.3(a)(5).....	31
RAP 10.3(a)(6).....	36
RAP 10.3(g)	35
RAP 18.1.....	57
RAP 18.1(b)	53

OTHER AUTHORITIES

<i>16 Couch on Insurance 3d</i> , § 224.148	23
---	----

I. SUMMARY

Philadelphia provides scant information about how orders that its brief mentions came to be entered. This brief provides the procedural background to which Philadelphia gives cursory treatment.

Shoring failed. An above-grade concrete slab the shoring was supposed to support collapsed. A construction project was damaged and delayed. The owner, Vision, had all risk builder's insurance. The insurer, Philadelphia, denied coverage based on two "sole cause" exclusions. Vision sued for coverage and for bad faith damages. After discovery, and with the benefit of thorough briefing and several rounds of oral argument, the trial court ruled that the policy covers Vision's slab-collapse losses. A jury found bad faith and awarded Vision \$1,148,428 for covered losses and damages. The trial court awarded Vision \$1.9 million in attorney fees and expenses. This Court should affirm that result. The case should be remanded, however, for amendment of the judgment to add \$128,817 in prejudgment interest and for a new trial on the issue of whether Vision sustained, as a result of the slab collapse and project delay, consequential losses that the jury was not allowed to consider.

Philadelphia did not make an "efficient proximate cause" argument until 14 weeks after entry of an order in limine precluding it from asserting new grounds for denying coverage, and asked the court to

misapply “efficient proximate cause” analysis to “sole cause” exclusions. An insurer must state in writing its reason(s) for denying coverage and bears the burden of proof if it relies on exclusions to deny coverage. Philadelphia denied coverage to Vision in January 2006 on the ground that “the only cause of the loss was defective design and faulty workmanship,” for which the policy has exclusions. It confirmed in March 2008, at a deposition taken after the close of discovery, that it stood by its 2006 coverage determination. When Vision sought an order in limine precluding Philadelphia from asserting grounds for denying coverage other than those stated in January 2006, Philadelphia did not mention, in its response, either “efficient proximate cause” or the policy’s “sequence of events” clause, which is not referred to in an assignment of error. On April 3, 2008, the court granted Vision’s motion for the order in limine. CP 5723 (¶ P). Philadelphia does not expressly assign error to the order in limine, does not acknowledge that orders in limine are reviewed for abuse of discretion, and does not argue that the trial court entered the order for an untenable reason. Philadelphia did not argue “efficient proximate cause” until July 18, 2008, did not say what it contended the efficient proximate cause of the collapse *was*, and cites no authority for applying “efficient proximate cause” analysis to “sole cause” exclusions.

Philadelphia's second assignment of error fails because the trial court decided there is coverage as a matter of law, and therefore did not need the jury to make, and did not ask the jury to make, a finding as to what the cause(s) of the collapse had been.

Philadelphia's third assignment of error fails because the concrete slab collapsed due to faulty shoring workmanship and equipment, not because of a faulty slab structure. Thus, loss of the shoring was not covered, but the slab collapse was a covered "resulting loss."

Philadelphia's denial of coverage and bad faith estop it from seeking to enforce the "impairment of rights" clause in the policy because of Vision's settlement with Berg. Arguments made under Philadelphia's fifth assignment of error fail for various reasons explained below.

Vision is cross-appealing. The trial court erred by misinterpreting the extra expenses endorsement as limiting, rather than adding, coverage for consequential losses and excluding evidence of profits that Vision lost because of project delay, and by not awarding prejudgment interest of \$128,817 on jury awards for extra construction loan interest and advertising expense.

II. COUNTERSTATEMENT OF CERTAIN ISSUES PRESENTED FOR
REVIEW BY PHILADELPHIA'S APPEAL

1. Philadelphia first made an "efficient proximate cause" argument on July 18, 2008, by which time an order in limine entered on April 3, 2008 (CP 5723 (¶ P)) precluded it from raising new coverage-denial arguments. Does Philadelphia's brief offer an argument that is adequate for appellate review of the order in limine, inasmuch as it does not expressly assign error to the order, does not acknowledge that orders in limine are subject to review for abuse of discretion, and does not argue that the April 3, 2008 order in limine was entered for an untenable reason?

2. Did the trial court have a tenable reason for entering the April 3 order in limine?

3. Would it have been error to apply "efficient proximate cause" analysis to the issue of coverage in view of the fact that Philadelphia denied all-risk coverage based on the stated ground that two excluded causes were "the only cause" of Vision's slab-collapse losses?

4. Did Philadelphia waive its assignment of error 5(a) by telling the court it took no exception to Court's Instruction 15 (CP 7323)?

5. Does the collateral source rule bar Philadelphia's objection to the award to Vision of \$1,011,084 in attorney's fees that Gemini paid?

7. Are the jury's findings that Philadelphia's bad faith and five RCW ch. 19.86 violations caused Vision to sue Berg Equipment, and the trial court's unchallenged oral and written findings in support of its award of attorney fees and expenses, and in particular the finding that Vision's litigation with Berg and Philadelphia were inextricably intertwined, sufficient to support the awards the court made?

III. COUNTERSTATEMENT OF THE CASE

A. Concrete Slab Collapse; Denial by Philadelphia of Vision's Claim.

In 2005, Vision One, LLC, began development of The Reverie at Marcato, a planned mixed-use complex, with an affiliate, Vision Tacoma, Inc., as project manager.¹ Vision One and Vision Tacoma will be referred to as "Vision." Vision hired D&D, Inc., to do the concrete work.² D&D obtained shoring equipment from Berg Equipment to temporarily support above-grade concrete slabs until the poured concrete cured.³ The shoring failed as D&D poured a slab on October 1, 2005; the slab collapsed.⁴ Workers employed by King Concrete (not a party) fell and were injured⁵; the shoring equipment was crushed; 10 to 20 trucks full of unused concrete went unused; it took three months to investigate the collapse,

¹ CP 543 (¶ 1.1), 2874, 5552; 9/24/08RP 74. Hereafter, unless indicated by an "/09" in the record citation, an "RP" citation is to a hearing or day of trial in 2008.

² CP 535 (¶ 1.3), 1069 (¶ 6.5); 9/24RP 78.

³ CP 608, 876, 1774-75, 1760-61.

⁴ CP 535 (¶ 3.1), 1620-21, 1778-79 (¶ ¶ 12, 16), 3961-62; 9/23RP 90-91, 104-06; 9/24RP 304-06.

⁵ CP 7150; 9/12RP 137; 9/23RP 107-08.

clean up, make repairs, and get the project back to where it had been on October 1.⁶ A cascade of further delays followed,⁷ with consequent extra expenses and lost sales and profits.⁸ The project was not completed until May 2007.⁹

Vision had a \$12,500,000 All Risk Builder's insurance policy with Extra Expenses Endorsement for the project from Philadelphia Indemnity,¹⁰ and liability coverage through Gemini Insurance.¹¹ Immediately after the collapse, Vision made a claim on its Philadelphia policy.¹² Philadelphia initially indicated that Vision was covered,¹³ but ended up taking three months to decide. By letter dated January 3, 2006, assistant vice president John Kirby acknowledged the claim for removal of debris, damage to the concrete, and soft costs associated with "the delay in completing this portion of the project as well as destruction of unusable material as a result of the damage and delay," CP 559, but denied coverage for any losses, CP 558-62. In response to Vision's request that Philadelphia reconsider, Mr. Kirby "clarified its coverage evaluation,"

⁶ 9/24RP 343-57; 9/30RP 691-96, 701-05; CP 1779 (¶ 16).

⁷ CP 3780, 3814, 3832-33, 3838-40, 3857-60, 3788-89, 9/24RP 346-52, 355-56, 360-65, 375-76; 9/30/08RP 706, 719-20, 725-31, 738-39, 789-90.

⁸ CP 3347, 3359-60, 4994, 7148-50, 7157-59, 7246-47; 9/30RP 746, 825-45, 847-59, 874-76, 888-89; Exs. 378, 379 (expenses); CP 5551-55; 9/24RP 369-70; 9/25RP 435-43 (lost profits).

⁹ 9/30RP 846-47, 10/14RP 71-73, 80, 92.

¹⁰ CP 2874, 5946 (¶ 4), 5953-89, 5956, 5958 and 5965.

¹¹ CP 10624 (¶ 3), 10626 (¶ 5).

¹² CP 619 (¶ 3.3).

¹³ 9/23RP 124-25; 9/24RP 320-21, 328-29; 9/29RP 568-69; 10/14RP 79-80, 96-97.

Phil. Br. at 13, by letter of January 27, 2006, CP 13139-43:

The damage to the construction project was a sole and direct result of the marginal shoring design and faulty installation of the shoring. The policy excludes loss caused by deficiency in design and loss caused by faulty workmanship. *While the faulty workmanship exclusion contains an exception for resulting loss from a Covered Cause of Loss, in the present case, the only cause of the loss was defective design and faulty workmanship. There is no separate and independent loss that resulted in the claimed damage.* CP 13142 (§ 3, ¶ 1) [Italics by Philadelphia; underlining emphasis added.]

The exclusionary language based on which Philadelphia denied coverage is at CP 5971 (C-1), 5977 (2e), and 5978 (3a). Philadelphia also denied coverage specifically for the unused and wasted concrete because its loss was not “accidental,” and for destruction of concrete vibrators because the policy excludes damage to machinery, tools, or equipment not intended to become permanent parts of the structure. CP 561 (§ 3, ¶ ¶ 2, 3).

Vision accepted that the policy excludes coverage for the unused concrete and damaged machinery, and made no claim for the loss of Berg’s faulty shoring. Vision did not accept Philadelphia’s contention that the slab collapse was not a “resulting loss” and had been caused only by defective design and faulty workmanship. In March 2006, it sued Philadelphia for coverage, for damages for bad faith handling of its claim in violation of the Consumer Protection Act, and for attorney fees and

expenses, and sued D&D for damages for breach of contract.¹⁴ D&D brought a third-party claim against Berg, which separately sued D&D.¹⁵ Matthew Thompson sued D&D and Berg for personal injuries.¹⁶ The cases were consolidated by agreement of all parties, including Philadelphia, and a case schedule order was entered establishing a discovery cutoff of January 31, 2008 and a trial date of March 20, 2008.¹⁷ D&D was uninsured, and in settlement paid Vision \$25,000 and assigned its claims against Berg.¹⁸ Vision thus was suing Philadelphia for coverage and bad faith and was suing Berg for economic damages under (D&D's assigned) contract theories and under product liability theories.

