No. 85350-9

SUPREME COURT OF THE STATE OF WASHINGTON
(Court of Appeals No. 38411-6-II)

VISION ONE, LLC and VISION TACOMA, INC.,

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondent.

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ANSWER TO PETITION FOR REVIEW

Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Mountain Monroe, WSBA #35843
KARR TUTTLE CAMPBELL
1201 Third Ave., Ste. 2900
Seattle, Washington 98101
Telephone: 206.223.1313
Facsimile: 206.682.7100

Attorneys for Respondent Philadelphia
Indemnity Insurance Company

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INTRODUCTION

Vision One, LLC and Vision Tacoma, Inc. ("Vision") seek discretionary review of *Vision One v. Philadelphia Indem. Ins. Co.*, 158 Wn. App. 91, 241 P.3d 429 (2010)("*Vision One*"). Philadelphia Indemnity Insurance Company ("Philadelphia") asks that the Petition for Review be denied.

The *Vision One* court reversed and remanded because the superior court failed to allow the jury to determine the efficient proximate cause of the loss and misinterpreted the "resulting loss" exception to the policy's faulty workmanship exclusion. The *Vision One* court correctly applied settled principles of insurance law in analyzing the errors of the superior court.

For the reasons that follow, the rulings and analysis of *Vision One* do not conflict with another decision of this Court or the Court of Appeals and nothing in *Vision One* raises an issue of substantial public interest. Because the criteria set forth in RAP 13.4(b)(1-2, 4) have not been met, this Court should decline discretionary review.

STATEMENT OF THE CASE

The facts and procedural background of the case are summarized in *Vision One,* 158 Wn. App. at 95-100.

RESPONSE TO ISSUES RAISED BY PETITIONER

A. *Vision One* does not conflict with any decision of this Court or the Court of appeals.

Vision argues that *Vision One* conflicts with *Sprague v. Safeco Ins. Co.*, 2010 Wn. App. LEXIS 2419 (2010), a recent decision of the Court of Appeals discussing "ensuing loss" coverage. (Pet., pg. 7-9). Vision makes too much of *Sprague*.[1] It is a fundamentally different case and Vision's efforts to link it analytically to *Vision One* is unpersuasive.

In *Sprague*, the parties brought cross-motions for summary judgment contesting the meaning of the terms "ensuing loss" and "collapse" in a homeowner's insurance policy. It was undisputed that certain "fin walls" supporting the homeowner's multi-level deck had decayed due to rot and defects in construction. The policy excluded coverage for loss caused by those perils but provided that "any ensuing loss not excluded is covered." Although no actual collapse had occurred, the insurer's consultant found there was "substantial impairment of structural integrity" which left the deck in a state of imminent collapse.

The superior court granted summary judgment for the insurer based on the rot and defective construction exclusions. On appeal, the *Sprague* court reversed in the policyholder's favor. The *Sprague* court

[1] As of the date this Answer is filed, a motion for reconsideration is pending in *Sprague* and the case has not been published.

held (as a matter of first impression in Washington) that in the absence of a policy definition, "collapse" means the "substantial impairment of structural integrity."[2] The *Sprague* court also ruled that "collapse" was an "ensuing loss" because the policy did not exclude it.

In contrast, *Vision One* arose from a jury trial involving coverage under a Builders Risk commercial policy for loss associated with the collapse of a concrete slab during a construction project. Unlike *Sprague*, Vision and Philadelphia disputed the cause of the collapse (but not the fact that a collapse had occurred.) Vision argued that faulty equipment was a cause while Philadelphia contended that faulty workmanship or defective design, both excluded causes of loss, caused the collapse. However, the faulty workmanship exclusion does not bar coverage if there is "resulting loss" attributable to a covered cause of loss. 158 Wn. App. at 106.

According to Vision, the *Sprague* court's holding that a collapse is an "ensuing loss" cannot be reconciled with the *Vision One* court's holding that the slab collapse is not a resulting loss. Vision is wrong for several reasons:

First, *Sprague*'s "ensuing loss" holding may be attributed at least in part to the insurer's interpretation of its own policy. The *Sprague* court

[2] The pre-2003 policies at issue in *Sprague* did not define "collapse." Subsequent policies defined the term to mean actually falling down.

noted this observation by the insurer's senior claim handler:

> It appears from my review of the [Pacific] report that the conditions of significant structural impairment and imminent collapse existed prior to the point in time that the Safeco policy forms changed and defined the term collapse.
>
> Will await coverage counsel's recommendation, but I suspect that this loss will be covered.

2010 Wash. App. LEXIS 2419 at 8. The *Sprague* court had no reason to highlight the insurer's internal coverage assessment if the admission did not support the holding.