The consolidated cases were litigated tenaciously and exhaustively.¹⁹ Vision litigated with Philadelphia over whether there were causes other than, or in addition to, defective design and faulty shoring for coverage purposes.²⁰ Vision's litigation with Berg concerned whether Berg was liable for Vision's damages as well as how fault for the collapse's cause(s) would be apportioned for purposes of tort and third-

¹⁴ CP 1-4.

¹⁵ CP 607-10, 1060-62. Claims by Philadelphia against Berg, CP 624-25, were dismissed on summary judgment, CP 1006-08.

¹⁶ CP 2724-29, 3568, 10601 (¶ 6).

¹⁷ CP 999-1005, 1009-1016.

¹⁸ CP 852-53, 4192-94.

¹⁹ See CP 12347; 2/19/09RP 32.

²⁰ *E.g.*, CP 1755-56, 13070 (50-52), 13072 (60), 13075 (201).

party personal injury claims.²¹ Vision litigated with both Philadelphia and Berg over what financial losses were attributable to the slab collapse and could be recovered.²² Philadelphia was able to economize on litigation expense by following the lead of Berg's counsel,²³ but Vision had to bear the cost of two-front litigation of the consolidated "fault" and coverage cases.²⁴ More than 40 depositions were taken; 40,000 pages of documents were produced; and there were 28 pre-trial hearings.²⁵ Counsel for Vision, Berg, and Philadelphia attended most hearings, and counsel for Thompson and D&D's defense counsel often did.²⁶ There are 13,300+ pages of Clerk's Papers, not including exhibits.

Philadelphia proved to be an unreliable litigation adversary. In late 2007, it repudiated an earlier assurance that it was not relying on a "reliance on counsel" defense to Vision's bad faith claim, but then refused to disclose its counsel's advice.²⁷ Vision obtained an order compelling disclosure of the advice and imposing sanctions. CP 2607-09.

²¹ *E.g.*, CP 1552-54, 2860-71, 2935-38, 2949-52, 3038-54, 3611-22, 3732-42.

²² *E.g.*, CP 3346-61, 3728-29, 3778-97, 3960-67, 4231-38, 4247-55, 4460-62, 4469-71, 4922-26, 4933-36, 4993-95, 5073-74, 5098-5105, 5528-38, 5715, 6126-38, 12928-35.

²³ *E.g.*, CP 3607-10, 3728-29, 3960-67, 5073-74, 5075-76; *and see* CP 1755-56 (court's post-trial observation that "Philadelphia joined in many, many, many of Berg's motions without doing too much extra work . . .").

²⁴ However, Vision One, Vision Tacoma, D&D, and Gemini (which paid for some of Vision's "fault" litigation with Berg) saved on cost by having Williams Kastner lawyers represent them all against Berg, and represent Vision against Philadelphia, at discounted hourly rates. CP 10600-03, 10612 (¶¶ 4-5, 8-9, 27).

²⁵ CP 9409.

²⁶ *See* 2/19/09RP 32.

²⁷ CP 2078-79, 2102-68, 2169-74.

Philadelphia failed to comply; Vision obtained an order on February 22, 2008, compelling compliance and requiring that Philadelphia vice president Kirby be made available for deposition. CP 4545-47. Mr. Kirby was deposed March 6, CP 13109, but Philadelphia withdrew the “reliance on counsel” defense rather than disclose its counsel’s advice. CP 5008.²⁸

Philadelphia’s denial of coverage based on the two “sole cause” exclusions dictated Vision’s discovery strategy: (1) develop evidence and seek admissions by Philadelphia witnesses that the collapse was the result of faulty shoring *equipment* as well as, or rather than, defective design and faulty workmanship in the shoring equipment,²⁹ and (2) develop evidence and seek admissions that there was no faulty workmanship in the concrete slab itself.³⁰ Because Philadelphia did not contend that there was a predominant cause of the slab collapse, Vision did not prepare a cause-ranking case.³¹

B. Post-Discovery Hearings Concerning Insurance Coverage Issues.

1. April 3, 2008 order in limine.

After discovery closed and pursuant to a February 29 order setting deadlines, CP 4421, the parties filed March 10 motions in limine in

²⁸ In May, Vision obtained an order awarding it \$4,944 in fees for the motion to compel, to be paid by May 15, CP 5832-33, and then an order for more sanctions in June when Philadelphia failed to pay, CP 6351.

²⁹ *See, e.g.*, CP 13070, 13072.

³⁰ *See, e.g.*, CP 13075 (199-200), 13115 (90).

³¹ *See* CP 1755-56.

advance of a trial then scheduled for March 20.³² Mindful of its experience with Philadelphia's "reliance on counsel" defense, Vision sought orders precluding Philadelphia from asserting at trial any grounds for denying coverage other than those stated in the first three paragraphs of the Coverage Determination sections of Mr. Kirby's coverage-denial letters, and from offering "reliance on counsel" testimony with respect to bad faith claims. CP 4915-16 (P, Q). Vision noted that Mr. Kirby had confirmed in his March 6, 2008 deposition that Philadelphia stood by the coverage position stated in the Coverage Determination section of his January 2006 letters.³³

Philadelphia filed a one-page opposition to the motion in limine to preclude it from asserting new grounds for denying coverage, CP 5007-08, but did not dispute that Mr. Kirby stands by the grounds he stated in January 2006. Instead, Philadelphia quoted general "non-waiver" language from its denial letters, *see* CP 13143, without specifying what provisions it intended to rely on at trial. Philadelphia's opposition did not mention "efficient proximate cause."³⁴

³² CP 4535-59, 4624-30, 4732-39, 4659-73, 4905-16.

³³ CP 4915; *see* CP 5137-38, 13114 (86-87).

³⁴ Nor did Philadelphia mention "initiates a sequence of events" language in the policy.

The court heard argument on motions in limine on April 3, 2008,³⁵ at which time there was discussion about a September trial,³⁶ and a formal order was entered on May 13 to reflect a trial continuance until September 8, to provide for the deposing of two expert witnesses, to allow Berg and Philadelphia to locate some subcontractors, and to schedule pretrial conferences. CP 5797-5800.

At the April 3 hearing on motions in limine, counsel for Philadelphia disclaimed the right to add reasons to those stated in its 2006 denial letters, but referred, as in the company's briefing, to "for any other reason" language in the denial letters and to "context," without specifying what he was referring to.³⁷ At the court's invitation, counsel for Vision speculated that Philadelphia might be thinking of citing two policy provisions that the denial letter had quoted but that the Coverage Determination sections did not give as reasons for denying coverage.³⁸ One provision was a "resulting loss" clause under the exclusionary clause for defective design, for "direct loss for fire or explosion." *See Phil Br. at 10.* Vision explained, and Philadelphia agreed, that the relevant "resulting

³⁵ Trial did not begin March 20 because the court did not have time to try the case then given the length of time the parties agreed was needed for trial. 3/20RP 37-38. Note that several pretrial hearings are grouped and paginated together for RP purposes.

³⁶ 4/03RP 190-92.

³⁷ *Id.* 175-76.

³⁸ *Id.* 171-72.

loss” clause – the one that would restore coverage if it applies – is the broader “resulting loss” under the faulty workmanship exclusion.³⁹

The other policy provision on which Vision’s counsel speculated at the April 3 hearing Philadelphia might attempt to rely on at trial, but which its 2006 denial letters had not cited as a ground for denying coverage, is an “initiates a sequence of events” clause, item 2 under Exclusion 2 (*see Phil. Br. at 9*).⁴⁰ Philadelphia asserts that the trial court ruled it could not rely on the “sequence of events” language “because it was not mentioned in the denial letters.” *Phil. Br. at 16* (citing remarks made at a *July 18* hearing, 14 weeks later). That was one reason for the April 3 order in limine. Another was that, as Vision advised the court, Mr. Kirby and Philadelphia’s insurance coverage expert had confirmed that the company stood by its 2006 denial letters and that those letters did not base the company’s denial of coverage on “sequence of events” language.⁴¹ Counsel for Philadelphia did not dispute that. However, when the court asked him directly on April 3, Philadelphia’s counsel said he was sure Kirby would testify at trial that the company *is* relying on the “initiates a sequence” clause.⁴² The court ruled that, because of “what everybody’s

³⁹ 4/03RP 172 (referring to testimony at CP 13113(71)).

⁴⁰ *Id.* 173; *see* CP 13141; compare CP 13412.

⁴¹ 4/03RP 173-74.

⁴² *Id.* 176-77.

been deposed on,” Philadelphia could not “switch horses midstream,”⁴³ and signed an order granting Vision’s motion in limine. CP 5723 (¶ P).

Philadelphia did not explain on April 3 how application of the “sequence of events” clause would exclude coverage, or if it contends that there *was* an “initiating” cause or what it was, or how it proposed to prove an “initiating” cause based on the expert opinion testimony it had disclosed during discovery in a “sole cause” case. As of April 3, 2008, Philadelphia had made no “efficient proximate cause” argument. Philadelphia did not move for reconsideration of the order in limine.

2. May 15, 2008 hearing.

On May 15, at a conference about jury instructions, Philadelphia confirmed its reliance on policy exclusions.⁴⁴ Both parties’ counsel agreed that legal issues were involved, and counsel for Philadelphia asserted that instructing the jury at all would be “problematic” and suggested the court “take cross-motions for summary judgment to figure out what this contract means before you instruct the jury.”⁴⁵ Counsel for Vision concurred.⁴⁶ The court noted that it needed “to make some hard decisions” and did not

⁴³ 4/03RP 177-78.

⁴⁴ 5/15RP 9-10.

⁴⁵ *Id.*, 16-17.

⁴⁶ *Id.*, 17-20, 42-43.

want to instruct the jury “about something they don’t need to decide.”⁴⁷

The court set a hearing for July 18, preceded by three rounds of briefing.⁴⁸

3. July 18, 2008 hearing.

Court convened for the July 18 hearing with Vision and Philadelphia having filed three briefs each, totaling 327 pages, since May 15.⁴⁹ Philadelphia’s opening brief, at CP 5846, listed issues without reference to “efficient proximate cause” (or “initiates a sequence of events”). Vision asked the court to rule that shoring is “equipment,” not “materials”; Philadelphia did not object.⁵⁰ Vision pointed out that Philadelphia had conceded in its pre-hearing reply brief that the purpose of the “solely and directly” language in the exclusions on which it was relying to deny coverage was “to preclude [it] from denying coverage if an excluded event and an [sic] non-excluded event result in loss or damage [underlining by Philadelphia].”⁵¹ Philadelphia’s counsel thereupon asserted that “additional analysis” – efficient proximate cause – would be necessary if there was more than one causal event,⁵² but he did not say what Philadelphia contends the efficient proximate cause was, or how it proposed to prove an “efficient” cause based on the expert opinion

⁴⁷ 5/15RP 44-45.

⁴⁸ *Id.*, 46, 62. Neither “efficient proximate cause” nor “sequence of events” were referred to at the May 15, 2008 hearing.

⁴⁹ CP 5835-5944, 6157-83, 6352-68, 6380-6411, 6486-6516, 6517-32.

⁵⁰ 7/18RP 8, 12-13.

⁵¹ *Id.* 15-16 (referring to CP 6492).

⁵² *Id.* 16-17.

testimony it had disclosed during discovery. The court ruled that, as Philadelphia's brief had conceded, if there was an excluded cause and a non-excluded cause, Vision would have coverage.⁵³ Thus, the court realized as of July 18 that Vision has coverage (a) if faulty *equipment* was a cause of the collapse, or (b) if the collapse was a "resulting loss."

Philadelphia, as of July 18, with discovery over and trial set for September 8, had started to try to argue – despite the April 3 order in limine – that "efficient proximate cause" analysis is necessary, as well as "sole cause" analysis, even though the "sole cause" exclusions were intended to preclude it from denying coverage "if an excluded event and an [sic] non-excluded event result in loss or damage." CP 6492. Philadelphia did not tell the court on July 18 what it contends the slab collapse's "efficient proximate" or "predominant" (*Phil. Br. at 17*) cause was, nor does it claim that it ever told the court. There was discussion of "resulting loss" case law⁵⁴ on July 18 but no "resulting loss" ruling.

4. August 22, 2008 hearing.

The court continued studying the "resulting loss" issue, and made no ruling on it at a hearing on August 22, when it entered its written order providing (a) that the shoring was "equipment," and (b) that the loss of the concrete slab would be covered if it was caused by one or more non-

⁵³ 7/18RP 20-21.

⁵⁴ *Id.* 32-49.

excluded events in combination with one or more excluded events. CP 6587-89. Philadelphia does not complain about (or mention) the “shoring is equipment” part of the August 22 order. Philadelphia moved for, Vision opposed, and on September 8 the court denied, reconsideration of the “cause” part of its August 22 order, CP 6676-79, and with it Philadelphia’s argument that “efficient proximate cause” should define what “cause” means in the policy’s “sole cause” exclusions.⁵⁵ Both sides asked the court to rule whether there was a “resulting loss.”⁵⁶

5. September 12, 2008 ruling that the concrete slab collapse is a “resulting loss” and thus covered.

On September 12, Philadelphia again urged the court to rule whether there had been a covered “resulting loss.”⁵⁷ The court did. It ruled that Vision is correct; that the concrete slab and shoring equipment were separate things; that, because there had been nothing wrong with the concrete, there is coverage for its collapse; and that trial would be limited to damages.⁵⁸ Philadelphia calls that a “sua sponte” ruling. *Br. at 21.*

On September 16, the court rejected Philadelphia’s new objection that whether faulty workmanship had been a cause of loss is something a

⁵⁵ CP 6605-06; 9/08RP 12-13; CP 6616-17, 6620-25.

⁵⁶ 9/08RP 39-43, 45-47.

⁵⁷ 9/12RP 152-53.

⁵⁸ *Id.* 152-56. The court was referring to the coverage trial; the “resulting loss” ruling did not resolve the issue of Philadelphia’s liability for bad faith and/or violation of the Consumer Protection Act. The court entered an written order on September 16. CP 7099-7100.

jury should decide, even though Philadelphia had been contending since 2006 that faulty workmanship *was* a cause. (The Court: “And now you’re going to say, no, it’s not [a cause]?”).⁵⁹

In another ruling on September 16, the court, *disagreeing* with Vision,⁶⁰ ruled that the policy’s Extra Expenses Endorsement, CP 5985, excludes coverage for Vision’s claims for “delay, loss of use, loss of market, or any other consequential loss . . . except for the items [listed in the Endorsement],” CP 7105.⁶¹

C. Settlement Between Vision and Berg.

Vision and Berg settled, conditioned on the court ruling that their settlement was reasonable and did not benefit Philadelphia by way of subrogation, offset or otherwise. CP 6746 (¶ 7).⁶² The court so ruled. CP 7030-31.

D. Trial; Jury Instructions.

Starting September 22, 2008, a jury heard from 23 witnesses during 11 days of testimony, after which Philadelphia made directed-verdict motions, one of which, based on the “90 day period” argument renewed at pages 32-37 of its brief, asked the court to order Vision’s

⁵⁹ 9/16RP 253-54.

⁶⁰ CP 6408-09, 6530; 9/16RP 295-302.

⁶¹ 9/16RP 304-07.

⁶² The agreement includes a proviso, under which, if the court were to determine in the future, because of a double recovery by Vision, that Philadelphia should have subrogation or other claim notwithstanding its denial of coverage, Philadelphia’s rights will be limited to the proceeds of settlement.

accounting expert to “rework his numbers”; that motion was denied.⁶³ Philadelphia affirmatively stated no exception to the court’s Extra Expense Endorsement instruction, CP 7323.⁶⁴

E. Verdict; Fees Award; Judgment Against Philadelphia.

On October 21, 2008, the jury awarded Vision \$178,728 for violation of RCW ch. 19.86 and bad faith handling of Vision’s claims and bad faith denial of coverage and (after elimination of \$5,928 in redundant awards⁶⁵) \$969,700 for covered losses (\$251,023 for repair and reconstruction and a total of \$718,677 in extra expense losses due to project completion delay); the jury found that Philadelphia had not dealt with Vision in good faith, committed five violations of the Consumer Protection Act,⁶⁶ and caused Vision to sue Berg. CP 7338-41.

On November 7 a judgment was entered against Philadelphia for \$1,148,428, but the court reserved ruling on interest and attorney fees issues, so the judgment was not final.⁶⁷ Vision asked for prejudgment interest on awards for extra construction loan interest (\$327,607), builder’s insurance premiums (\$71,663), and advertising expense

⁶³ 10/15RP 1361-64, 1371-72.

⁶⁴ 10/15RP 1384-98, *see especially* p. 1389.

⁶⁵ Vision agreed that items in the jury’s covered-losses award, CP 7339, were ones the court had ruled could not be recovered, CP 7347.

⁶⁶ The court’s instructions on bad faith, CP 7325-26, 7330-31, reflect insurance claims-handling regulations of the Insurance Commissioner. *See* WAC 284-30-330.

⁶⁷ CP 7451-52.

(\$305,816).⁶⁸ On December 12, 2008, in an amended (and final) judgment, the court awarded prejudgment interest on the extra insurance premiums only, reserving the issue of attorney fees.⁶⁹

Vision applied for \$2,497,272 in attorney fees and expenses,⁷⁰ submitting 19 declarations and extensive exhibits,⁷¹ as well as expert testimony supporting the fee application.⁷² Vision reminded the court how closely issues in the coverage case had overlapped with those in the Vision-Berg litigation, which did not settle until the eve of trial,⁷³ and that Vision had faced significant risks in its litigation with Berg due to solvency questions.⁷⁴ Philadelphia filed an opposition insisting that Vision had to segregate fees, and a declaration criticizing Vision's counsel's billing format, efficiency, and use of senior lawyers, questioning qualifications of paralegals, and asserting that the work done was excessive.⁷⁵ Noting that determining a fee award "should not become an unduly burdensome proceeding for the adjudicator or the parties,"⁷⁶ expressing concern over the amount of time and resources being spent

⁶⁸ CP 7339, 7348-50.

⁶⁹ CP 12229-30, *and see* CP 9360.

⁷⁰ CP 7556-8747 (see CP 7583 for amount).

⁷¹ CP 10582-95, 10596-10620, 10621-46, 10647-76, 10677-87, 10787-88, 10789-90, 10791-92, 10793-94, 10883-85, 10886-10913, 10914-23, 11772-73, 11745-71, 10785-786, 12062-83, 12084-87, 12088-96, 12097-12118.

⁷² CP 10677-87, 10795-803.

⁷³ CP 9403-08, 10604-09 (¶¶ 11-18).

⁷⁴ CP 9316-17, 10602-03 (¶ 7).

⁷⁵ CP 10688-10715, 10716-54.

⁷⁶ CP 12348.

litigating over fees,⁷⁷ and rejecting Philadelphia's criticisms of billing formats, use of paralegals,⁷⁸ and what lawyers had done which tasks, the court found that work Vision's counsel had done in litigating with Berg and for which Gemini had paid had been inextricably intertwined with the work done litigating with Philadelphia, asked Vision to attempt to apportion work to certain of its "claims" that had not been successful (referring not to entire causes of action but rather to specific motions or aspects of claimed damages), ignored a supplemental request for fees incurred after October 2008, and ultimately awarded Vision 80% of its original requested amount (74.7% of its total request), or \$1,997,818, to account for the unsuccessful "claims" work.⁷⁹

Thus, Philadelphia has been held liable for \$1,148,428 in covered losses and damages; \$50,000 in exemplary damages for its five CPA violations; \$14,848 in prejudgment interest; \$1,508.14 in costs; and \$1,997,818 in attorney fees and expenses, for a total of \$3,212,602.10. The court denied Philadelphia's CR 50(b) and 59(a) motion for post-trial relief.⁸⁰ Philadelphia appealed. Vision cross-appeals from the extra expense endorsement ruling and prejudgment interest rulings.