Second, *Sprague* and *Vision One* are not in conflict. *Sprague*'s "ensuing loss" provision differs literally and functionally from the "resulting loss" provision at issue here.

In *Sprague*, the policy lists certain excluded perils (including "loss caused by ... wet or dry rot;") followed by the statement:

> "Under items 1. Through 5., any ensuing loss not excluded is covered."

2010 Wash. App. 2419 at 4. From this language, the *Sprague* court held:

> "the losses that are faulty construction and rot are not covered, but the 'ensuing losses,' those that result from such faulty construction or rot, are covered because such an ensuing loss is not excluded elsewhere in the policy."

2010 Wash. App. 2419 at 6. (emphasis added).

The "ensuing loss" provision in *Sprague* operates like the type **distinguished** by the *Vision One* court, a type that excludes the cost of

repairing faulty workmanship but covers the loss resulting directly from faulty workmanship. 158 Wn. App. at 110. In contrast, the provision at issue in *Vision One*:

> "excludes damage *resulting from* faulty workmanship but provides coverage when 'loss caused by any of the covered causes of loss results' from faulty workmanship.... In other words, this policy covers damage resulting from an independent covered cause but does not cover damage resulting directly from faulty workmanship. ..... "

158 Wn. App. at 110. (citations omitted).

The validity of the distinction drawn by the *Vision One* court should be apparent. By the terms of the policy, a resulting loss must follow from a covered cause of loss. Logically, the covered cause must be independent of the underlying faulty workmanship or it would be a covered cause in the first place. The "ensuing loss" provision in *Sprague* lacks this textual precondition and thus may lend itself to a different, perhaps broader, interpretation. In any event, because *Vision One*'s "resulting loss" provision differs from Sprague's "ensuing loss" clause in phrasing and effect, there is no conflict justifying review by this Court.

Third, it makes little sense to argue that *Sprague* and *Vision One* conflict when efficient proximate cause has yet to be decided in *Vision One*. If a jury finds that defective design is the cause of loss then the scope of "resulting loss" coverage under the faulty workmanship

exclusion is moot. There is no possibility of "resulting loss" coverage through the defective design exclusion because there was no "resulting fire or explosion" associated with the collapse.

In fact, it is difficult to foresee how "resulting loss" will figure into the retrial at all. Even if faulty workmanship is found to be the efficient proximate cause, the *Vision One* court correctly rejected Vision's characterization of the shoring structure as separate and distinct from the slab it was meant to support:

> In supplemental briefing, Vision argues that the faulty workmanship in the shoring structure was the initial excluded period, the collapse of the shoring structure was an independent covered peril, and the damaged concrete slab was a resulting loss. We disagree. If faulty workmanship was the initial excluded peril, then **the simultaneous collapse of the shoring and concrete slab was the loss.** Had the collapse triggered a secondary covered peril, such as a fire, then damage caused by the fire would be covered as a resulting loss.

158 Wn. App. 108 n.3. (emphasis added). The *Vision One* court further explained why resulting loss coverage does not apply in this case:

> In short, the fact that the defective shoring structure allegedly damaged separate, non-defective property does not automatically trigger the resulting loss provision in this case. As discussed above, the resulting loss provision covers damage resulting from an independent covered peril, such as fire. If faulty workmanship in the shoring installation caused the shoring structure and concrete slab to collapse, then the damage resulted directly from faulty workmanship, not from an independent covered peril. Therefore, we hold that the concrete slab collapse does not

> qualify as a resulting loss under the resulting loss exception to the faulty workmanship exclusion in Vision's insurance contract.
>
> Thus, even if a jury determines that faulty workmanship caused the collapse, the resulting loss exception does not apply. .....

158 Wn. App. at 110-11. Vision offers little to challenge this reasoning. Vision makes creative use of *Sprague* but as discussed earlier *Sprague* is a much different case. The "ensuing loss" clause in *Sprague* bears little resemblance to the "resulting loss" provision at issue here in terms of the language used, the trigger imposed, and the overall structure. Moreover, the insurer in *Sprague* essentially admitted the loss should be covered.

Similarly, Vision's attempt to conjure up a conflict between *Wright v. Safeco Ins.*, 124 Wn. App. 263, 109 P.3d 1 (2004) and *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992) is not persuasive. In fact, the *Vision One* court cites *Wright* and *McDonald* and their basic principles to frame the decision. 158 Wn. App. at 107-08.

Vision argues that under *Wright*, the collapse of the slab should be covered here because collapse was not specifically excluded and under *McDonald*, a "reasonable interpretation" of the "resulting loss" provision would find coverage for the slab collapse even though the "loss of the faultily-erected shoring" is not covered. (Pet., pg. 9-10). Vision also complains that the *Vision One* court re-wrote the "resulting loss" provision

to require that the resulting loss arise directly from a separate and independent peril. (Pet., pgs. 11-13). Vision's arguments lack merit.