⁷⁷ 1/16/09RP 8; 2/13/09RP 39.

⁷⁸ 2/19/09RP 36-38.

⁷⁹ CP 12347-49.

⁸⁰ CP 7490-7518, 9358-61.

IV. ARGUMENT IN RESPONSE TO PHILADELPHIA'S APPEAL

Vision addresses Philadelphia's fourth assignment of error in Part A below, because Philadelphia seeks, under it, a ruling that Vision lost any coverage it had no matter what the trial court's coverage rulings were. Vision then explains in Part B why this Court should affirm the trial court's coverage rulings and reject Philadelphia's coverage arguments, and, in Parts C and D, respectively, why the CPA exemplary damages and attorney fees awards should be affirmed.

A fact relevant to all of Philadelphia's arguments is that the jury made, and Philadelphia does not challenge, findings that Philadelphia denied coverage and handled Vision's claim in bad faith, causing Vision \$178,728 in tort damages and causing Vision to sue Berg. CP 7340-41.

A. Vision Did Not Forfeit Its Coverage By Releasing Berg.

Philadelphia contends in its fourth assignment of error that Vision lost any coverage it has by settling with and releasing Berg. *Phil. Br. at 28-32*. There is no Washington decision directly on point, but one who has not paid the debt of another is not entitled to *equitable* subrogation, *Kottler v. State*, 136 Wn.2d 437, 449 n.12, 963 P.2d 834 (1998), and the law generally is that "[w]here an insurer denies liability on a policy, it is estopped from thereafter claiming that it is released when the insured settled with the wrongdoer, or that the insured breached the policy's

subrogation provision, by impairing its subrogation rights, or extinguishing its subrogation rights.” *16 Couch on Insurance 3d*, § 224.148.⁸¹ Washington decisions implicitly recognize that principle by holding that, when a liability insurer refuses to settle a claim against its insured, the insured may settle with the claimant without the insurer’s consent and assign its coverage and other rights against the insurer to the claimant.⁸² If a coverage claim is assignable, the settlement assigning it cannot also extinguish the coverage claim.

In the cases Philadelphia cites, *Kalamazoo Acquis. LLC v. Westfield Ins. Co.*, 395 F.3d 338 (6th Cir. 2005), and *Leader Nat. Ins. Co. v. Torres*, 113 Wn.2d 366, 779 P.2d 722 (1989), the insurers had not denied coverage when the insured settled with the tortfeasor. Philadelphia claims the only difference between this case and *Leader* is that it “made no payment to Vision pending resolution of the coverage dispute . . .,” *Br. at 31-32*, but the truth cannot be spun that way. Philadelphia denied coverage and refused to pay. Moreover, the jury’s bad faith findings are unchallenged and are “verities.” *Malarkey Asphalt Co. v. Wyborney*, 62

⁸¹ *And see Community Title Co. v. Safeco Ins. Co.*, 795 S.W.2d 453, 462 (Mo. Ct. App. 1990) (once first-party fire insurer denied coverage, it waived policy provisions requiring its consent to settle with the responsible parties); *Prudential Lines, Inc. v. Fireman’s Ins. Co. of Newark*, 457 N.Y.S.2d 272, 276 (1982) (when insurer has denied its liability under a policy, the insured may enter into a settlement with a third party without prejudicing its rights against the insurer).

⁸² *E.g., Villas at Harbour Pointe Owners Ass’n v. Mutual of Enumclaw Ins. Co.*, 137 Wn. App. 751, 759, 154 P.3d 950 (2007), *rev. denied*, 163 Wn.2d 1020 (2008).

Wn. App. 495, 513, 814 P.2d 1219 (1991). Philadelphia's bad faith should estop it to complain that Vision resorted to self help and might recover (but to date has not recovered), from it and Berg's liability insurers, more than what Philadelphia would have had to pay if it had honored its policy. Moreover, the Vision-Berg settlement includes a provision under which Philadelphia can obtain relief if Vision double-recovers. CP 6746 (¶ 7).⁸³

B. The Trial Court Correctly Ruled that Philadelphia's Policy Covers Vision's Slab-Collapse Losses, and Did Not Erroneously Take the Issue of Collapse Causation Away from the Jury.

In Parts 1(a) – (e) below, Vision explains why trial court rulings to which Philadelphia's brief refers and about which Philadelphia appears to complain, and that relate to coverage, were correct or made for tenable reasons. In Parts 2(a) – (f) below, Vision explains why the arguments at pages 17-24 of Philadelphia's brief lack merit.

⁸³ It currently is the law that bad faith does not estop a *first* party insurer to deny coverage, *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 285, 961 P.2d 933 (1998), but if Vision finds itself before the Supreme Court on review of this Court's decision, it reserves the right to, and gives Philadelphia notice that it may, argue that estoppel to deny coverage is appropriate in this case in light of changes in denial-of-coverage law since 1998 and of the jury's bad faith findings. *See* CP 7151-54.

1. The trial court's coverage-related rulings were correct.
 - a. The policy covers all slab-collapse losses unless (a) an exclusionary clause applies and (b) an exception does not "give back" coverage.

Philadelphia sold Vision an all risk builder's insurance policy. "Under an all risk policy, any risk that is not specifically excluded is an insured peril . . ." *Frank Coluccio Const. Co., Inc. v. King County*, 136 Wn. App. 751, 767, 150 P.3d 1147 (2007). Philadelphia admitted that the Reverie concrete slab collapse is covered unless a policy exclusion or exclusions apply.⁸⁴ Its contention was that its policy doesn't cover *this particular* collapse because the only causes of loss were defective design and faulty workmanship, and because there was no "resulting loss."⁸⁵ The reference to "resulting loss" is to an exception to the policy's exclusions:

But if "loss" by any of the Covered Causes of Loss results, we ***will pay*** for that resulting "loss."

- a. Faulty, inadequate, or defective materials, or workmanship. [But if loss or damages by a Covered Cause of Loss results, we will pay for the loss or damage caused by that Covered Cause of Loss].⁸⁶

The function of a "resulting loss" (or "ensuing loss") clause in an all risk policy is explained at pages 26-32 below. Basically, it precludes coverage

⁸⁴ CP 13112 (46); 13092 (67-68).

⁸⁵ CP 13142 (¶ 3).

⁸⁶ CP 561 (top of page); CP 5978 (3). The brackets are in the policy; emphases added.

for the cost of fixing faulty workmanship but not for losses when *other* property is damaged *by* the faulty workmanship.

- b. Philadelphia asked the court to interpret the policy and decide coverage as a matter of law.

Counsel for *Philadelphia* suggested that the court should “take cross-motions for summary judgment to figure out what this contract means before you instruct the jury.”⁸⁷ Before doing exactly that, the court received 327 pages of briefing and conducted July 18, August 22 and September 8 hearings. It is disingenuous for *Philadelphia* to characterize the court’s ultimate ruling as one it made “*sua sponte*.” *Phil. Br. at 21*.

- c. Because the concrete slab and the faultily assembled shoring were separate things, the slab’s collapse was a “resulting loss” and was covered.

The court’s conclusion that the slab collapse was a “resulting loss” was reached not only carefully and with the parties agreeing the issue was one of law, but was correct. As Mr. Kirby put it, a “resulting loss” clause “gives back” some of the coverage that an exclusion takes away; *Philadelphia* simply does not want to repair bad workmanship.⁸⁸ As Mr. Kirby agreed, when some portion of an insured building that did not include faulty workmanship is damaged, that would be a covered resulting

⁸⁷ 5/15RP 16-17.

⁸⁸ CP 13110(31) and 13118 (116-17).

loss.⁸⁹ Mr. Kirby agreed that, if an electrician were to wire a building improperly, and the wiring defect were to cause a fire, the cost to repair defective wiring would not be covered, but the fire damage would be a covered “resulting loss.”⁹⁰ Philadelphia’s engineering expert agreed that nothing indicates that assembly of the concrete rebar and the pouring of the concrete were done incorrectly, and that the concrete pour was a separate thing from the shoring.⁹¹ The court ruled that the shoring was “equipment,” CP 6588 (¶ 1); Philadelphia does not assign error to that ruling or offer argument disputing it, and has never argued that the concrete slab was equipment.

If the “resulting loss” clause “gives back” coverage, the exclusion to which it is an exception cannot be interpreted so broadly as to leave nothing that can ever be a “resulting loss,” because courts are not supposed to construe an insurance policy in a way that renders any term meaningless. *Neer v. Fireman’s Fund Am. Life Ins. Co.*, 103 Wn.2d 316, 320, 692 P.2d 830 (1985).

As elucidated in decisions applying “resulting loss” (or “ensuing loss”) exceptions to all-risk policy exclusions, such clauses limit exclusions for faulty workmanship to the part of a structure that is faultily

⁸⁹ CP 6543-44.

⁹⁰ CP 13117(99).

⁹¹ CP 13075(199-200), 13115 (90).

built or installed, but provide coverage to *other* property, or *other* parts of the structure, that suffer damage *because of* the faulty workmanship. *Laquila Const., Inc. v. Travelers Indem. Co. of Illinois*, 66 F. Supp.2d 543, 546 (S.D.N.Y. 1999), is instructive. A concrete floor slab was defectively built and had to be re-shored and replaced. The policy excluded the “cost of making good faulty or defective workmanship or material.” The court, granting summary judgment to the insurer, explained:

[H]ad the fifth floor slab . . . collapsed and damaged machinery, plumbing and electrical fixtures, or even neighboring property, such losses – wholly separate from the defective materials themselves – would qualify as non-excluded “ensuing losses” . . . Laquila’s claim for coverage here is . . . an attempt to recover for the excluded costs of making good its faulty or defective workmanship.