Like *Wright* and *McDonald*, the *Vision One* court evaluated "resulting loss" issues based on the policy language used to describe it and the context within which it appears. As this Court held in *McDonald*:

> The ensuing loss clause may be confusing, but it is not ambiguous. Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered. The uncovered event itself, however is never covered.

119 Wn.2d at 734. *Vision One* embraces this principle fully.

Indeed, the requirement that "resulting loss" arises from a peril that is independent of the excluded peril is grounded in the policy language. As discussed earlier, "resulting loss" arises when a "Covered Cause of Loss" emerges from or in the course of an excluded peril such as faulty workmanship. A "Covered Cause of Loss" must be independent or it would be subsumed within the same excluded peril. In using the terms "directly" and "independent" the *Vision One* court was describing the mechanism by which "resulting loss" coverage arises, not restricting its scope or adding a new condition of coverage.[3]

[3] However, the structure of the policy places at least a conceptual limitation on resulting loss coverage. As in *McDonald*, the resulting loss provision here is embedded within a set of exclusions. Under *McDonald*, this is important context and makes it "difficult to

Vision's Petition largely sidesteps the fundamental error of the superior court. The *Vision One* court reversed and remanded because the superior court misapplied well-settled principles of efficient proximate cause to the parties' competing theories on the cause of loss. The superior court misstated the efficient proximate cause rule then compounded the error by ruling that the collapse was a "resulting loss." In so ruling, the superior court effectively forced a determination that faulty workmanship was the cause of the loss (because "resulting loss" cannot otherwise arise.) The determination of cause, however, should have been left to the jury. After summarizing the efficient proximate cause principles established in *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 656 P.2d 1077 (1983) and other decisions of this Court,[4] the *Vision One* court held:

> Thus, the cause of the shoring and concrete slab collapse remains in dispute and the parties have consistently argued that multiple perils, some covered and some excluded, caused the collapse. Accordingly, we reverse the trial court's resulting loss ruling and remand for a jury to determine which of the alleged causes – faulty workmanship, defective design, and/or faulty equipment caused the collapse. If the jury finds that multiple causes

---

reasonably interpret the ensuing loss clause ... to be a grant of coverage." 119 Wn.2d at 734.

[4] Among other cases, the *Vision One* court also relied upon: *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 917 P.2d 116 (1996); *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 883 P.2d 308 (1994); *McDonald v. State Farm*, supra; *Safeco Ins. Co. v. Hirschmann*, 112 Wn.2d 621, 773 P.2d 413 (1989); and *Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 725 P.2d 957 (1986).

> contributed to the collapse, then it must determine which cause was the predominant or efficient proximate cause.

158 Wn. App. at 105-06.

For the reasons discussed above, the *Vision One* court correctly applied long-standing principles of Washington insurance law in evaluating the superior court's handling of the causation theories and policy provisions of central importance in this case. The *Vision One* court's analysis is unaffected by *Sprague* and fully consistent with prior decisions of this Court and the Court of Appeals. Accordingly, RAP 13.4(b)(1-2) is not a basis for the acceptance of discretionary review.

B. *Vision One's* discussion of "resulting loss" does not raise an issue of substantial public interest.

Vision argues that there is a substantial public interest at stake in determining whether *Vision One* correctly interpreted the "resulting loss" coverage in light of *Sprague*'s recent "ensuing loss" ruling. (Pet., pg. 14-15). Vision's argument is unpersuasive.

Philadelphia's policy may be "pretty standard," as Vision mentions, but that proves nothing. Commercial property insurance policies are often based on standard forms for the sake of uniformity and consistency. The question is whether *Vision One's* "resulting loss" holding raises an issue of special importance and clearly it does not.

Vision One is fundamentally about Washington's efficient proximate cause principles and the roles of the judge and jury in applying them. The "resulting loss" issues arose in this context and were resolved on the basis of established precedent and the specific policy language at issue. *Sprague* and *Vision One* do not conflict precisely because their different phrasing causes them to operate differently. Juxtaposing *Sprague* and *Vision One* raises no issue of substantial public interest sufficient to justify review under RAP 13.4(b)(4).

C. *Vision One's* discussion of efficient proximate cause does not raise an issue of substantial public interest.

Vision contends that there is a substantial public interest raised by the *Vision One* court's reliance on Washington's efficient proximate cause rule. (Pet., pg. 15-18). The argument, a bit labored, comes down to the idea that the *Vision One* court "created a new contract" for the parties. Vision argues that by directing the superior court to follow the efficient proximate cause rule it effectively broadens Philadelphia's policy exclusions beyond their intended reach and that efficient proximate cause principles should not apply in the face of narrower exclusionary language.