Laquila, 66 F. Supp.2d at 546. In another case, *Allianz Ins. Co. v. Impero*, 654 F. Supp. 16, 18 (E.D. Wash. 1986), the court denied coverage under a builder’s risk policy, but it did so *because there had been no collapse*:

The sole claim is for the cost of correcting the deficiencies in the wall. Had the wall, as a result of the deficiencies in the concrete, collapsed and caused damage to some other portion of the work, or to the equipment of a subcontractor or some similar thing, we would have a different case.

Philadelphia’s counsel attempted to argue below that the slab was part of the same “system” as the shoring, or became “faulty workmanship” when D&D poured wet concrete into forms sitting above shoring equipment that

had previously been faultily assembled.⁹² Philadelphia does not renew those same contentions on appeal, likely because it cannot defend the argument based on the policy's actual language and/or because of how *Allstate Ins. Co. v. Smith*, 929 F.2d 447 (9th Cir. 1991), treated a similar "flawed process" argument. There, rain damaged equipment inside a building because a contractor hadn't put a tarp on a roof. The insurer denied coverage on the ground that the construction "process" had been faulty. The court disagreed:

[I]t is difficult to imagine what covered "ensuing losses" could flow from a flawed process, because "any loss or damage caused" by the process would be excluded. In other words, if the broader "flawed process" interpretation is accepted . . . , the "ensuing loss" language is seemingly rendered meaningless.

Allstate v. Smith, 929 F.2d at 450.⁹³ Similarly, the court in *Narob Dev. Corp. v. Insurance Co. of North Am.*, 631 N.Y.S.2d 155 (1995),⁹⁴ denied coverage under an all risk builder's policy's defective workmanship exclusion for the collapse of a defectively built retaining wall "inasmuch as there was no collateral or subsequent damage or loss as a result of the collapse of the . . . wall."

⁹² CP 5838; 7/18RP 48-49.

⁹³ See also *Arnold v. Cincinnati Ins. Co.*, 688 N.W.2d 708, 719 (Wis. Supr. Ct. 2004) (holding that a faulty workmanship exclusion excluded coverage under homeowners policy for loss consisting of deterioration of caulking, but that "any loss caused to the interior of the house by rain in conjunction with the damaged caulking," was an "ensuing loss" not excluded by the faulty workmanship exclusion).

⁹⁴ *Leave to appeal denied*, 87 N.Y.2d 804 (1995).

Wright v. Safeco Ins. Co. of Am., 124 Wn. App. 263, 274-75, 109 P.3d 1 (2004), also shows how the “resulting loss” clause works. The court held that, unless some other policy provision excluded coverage for it, mold damage is covered under an “ensuing loss” exception to a defective construction exclusion if defective construction causes water damage that in turn causes mold. The “ensuing loss” exception did not restore coverage in *Wright*, but only because the insurance policy there separately excluded damage caused by mold.

In *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000 (1992), the court held there was no coverage because the insured’s claim was for the cost of repairing cracks in the foundation that resulted from earth movement due to poor construction and use of unsuitable fill material near the foundation. Because foundation cracking, earth movement, faulty workmanship, and faulty materials were not covered perils, the ensuing loss clause did not restore coverage that the exclusions excluded. Under the Philadelphia policy at issue in this case, collapse *is* a covered peril and covered cause of loss, and thus it is a “resulting loss” even when its cause is faulty workmanship.

Alton Ochsner Med. Fund v. Allendale Mut. Ins. Co., 219 F.3d 501 (5th Cir. 2000) (applying Louisiana law), cited at *Phil. Br. at 26-27*, does not support Philadelphia’s challenge to the trial court’s “resulting loss”

ruling. There, what the insured claimed was diminished structural integrity consisted of exactly the same cracking in the faultily-built foundation that constituted the faulty workmanship for which there was no coverage. Here, there was nothing faulty in the concrete slab structure, and it and the faulty shoring were separate things.

Nonetheless, without citation to the record or legal authority, Philadelphia asserts that “the faulty workmanship . . . in the shoring cannot be separated from the faulty workmanship that contributed to the collapse of the concrete [because i]t is one, inseparable system.” *Phil. Br. at 27*. This Court thus may and should disregard the assertion. RAP 10.3(a)(5) (Reference to the record must be included for each factual statement); *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *rev. denied*, 136 Wn.2d 1015 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”); *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (appellate courts decline to consider issues unsupported by cogent legal argument and citation to relevant authority).

Thus, as the trial court recognized, Vision is right. The shoring, which was equipment (CP 6588 (¶ 1)), had been faulty, but the properly-prepared *concrete slab* itself, which was *not* equipment, was separate from

the temporary shoring (as Philadelphia's expert had acknowledged⁹⁵), and its destruction (although not the shoring's destruction) was a covered "resulting loss" of property *other than* the shoring, even if the faulty workmanship exclusion would initially apply.

d. Collapse causation ceased to be a jury issue after the court ruled that the collapse was a "resulting loss".

Once the court ruled that the concrete slab collapse was a "resulting loss," coverage followed. The only finding left for the jury to make concerning causation had to do with damages, *i.e.*, which of Vision's claimed financial losses were caused by the concrete collapse or project delay, as opposed to something else. The court duly submitted the damages-causation issues to the jury under a pattern instruction to which Philadelphia did not except.⁹⁶ (The court had to, and did, CP 7334-35, give the jury instructions *about* collapse-causation for purposes of Vision's bad faith and Consumer Protection Act violation claims, to guide the jury's determination as to whether Philadelphia's coverage analysis, although incorrect, had been reached in good faith. *See Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988) (denial of coverage based on a reasonable

⁹⁵ CP 13075(199-200), 13115 (90).

⁹⁶ CP 7324; 10/15RP 1391.

but incorrect interpretation of the policy is not bad faith). The court's collapse causation instructions were expressly limited to those claims.⁹⁷⁾

- e. There is coverage because defective design and faulty workmanship were not the collapse's only causes; faulty shoring equipment was a cause, too.

A trial court's ruling may be affirmed on any ground supported by the record. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). The court did not rule whether the two "sole cause" exclusions Philadelphia relied on to deny coverage applied in the first place. But, because Philadelphia's engineering expert admitted that faulty shoring equipment was a cause of the collapse,⁹⁸ this court may affirm the trial court's ruling that Vision's collapse losses are covered because defective design and faulty workmanship were *not* the collapse's only causes.

2. Philadelphia's assignments of error with respect to coverage-related rulings are without merit.
 - a. Philadelphia fails to acknowledge or address under the correct standard of review the discretionary order in limine that precluded it from making "efficient proximate cause" or "sequence of events" arguments.

Philadelphia did not raise "efficient proximate cause" *or* "sequence of events" in its brief opposing Vision's motion in limine, which the court had tenable reasons for granting on April 3, 2008. Philadelphia raised

⁹⁷ The causation instruction Philadelphia's brief says it proposed, *Phil. Br. at 22*, would not have been given except with respect to the bad faith claims; Philadelphia does not assign error to entry of judgment for bad faith damages based on bad faith findings.

⁹⁸ CP 13070(50-52).

“efficient proximate cause” long after discovery was over, 14 weeks after the court entered the April 3 order in limine, and with respect to “sole cause” exclusions to which such analysis would not apply in the first place. It raised “efficient proximate cause” only because the court was about to hold it to its July 16 admission (CP 6492) that Vision has coverage if the slab collapse was caused partly by an unexcluded event, such as faulty equipment, as well as by excluded events.

Insofar as Philadelphia’s arguments on appeal fault the court for refusing to let it change its coverage theory from defective design and faulty workmanship being the *sole causes* of the collapse and there being no “resulting loss,” Philadelphia needed to assign error to and complain about the April 3 order in limine and/or the court’s failure to spontaneously vacate that order after Philadelphia later sought to reframe the causation issue in terms of “efficient proximate cause” starting July 18. But Philadelphia not only fails expressly to assign error to the April 3 order in limine, it also fails to acknowledge that orders in limine are reviewed for abuse of discretion. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). Nor does Philadelphia offer any argument that the court’s reasons for entering the April 3 order were untenable. *See Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007) (a court abuses discretion when it exercises it on untenable grounds

or for untenable reasons). Refusal by the trial court to *reconsider* the April 3 order on July 18 (or later) would also be subject to review for abuse of discretion, not error of law, *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004); *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001), *rev. denied*, 146 Wn.2d 1018 (2002), but Philadelphia again neither assigns error to a refusal to reconsider nor argues that the trial court lacked tenable reasons for not modifying its April 3 order.

While “[a] minor technical violation of RAP 10.3(g) will not bar appellate review where the nature of the challenge is perfectly clear and the challenged ruling is set forth and fully discussed in the appellate brief,” *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 774 n.6, 189 P.3d 777, *rev. denied*, 164 Wn.2d 1033 (2008), that is not what we have here. If Philadelphia is challenging the April 3 order in limine, its brief omits *any* discussion, much less a “full” discussion, of when, how, or why the court entered the order, and offers this Court no basis at all for holding that the court abused its discretion by entering the order in limine. In any event, Mr. Kirby’s testimony on March 6, 2008, that Philadelphia stands by the his January 2006 Coverage Determination, CP 13114 (86-87), was a tenable reason for the court’s decisions both to enter, and then to not allow Philadelphia to circumvent, its April 3 order in limine.

Philadelphia's assertion that "[n]o principle of law requires an insurer to set forth verbatim all provisions of a policy or risk the right to rely upon them," *Br. at 18*, both ignores the April 3 order in limine and is unsupported by citation to authority and may be disregarded for that reason. RAP 10.3(a)(6). If considered, the assertion is an incomplete and, for this case, an inaccurate statement of Washington law.

Vision never contended, and the trial court did not rule, that Philadelphia was bound by its January 2006 denial letters once it mailed the letters. But an insurer must have a valid reason for citing reasons for denying coverage that were not specified in its original denial letter. WAC 284-30-380(1) provides that an insurer may not deny a claim based on a specific policy exclusion unless reference to that exclusion is included in the denial. Although violation of that rule has been held not to estop an insurer from relying in coverage litigation on a policy provision other than one specified in its denial letter, *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wn.2d 55, 62-63, 1 P.3d 1167 (2000), traditional principles of estoppel may do so when (a) the insured will be prejudiced, and/or (b) when the insurer denied coverage in bad faith, *Id.*; *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 454 P.2d 229 (1969).⁹⁹ Both were true here: Vision

⁹⁹ Vision would agree that, in cases where an insurer, after denying coverage based on a policy exclusion, conducts a full and timely investigation and learns of facts based on which other policy provisions would exclude coverage, and timely so advises the insured

would have been prejudiced by a switch of coverage-denial theories, and the jury's verdict establishes that Philadelphia denied coverage in bad faith.

By the time Philadelphia tried to switch coverage-denial horses, Vision had spent two years litigating a "two sole causes" case and had devoted considerable effort and expense to developing evidence refuting Philadelphia's denial-letter position that the sole causes of the concrete collapse had been faulty workmanship and defective design in the shoring.¹⁰⁰ Vision had not needed to, and had not, prepared to dispute that faulty workmanship was not a cause of the collapse at all, or that deficient design was not a contributing factor at all, or that there was or was not a "predominant" cause. It manifestly would have been prejudicial to Vision if the court had allowed Philadelphia to change coverage theories after the close of discovery and after Vision had spent two years litigating over Philadelphia's stated ("two sole causes") grounds for denying coverage.

In *Hayden*, the insured did not allege either prejudice or bad faith, so the court held that estoppel did not apply. 141 Wn.2d at 63. Here, not

in writing, such that the insured can evaluate the new theory in consultation with appropriate experts and engage in discovery, the insurer may, indeed, avoid being limited to its originally stated grounds for denying coverage. But this was not such a case, because Philadelphia never claimed to have learned of new facts; it simply sought to switch theories after the close of discovery when court rulings made its stated grounds for denying coverage untenable.

¹⁰⁰ Philadelphia's engineering expert acknowledged during discovery that mismatching of equipment had been a cause of the collapse. CP 13070, 13072.

only was the prejudice prong of the *Hayden* rule satisfied but Vision *proved* bad faith five times over and was awarded damages specifically because of it. Basic principles of estoppel – not to mention Philadelphia’s failure to specify what new grounds it proposed to rely on, even in response to Vision’s motion in limine – gave the trial court in this case discretion to enter the April 3 order in limine.¹⁰¹ Philadelphia, *even on appeal*, does not argue that the order was entered for an untenable reason.

- b. Philadelphia was not entitled to demand that the court see how the jury resolved a dispute between “competing experts” over “predominant cause”.

Philadelphia complains that the April 3 order in limine order precluded it from raising unspecified defenses that had not been cited in its denial of coverage letters as grounds for denying coverage, *Br. at 14-15*, and asserts that it “should have [been] allowed . . . to argue its case under the policy’s ‘sequence of events’ and ‘directly and solely’ provisions,” *id. at 19*, but it does not even refer to “sequence of events” in its assignments or error, and neglects to explain why “sequence of events” would have made a difference. At pages 18-19 of its brief, Philadelphia argues that

¹⁰¹ In *Bosko*, 75 Wn.2d at 864, the court held that “if an insurer denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer’s failure to initially raise the other grounds.” Philadelphia has never contended that it did not know enough about the collapse to switch to an argument based on “efficient proximate cause” as a reason for denying coverage until July 18, 2008 (when it first raised the argument).

the trial court should have allowed it to “argue its case” because, even though it “contended that both inadequate design and faulty workmanship” were “*contributing factors*” [italics supplied because that had *not* been Philadelphia’s contention or “case”], the jury might have found, in light of how Philadelphia characterizes the causation dispute between Vision and *Berg*, that Philadelphia’s coverage position was *wrong* and defective design had been the predominant cause. In the event of such a verdict, Philadelphia seems to argue, it would have *prevailed* on coverage because the “resulting loss” clause would be rendered irrelevant by a jury finding that faulty workmanship was not a cause of the collapse.

That argument is as bizarre as it is convoluted, and not just because Philadelphia fails to explain why (or even assert that) the trial court lacked tenable reasons for entering the April 3 order in limine. At least six other fallacies and/or defects are embedded in the argument.

– Philadelphia did not tell the court what its “case” *was* under any theory except the “two excluded sole cause” theory announced in January 2006 and confirmed in March 2008.

– Even if Philadelphia’s characterization of the causation issues that Vision and Berg had been litigating were accurate, those parties settled and their issues were not tried.

– Philadelphia does *not* correctly characterize the Vision-Berg causation dispute. Vision and Berg’s dispute was over who had been *at fault* for the causes of the collapse, not what the “sole” or “predominant” cause(s) were. Thus, it is incorrect to assert that “competing experts disputed the predominate cause.” *Phil. Br. at 18*. Vision did not argue, for purposes of its dispute with Berg, that the collapse’s cause was only defective design and not faulty workmanship; it argued that any design defects and/or faulty workmanship and/or faulty equipment had been Berg’s fault and not D&D’s fault or its fault.¹⁰²

– Even if the trial court had not ruled there is coverage as a matter of law and even if the Vision-Berg dispute had been tried rather than settled, Philadelphia would not have been entitled to have the jury apply or make causation findings based on instructions given for that dispute. The court would have given a set of jury instructions expressly for the insurance coverage dispute, and would have had to frame any collapse-causation instructions in terms of the exclusionary clauses on which Philadelphia’s denial of coverage was based. The court would have instructed the jury that Philadelphia had the burden of proving that its stated grounds for denying coverage were true.

¹⁰² *See, e.g.*, CP 1552-54, 3615.

– Thus, even if the Vision-Berg dispute had been tried, the jury would not have made a finding that could have had the dual effect of vindicating Philadelphia’s denial of coverage even while rejecting Philadelphia’s reliance on both defective design and faulty workmanship exclusions. Philadelphia may be trying to argue otherwise, but it fails to cite any legal authority, and the notion is absurd.

– Philadelphia cannot make such an argument in light of its own engineering experts’ testimony that the shoring design was good enough to have borne the weight of the pour but for deficient workmanship in the shoring’s assembly.¹⁰³

Philadelphia ignores the fact that an insurer must state its position, WAC 284-30-330(13)¹⁰⁴, and bears the burden of proof when it relies on an exclusionary clause to deny coverage, as Philadelphia did. *McDonald*, 119 Wn.2d at 731. No decision holds that an insurer may insist on going to trial on the off chance that the jury will reject its position and make a finding based on which the insurer could claim it would have prevailed had it taken the position in the first place.

¹⁰³ 9/23RP 185-86; 10/09RP 1091-92, 1121-23, 1125-27, 1142-44.

¹⁰⁴ Under that regulation, it is an unfair practice for an insurer to “fail[] to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.”

- c. Philadelphia proposed to use efficient proximate cause analysis inappropriately.

The efficient proximate cause “rule” is applied when an insurer has denied coverage under an exclusion for losses “caused by” a certain type of event, and was adopted to make it more difficult, not easier, for an insurer to deny coverage when a covered peril causes both covered and excluded losses, and it is not used with respect to “*sole cause*” exclusions.

The efficient proximate cause rule *operates to permit coverage* when an insured peril sets other excluded perils into motion which “in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought”.¹⁰⁵ [Italics added].

Kish v. Ins. Co. of North Am., 125 Wn.2d 164, 169, 883 P.2d 308 (1994).

“Courts employ the efficient proximate cause rule *to find coverage* when the initial act is a covered one but somewhere in the chain of causation, an excluded act occurs.” *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 888, 91 P.3d 897 (2004) (italics added). The “efficient proximate cause” decisions involve cases in which insurers have denied coverage based on a “caused by” exclusion and there is a dispute whether the cause identified in the insurer’s denial letter was the main one. Here, Philadelphia denied coverage based on two *sole cause* exclusions. Philadelphia cites no decision applying “efficient proximate cause” analysis to determine

¹⁰⁵ Quoting *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).

whether an insurer properly denied coverage based on a *sole cause* exclusion. To the extent Philadelphia is trying to argue that “efficient proximate cause” applies to “sequence of events” language, such an argument also was not asserted in 2006 or 2007, was precluded by the April 3 order in limine, was never adequately articulated, and *remains* unarticulated because Philadelphia didn’t take a position as to what the “initiating” cause *was*.

Philadelphia argues, *Br. at 22*, that the trial court should not have concluded that there was a “resulting loss” until it got a jury finding that faulty workmanship was the efficient proximate cause. That is nonsense. At the risk of belaboring points already made, (a) *Philadelphia* asked the court to rule on resulting loss as a matter of law; (b) it was *Philadelphia’s* position that faulty workmanship was not only a cause, but the *sole cause* of the collapse along with defective design, such that, if there was a “resulting loss,” its reason for denying coverage collapsed, and Vision had coverage, and (c) *Philadelphia* argued below that “efficient proximate cause” applied not to the issue of whether there had been a “resulting loss,” but only to the question of whether a “sole cause” exclusion applied, which was illogical and is without supporting case authority. In making the “resulting loss” ruling, the court assumed Philadelphia was correct,

and that faulty workmanship *was* a cause¹⁰⁶; Philadelphia was not entitled to the benefit of an assumption that it was wrong.

- d. Philadelphia does not claim ever to have said what it contends the “efficient proximate” (or “predominant”) cause *was*.

“Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim” is an unfair claims handling practice. WAC 284-30-330(13). And when an insurer relies on exclusionary clauses to deny coverage, , as Philadelphia did, it bears the burden of proof in coverage litigation. *McDonald*, 119 Wn.2d at 731. Even if Philadelphia had timely argued that it was entitled to have the inquiry under its “sole cause” exclusions framed in terms of “efficient proximate” or “predominant” cause, it would still have been obliged say what it contends the predominant cause of the slab collapse *was*. Philadelphia does not claim to have done that. Even when its counsel tried desperately to reverse course on September 16, 2008, and argue that whether faulty workmanship been a cause of the collapse should be a question for the *jury*, he did not tell the court what Philadelphia would seek to prove at trial and would ask the jury to find.¹⁰⁷

¹⁰⁶ Because, if Philadelphia was wrong, and faulty workmanship was not a cause, it would have failed to carry the burden of proof it assumed by denying coverage based on the two “sole cause” exclusions cited in its denial letters.