Vision's premise is wrong. The "directly and solely" language in Philadelphia's policy does not narrow the policy exclusions as Vision contends. Moreover, Vision previously urged the superior court to depart

from the efficient proximate cause rule and now the case has to be retried.[5] That said, if Vision wishes to argue the point, it is free to do so following remand. At present however, there is nothing for this Court to review. The *Vision One* court did not consider, much less resolve, whether the efficient proximate cause rule should yield to exclusionary language alleged to be narrower than the "predominant cause" standard articulated in *Graham*, *Villella*, *Kish*, and other decisions of this Court. The issue was not briefed and decided by *Vision One* court. It is not ripe for review and cannot be considered an issue of substantial public interest under RAP 13.4(b)(4).

D. Vision's issues concerning the Extra Expense Endorsement do not warrant review.

Vision asks this Court to accept review and determine whether lost profits are recoverable under the policy's Extra Expense Endorsement, a subject raised by Vision's cross-appeal. Alternatively, Vision asks this Court to remand to the Court of Appeals for a ruling. (Pet., pg. 18-19).

Vision's argument should be rejected. Vision has not even attempted to justify review by this Court under the criteria set forth in

[5] At the *Vision One* court noted, the "directly and solely" clause came up in the course of pretrial arguments over proposed jury instructions. 158 Wn. App. at 97-98. The trial court did not rule on the meaning and effect of the "directly and solely" provision. The extent to which it influenced the superior court's instructions on cause, if at all, is unknown.

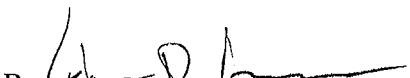
RAP 13.4(b). Similarly, remand to the Court of Appeals is unwarranted. The *Vision One* court expressly declined to reach damages issues raised by the appeal because the case has been remanded for a new trial. 158 Wn. App. at 111. Issues associated with the Extra Expense Endorsement, and other damages issues, should be addressed in the first instance to the superior court in the context of the evidence and motion practice that shape the new trial.

CONCLUSION

Philadelphia asks that Vision's Petition for Review be denied.

DATED this 17th day of December, 2010.

KARR TUTTLE CAMPBELL

By 

Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Mountain Monroe, WSBA #35843

Attorneys for Respondent Philadelphia Indemnity Insurance Company

Certificate of Service

I hereby certify that on the 17th day of December, 2010, I caused to be served a copy of Philadelphia's *Answer to Petition for Review* via E-Mail:

Jerry Edmonds Teena Killian Williams, Kastner & Gibbs PLLC Two Union Square 601 Union Street, Ste. 4100 Seattle, WA 98101 Tel: 206.628.6600 Fax: 206.628.6611 jedmonds@williamskastner.com tkillian@williamskastner.com ***Counsel for D&D, Vision One, and Vision Tacoma***	Daniel F. Mullin Tracy A. Duany Mullin Law Group PLLC 101 Yesler Way, Ste. 400 Seattle, WA 98104 Phone: 206.957.7007 dmullin@mullinlawgroup.com tduany@mullinlawgroup.com ***Counsel for Berg Equipment & Scaffolding, Inc.***
Dennis J. Perkins Attorney at Law 1570 Skyline Twr. 10900 NE 4th St. Bellevue, WA 98004 Phone: 425.455.5882 dperklaw@seanet.com ***Counsel for Berg Equipment & Scaffolding Co., Inc.***	Michael D. Helgren Barbara H. Schuknecht David A. Linehan McNaul Ebel Nawrot & Helgren 600 University St., Ste. 2700 Seattle, WA 98101-3143 Phone: 206.467.1816 MHelgren@mcnaul.com BSchuknecht@mcnaul.com DLinehan@mcnaul.com ***Counsel for RSUI Indemnity Company***
Charles K. Wiggins Wiggins & Masters PLLC 241 Madison Ave. N. Bainbridge Island, WA 98110 Phone: 206.780.5033 Charlie@appeal-law.com ***Counsel for RSUI Indemnity Company***	

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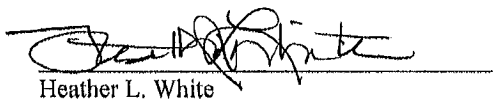

Heather L. White

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Thomas D. Adams, WSBA #18470
206-223-1313

KARR ▾ TUTTLE ▾ CAMPBELL

Heather White
Legal Secretary
1201 3rd Avenue, Suite 2900
Seattle, Washington 98101
- direct 206-224-8190
- main 206-223-1313
- fax 206-682-7100

Visit our website www.karrtuttle.com

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