¹⁰⁷ Philadelphia was obviously grasping for a new theory that involved some question of fact, but the court appreciated that it would be legally unsound and unfair to Vision to let

An appellate court need not consider an argument that was not made in the trial court. RAP 2.5(a); *Clapp v. Olympic View Pub. Co., L.L.C.*, 137 Wn. App. 470, 476, 154 P.3d 230 (2007), *rev. denied*, 162 Wn.2d 1013 (2008).

- e. An argument based on “sequence of events” language likewise was precluded by the April 3 order in limine, and Philadelphia has never said what its position under *that* policy clause is, either.

Philadelphia does not refer to a “sequence of events” argument in its assignments of error, but refers to that policy language in its brief. Vision advised the court at the April 3, 2008 hearing on its motion in limine that both Philadelphia’s vice president and its coverage expert had declined in their depositions to rely on the “initiates a sequence of events” clause as a ground for denying coverage.¹⁰⁸ Counsel for Philadelphia did not dispute that. It was only in response to a pointed inquiry from the court on April 3 that counsel for Philadelphia admitted that the same company vice president would testify at trial that the “initiates a sequence” clause *is* a reason the company denied coverage.¹⁰⁹ The court entered its April 3 order in limine after discovery had closed because of “what everybody’s been deposed on,” and to preclude Philadelphia from

Philadelphia assert inadequately explained new causation theories on the eve of trial and 23 weeks after entering its April 3 order in limine precluding new theories.

¹⁰⁸ 4/03RP 173-76.

¹⁰⁹ *Id.*, 176-77.

switching coverage-denial horses.¹¹⁰ Philadelphia has not expressly assigned error to that ruling, and does not even cite to CP 5723 in its brief. Philadelphia fails to acknowledge that the order in limine is subject to review for abuse of discretion or argue that the court lacked a tenable reason for entering the order. And Philadelphia does not claim to have informed the court what cause it contends “initiated” a “sequence of events.” *See* WAC 284-30-330(13). It fails to make a case that it was unfairly prevented from making “a case” against coverage based on a “sequence of events” clause.

For the reasons stated in subsections 1(a) through 2(e) above, this Court should reject Philadelphia’s first through third assignments of error.

- f. Philadelphia should not be permitted to make, in reply, arguments that belonged in its opening brief.

Based on how Philadelphia litigated, Vision wouldn’t be surprised if its reply brief offers arguments that belonged in an opening brief. The Court should not allow that. *ZDI Gaming, Inc. v. State Gambling Comm.*, 151 Wn. App. 788, 818, 214 P.3d 938 (2009).

3. Philadelphia’s “90 day period” argument was waived and is contrary to the terms of the extra expenses endorsement.

Philadelphia disclaimed objection to the court’s jury instruction on

¹¹⁰ 4/03RP 177-78; CP 5723 (¶ P).

the Extra Expenses Endorsement, CP 7323,¹¹¹ which told the jury what the relevant “period of time” was in the terms that the Endorsement itself used.¹¹² Instructions not excepted to are the law of the case. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001). Philadelphia waived any argument that the jury was misinstructed on, or awarded extra expenses based on, the wrong “period of time.”

As the court told the jury in the instruction to which Philadelphia did not except, the relevant “period of time” is bracketed by (a) the actual date of project completion and (b) the earlier of (i) the date scheduled for completion in the construction contract or (ii) the policy expiration date. CP 7323. There was no “date scheduled for completion in the construction contract.”¹¹³ The alternative (b)(ii) “policy expiration date” was October 1, 2006. CP 5955. Thus, one end of the relevant “period of time” was October 1, 2006. Philadelphia does not show that it argued below that there was insufficient evidence to support the jury’s implicit finding that the “period of time” was October 2006-May 2007, so the argument was not preserved for appeal. RAP 2.5(a). In any event, testimony did support a finding by the jury that actual project completion

¹¹¹ 10/15RP 1389.

¹¹² See CP 5985 (¶ 1(a)(1)) and 5986-87 (¶ 5(a)(1)-(2)).

¹¹³ 10/14RP 39, 69.

occurred in May 2007.¹¹⁴ Mr. Pederson, whose testimony Philadelphia quotes, *Br. at 35-36*, was an expert witness. Vision presented fact witness testimony through Stacy Kovats to support Pederson's stated that its claimed extra expenses because of the slab collapse were incurred during a period of time greater than the 90-day construction progress delay, and that Vision completed the project in May 2007.¹¹⁵ The jury was entitled to credit that testimony. CP 7308 (¶ 5).¹¹⁶

C. The Trial Court Had Authority to Award Vision \$50,000 for the Five CPA Violations Philadelphia Committed.

RCW 19.86.090 gave the trial court authority to award exemplary damages for CPA violations provided the awarded did not exceed three times actual damages or \$10,000. The jury found *five* CPA violations and awarded \$178,800. Philadelphia did not object to the verdict form on the ground that it failed to ask the jury to make awards specifically for each CPA violation it found.¹¹⁷ The \$50,000 award was \$10,000 each for five violations,¹¹⁸ or less than thrice the average for each violation ($\$178,800 \div 5 = \$35,760$). Any doubt about whether a court may award \$50,000 in

¹¹⁴ 10/14RP 70, 92.

¹¹⁵ *Id.* 69-73, 92.

¹¹⁶ The Endorsement did not require that the slab collapse and ensuing construction delay be the sole reason(s) why Vision incurred an extra expense; expenses need only have been "directly caused" by the collapse. *Philadelphia* proposed an instruction that "[i]f a loss due to delay resulted from the concrete collapse, it is not necessary that the entire loss was due to the concrete collapse." CP 7238.

¹¹⁷ 10/15RP 1396-97.

¹¹⁸ CP 7374-75, 7424, 9361.

exemplary damages for five violations with actual damages of \$178,800 should be resolved in Vision's favor in light of the bad faith findings and the directive in RCW 19.86.920 to construe the CPA liberally.

D. Philadelphia's Objections to the Trial Court's Fee Award Are Without Merit, Particularly in Light of Philadelphia's Bad Faith.

When an insurer's incorrect denial of coverage forces an insured to resort to litigation to obtain the benefits of an insurance policy, the insured is entitled to the make-whole remedy of an award of attorney fees and litigation expenses as well as to coverage. *Panorama Village Condo. Owners' Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 144-45, 26 P.3d 910 (2001). Jury findings that Philadelphia dealt with Vision in bad faith and caused it to sue Berg as well as to sue it for coverage, CP 7340-41, and all findings in the Order on Attorney's Fees, CP 12348-49, are verities because Philadelphia does not assign error to them. *Malarkey Asphalt*, 62 Wn. App. at 513.

It was not Vision's idea to engage in protracted and contentious litigation with Berg and its own insurer. Philadelphia joined in the stipulation consolidating all the slab-collapse cases.¹¹⁹ Philadelphia kept trying to raise new arguments whenever it lost a coverage-related ruling. Causation and fault issues became inextricably intertwined with coverage issues even after Vision settled with Berg, because of Philadelphia's

¹¹⁹ CP 999-1003, 1009-15.

decision to offer evidence of causation and fault in defending against the bad faith claims at trial. CP 12348. As the court concluded, the jury's findings that Philadelphia's bad faith caused Vision to sue Berg make the expense of successful claims against Berg recoverable from Philadelphia, and Philadelphia does not argue otherwise.

Vision, after being denied coverage and presented with the risk of litigating with a potentially underinsured Berg¹²⁰, had no reason to incur fees and expenses wastefully. In any event, the fees and expenses that Vision incurred litigating with Berg sought to mitigate the harm caused by Philadelphia's bad faith denial of coverage for Vision's slab-collapse losses, and courts allow a wide latitude of discretion to someone who, by another's wrong, is forced into a predicament where he or she is faced with a probability of injury or loss and makes choices in trying to mitigate the injury or loss. *Jaeger v. Cleaver Const., Inc.*, 148 Wn. App. 698, 714-15, 201 P.3d 1028, *rev. denied*, 166 Wn.2d 1020 (2009). Extending the principle of harm-mitigation law to fee applications in bad-faith cases against insurers, as courts in other jurisdictions do, *see, e.g., Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp.2d 284, 286 (S.D.N.Y. 2002) (applying California law); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 790 F. Supp. 1339, 1346 (E.D. Mich 1992); *Am.*

¹²⁰ See the separate briefing on the appeal by Berg's excess liability insurer, RSUI.

Motorists Ins. Co. v. Superior Court, 68 Cal. App.4th 864, 874-75 (Ct. App. Cal. 1998), Philadelphia should have been required, after the jury made the bad faith findings, and should be required on appeal, to show that Vision's fees and expenses were incurred unreasonably. Instead, Philadelphia resorted to criticizing Vision's counsel's timekeeping and billing format and its good-faith efforts to quantify work done on issues that were litigated but for which the trial court indicated it would not award fees.¹²¹ A trial court is given broad discretion in determining the reasonableness of a fee award and, in order to reverse such an award, it must be shown that the court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). The decision to award Vision 20% less than the amount it requested gave Philadelphia a more than generous discount. Vision is not challenging the trial court's exercise of discretion in that regard, but there is no sound reason to go further than the trial court did, because that would serve only to make Vision less than whole despite Philadelphia's bad faith denial of coverage.

Insofar as Philadelphia argues that it was error for the trial court to award any portion of the fees and expenses that were paid by Gemini because Gemini insured Vision and D&D for injury claims and thus did not pay for work Vision's counsel did with respect to coverage or bad

¹²¹ CP 10621-46, 10707-12, 10716-54, 10809-76, 11745-71, 11774-99, 11800-51, 10809-76, 12084-87, 12119-21, 12122-63, 12348-49.

faith claims against Philadelphia, *Phil. Br. at 40*, it is both mistaken and the collateral source rule defeats the argument. Workers injured in the collapse had not been at fault, so the issue of who would bear joint and several liability for their personal injuries turned on how causal fault for the collapse was apportioned among Berg, D&D, and Vision. *See* CP 1011 and RCW 4.22.070. Philadelphia's counsel unwisely sought at trial to defend the bad faith claims by maligning Vision and blaming it for the collapse,¹²² even though the company's witnesses admitted that an insured's fault is irrelevant to coverage under first-party insurance.¹²³ The court thus recognized and found that virtually all the work Vision's counsel had done on the case because of "fault" issues raised by the bodily injury claims was inextricably intertwined with work necessary to address issues created by Philadelphia's reliance on the "sole cause exclusions" and the consequent focus on collapse-causation issues.¹²⁴ As the court explained, "I think that most of the issues were absolutely intertwined, and they cannot be segregated out. . ."¹²⁵

The collateral source rule "enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor," and is "a

¹²² 9/23RP 37-43, 46-54, 58, 97.

¹²³ 9/29RP 564, 566, 600-01.

¹²⁴ CP 12348.

¹²⁵ 2/13/09RP 32-33.

means of ensuring that a fact finder will not reduce a defendant's liability because the claimant received money from other sources, such as insurance carriers." *Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006). Because Philadelphia denied coverage in bad faith, it is a tortfeasor. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 429 (1992). "Claims of insurer bad faith 'are analyzed applying the same principles as any other tort: duty, breach of that duty, and damages proximately caused by any breach of duty.'" *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 916, 169 P.3d 1 (2007).¹²⁶ Any concern that Vision stands to realize a double recovery of fees if Philadelphia has to pay fees for which Gemini paid is properly addressed between Vision and Gemini; the Vision-Berg settlement includes a mechanism for doing that. CP 6746 (§ 8).

E. Vision Is Entitled to An Award of Fees and Expenses for Appeal.

Pursuant to RAP 18.1(b), and under authority of *Equilon Enters., LLC v. Great Am. Alliance Ins. Co.*, 132 Wn. App. 430, 441, 132 P.3d 758 (2006), Vision requests an award of attorney fees and expenses for appeal.

¹²⁶ Quoting *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

V. VISION'S CROSS-APPEAL ASSIGNMENTS OF ERROR

1. The trial court erred by ruling, CP 7105, that the extra expenses endorsement excludes coverage for types of consequential loss not enumerated in it, and by excluding evidence of other types of delay losses claimed by Vision.

2. The trial court erred by refusing to award Vision 12% prejudgment interest on the jury's awards for extra construction loan interest and extra advertising/promotional expense.

VI. ISSUES PERTAINING TO CROSS-APPEAL ASSIGNMENTS OF ERROR

1. Does the Extra Expense Endorsement supplement or limit the policy's coverage for consequential financial losses?

2. (a) Was the \$327,607 award for extra construction loan interest an award for a "readily determinable" amount?

(b) Was the \$305,816 award for extra advertising expense an award for a "readily determinable" amount?

VII. ARGUMENT WITH RESPECT TO VISION'S CROSS-APPEAL

A. The Trial Court Erred in Ruling that The Policy's Extra Expenses Endorsement Operates to Exclude Coverage For Consequential Delay Losses Other Than The Types Listed in That Endorsement.

"'All Risk' insurance is a promise to pay . . . loss or damage from any cause whatsoever unless that cause is specifically excluded." *Frank*

Coluccio Const., 136 Wn. App. at 767. There was a “delay” exclusion in the policy, *see* CP 5977 (2a), but, as Philadelphia’s witnesses acknowledged in discovery, it does not exclude coverage for the “soft” losses due to delay that Vision has claimed; it excludes losses involving physical harm to property, and not financial consequences of physical events.¹²⁷ The trial court nonetheless interpreted the Extra Expenses Endorsement as a limitation on, instead of as a supplement to, the policy’s coverage for consequential losses, allowing Vision to recover only consequential losses of the types listed in the Endorsement at CP 5985 (¶ 1)(a). CP 7105. That was error because Philadelphia’s policy excludes coverage by specifying what is *not* covered (“we will not pay,” *e.g.*, CP 5976 (¶ B)(1)). *See Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990) (“the [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions”). The court should have held, as Vision argued,¹²⁸ that the Endorsement provides coverage of up to \$1 million more for certain kinds of extra expenses if and when Vision exhausts the \$12,500,000 coverage limit. If this Court concludes that the Endorsement is ambiguous, it must reverse under the rule that ambiguities in insurance policies are to be resolved in favor of the

¹²⁷ CP 6550-51, 6529-30, 13093 (71-73).

¹²⁸ CP 6177-78, 9/16RP 302, 305.

insured. *E.g., Sharbono v. Universal Underwriters Ins. Co.*, 136 Wn. App. 383, 161 P.3d 406 (2007), *rev. denied*, 163 Wn.2d 1055 (2008).

The trial court's ruling prejudiced Vision, because it led to the exclusion of evidence that Vision had lost several million dollars in profits due to project delay resulting from the concrete collapse.¹²⁹ This Court should remand for trial of the issue of whether lost profits that Vision was not permitted to prove are ones it incurred because of the slab collapse and project delay. This Court should hold that Vision will be entitled to seek an additional fees-and-expenses award if it obtains an additional recovery.

B. The Trial Court Erred in Not Awarding \$128,817 in Prejudgment Interest on the Jury's Award for Extra Construction Loan Interest Expense and Extra Advertising/Promotional Expense.

Prejudgment interest compensates for lost "use value" of the money when a party recovers an amount that was liquidated or readily determinable, *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). When the reasonableness of a claimed amount was not at issue, a dispute over whether the sums at issue are owed or not, or are owed only in part, does not make them sums on which prejudgment interest cannot be awarded. *E.g., Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 686, 15 P.3d 115 (2000). Philadelphia contested the amount of delay-loss damages at trial not by arguing that any of Vision's claimed

¹²⁹ CP 3347, 2259-60, 5528-38, 5542-43, 5550-55.

expenses were incurred or excessive, but rather by arguing that the wrong “period of time” had been used when deciding which general-ledger figures to add up.¹³⁰ When the jury found in Vision’s favor on the “period of time” issue, the expenses that accountant Paul Pederson had taken from Vision’s general ledger and invoices and added up¹³¹ came with the finding; the dollar amounts that the jury wrote in on Part I-2(a) and (f) of the Verdict Form, CP 7339, are Pedersen’s figures (*see second summary page in Ex. 379*). Thus, the \$327,607 award for extra loan interest expense and the \$305,816 award for extra advertising expenses were ones on which Vision should have been awarded prejudgment interest at 12%.

Even if this Court disagrees with Vision on this issue, Vision is entitled, if Philadelphia does not prevail on appeal, to 12% post-judgment interest on the jury’s entire award, retroactive to October 21, 2008. RCW 4.56.110(4) (“In any case where . . . a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date [of] the verdict”). The Court’s decision should so provide.

C. Request for Fee Award if Vision Prevails on Its Cross-Appeal.

Vision requests that this Court award it attorney fees and expenses for its cross-appeal. RAP 18.1; *Panorama*, 144 Wn.2d at 144-45.

¹³⁰ CP 7372-73, 7409-10.

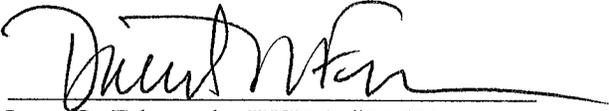
¹³¹ See CP 7362-64 and 10/1RP 831.

VIII. CONCLUSION

For the reasons explained above, the judgment against Philadelphia should be affirmed, but the case should be remanded for a new trial on the issue of whether Vision incurred the consequential losses that the trial court did not permit it to prove because of its ruling on the extra expenses endorsement, and for amendment of the judgment to include an additional \$128,817 in prejudgment interest. Vision should be awarded attorney fees and expenses incurred on appeal.

RESPECTFULLY SUBMITTED this 20th day of November, 2009.

WILLIAMS, KASTNER & GIBBS PLLC

By 

Jerry B. Edmonds, WSBA #05601

Daniel W. Ferm, WSBA #11466

Attorneys for Respondents Vision One, LLC,
Vision Tacoma, Inc. and D&D, Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 20th day of November, 2009, I caused a true and correct copy of the foregoing document, "Vision Respondents' Brief In Response to Philadelphia Indemnity's Appeal and In Support of Their Cross-Appeal," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

Counsel for Appellant Philadelphia Indemnity Ins. Co.:

J. Dino Vasquez, WSBA #25533
Thomas D. Adams, WSBA# 18470
Celeste M. Monroe, WSBA #35843
KARR TUTTLE CAMPBELL
1201 3rd Ave Ste 2900
Seattle WA 98101-3028

Counsel for Appellant RSUI:

Michael D. Helgren, WSBA #12186
David R. East, WSBA #31481
Barbara H. Schuknecht, WSBA #14106
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University St Ste 2700
Seattle WA 98101-3143

Counsel for Respondent Berg Equipment & Scaffolding Co., Inc.:

Daniel F. Mullin, WSBA #12768
Tracy A. Duany, WSBA #32287
Kiera M. Silva, WSBA #34897
MULLIN LAW GROUP PLLC
315 5th Ave S Ste 1000
Seattle WA 98104-2682

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
NOV 23 PM 2:03
BY _____
DEPUTY

Counsel for Respondent Berg Equipment & Scaffolding Co., Inc.:

Peter T. Petrich, WSBA #08316

ATTORNEY AT LAW

920 Fawcett Ave

Tacoma WA 98402-5606

Dennis J. Perkins, WSBA #05774

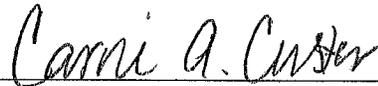
ATTORNEY AT LAW

1570 Skyline Tower

10900 NE 4th St

Bellevue WA 98004-5873

DATED this 20th day of November, 2009, at Seattle, Washington.



Carrie A. Custer