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SUPREME COURT OF THE STATE OF WASHINGTON

MAX B. SPRAGUE and KRISTA SPRAGUE,

Respondents

v.

SAEBCO INSURANCE COMPANY OF AMERICA,

Petitioner.

FILED
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STATE OF WASHINGTON

SPRAGUES' ANSWER TO PETITION FOR REVIEW

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I. Introduction

While the Spragues disagree with almost everything contained in Safeco's Petition For Review, the Spragues agree that the proper interpretation of an ensuing loss clause to a construction defect exclusion is an issue of substantial public interest.

This Court has already accepted review of *Vision One, LLC v. Philadelphia Indemnity Ins. Co.*¹ In *Vision One*, Division II of the Court of Appeals held there was no coverage under an ensuing loss clause to a construction defect exclusion because, in the Court of Appeals' judgment, the collapse loss was not "separate and independent" enough from the construction defects that caused the collapse.² The Spragues submit that Division II got it wrong. And while there are textual differences between the policies at issue in *Vision One* and *Sprague*,³ this Court should accept review of *Sprague v. Safeco* as well to make clear the proper interpretation of ensuing loss clauses within construction defect exclusions and to resolve related interpretation issues.

¹ 158 Wn. App. 91, 241 P.3d 429 (2010), *review granted*, *Vision One, LLC v. Philadelphia Ind. Ins. Co.*, 171 Wn.2d 1001, 249 P.3d 182 (March 1, 2011) (Table, No. 85350-9).

² 158 Wn. App. at 107-08.

³ *Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 241 P.3d 1276 (2010).

In short, while the Spragues believe that Division I of the Court of Appeals got it right in *Sprague v. Safeco*, they agree for the above reasons that grounds exist for accepting review of this case.

II. Identity of Respondents

Respondents are Max B. Sprague and Krista Sprague. The Spragues were the Appellants in the Court of Appeals and the Plaintiffs in Superior Court.

III. Counterstatement of Issues Presented for Review

1. Whether an all-risk policy that does not exclude collapse but identifies "collapse" as a type of peril necessarily covers the loss of collapse?
2. If the policy covers collapse, does collapse remain covered when it results or ensues from construction defects, when the construction defect exclusion provides that ensuing losses not excluded by the policy are covered?

IV. Counterstatement of the Case

A. Background Facts

Although the *Sprague v. Safeco* dispute hinges on the interpretation of Safeco's policy language and is therefore a legal issue, Safeco omits several important facts (and, frankly, misrepresents others).

1. The Spragues discover decay in the walls supporting their exterior decks

Safeco continues to take liberty with the facts by suggesting that the Spragues knew of decay in the walls supporting their exterior decks years before they actually did. The Spragues' decks are supported by six tall piers or "fin walls," thin walls that look like fins that stand apart from the main structure of the home and run from concrete pads on the ground up to the bottom deck and continue through to the middle deck.⁴ See photos at CP 14. Two of the middle fin walls continue up to a smaller third deck.⁵ The fin walls are covered with EIFS, Exterior Insulating and Finishing System, a foam and stucco cladding also known by the brand name "Dryvit."⁶

The Spragues' discovered decay in their fin walls in March 2008, when a contractor who was making other, unrelated repairs for the Spragues suggested that they put vents in the fin walls as a precaution.⁷

⁴ CP 13, ¶ 2.

⁵ *Id.*

⁶ *Id.*

⁷ CP 15 at ¶ 1. The unrelated repairs addressed conditions discovered in 2007, when the Spragues found rot on the lower level exterior wall at a bay window feature, referred to by the Spragues as "the column." CP 13 at ¶ 3. The column feature is part of the exterior wall of the original house that was built in 1978 by the Spragues' predecessors and extends from the bottom foundation to the top floor in approximately the center of the western face of the house. *Id.* The decks attach to the house on the western face. *Id.* But the deck piers or fin walls at issue in this case are

When the contractor made openings in the fin walls to install vents in March 2008, he discovered severe decay.⁸ The Spragues notified Safeco of the discovery of severe rot in the fin walls soon thereafter, in early April 2008.⁹

2. Safeco's investigation and (initial) policy interpretation

Safeco also fails to acknowledge how its senior adjuster initially concluded that the Spragues' claim was covered, because collapse was a covered ensuing loss.

After Safeco's initial coverage denial in July 2008, Krista Sprague requested that Safeco consider the collapse coverage under prior policies.¹⁰ In response, Safeco assigned Senior Analyst and Claim Representative Deborah Lee to the claim.¹¹

In September 2008, Safeco sent Pacific Engineering Technology (PET) back to conduct a more in-depth examination of the fin walls.¹² At

not directly attached to the western face of the house and are 3 ½ feet away from the house at their nearest point. *Id.* When the Spragues discovered the rot at the bay window feature, they submitted a claim to Safeco and the claim was denied. *Id.* The Spragues hired a contractor to repair the rot at their own cost and to re-do the entire connection and flashing between the decks and the western face of the house. *Id.* None of this work impacted the fins walls at all. *Id.*

⁸ CP 15 at ¶ 1.

⁹ *Id.*

¹⁰ CP 15 at ¶ 3.

¹¹ *Id.*

¹² *Id.*

that second investigation, PET's engineers warned Krista Sprague to stay off the decks and PET also directed a contractor to install shoring to hold up the decks.¹³

In a claim file note under the title "Coverage Analysis," Safeco's adjuster, Ms. Lee, recorded her tentative conclusion regarding coverage under the pre-September 2003 policies:

Collapse coverage is neither excluded nor added as an additional coverage yet. Again, if collapse occurred as an ensuing loss to the faulty construction exclusion, coverage would have been triggered.¹⁴

Ms. Lee then told Ms. Sprague that if the collapse damage occurred prior to a 2003 change in the policy language, the Spragues' loss would be covered by Safeco, because collapse was not excluded in the pre-2003 policies.¹⁵

Safeco's engineers, PET, wrote a report for Safeco on October 14, 2008 and concluded that the deck piers were in a state of collapse and that the collapse occurred before September 2003:

To summarize our findings, it is our opinion that the decayed wood posts in each of the six piers that support the multi-level deck cause a state of **imminent collapse** and have **substantial impairment of structural integrity**. It is

¹³ *Id.* at ¶ 4.

¹⁴ CP 168.

¹⁵ CP 16 at ¶ 5.

also our opinion that said conditions first occurred *prior* to September 2003.¹⁶

PET also concluded that the cause of the collapse was inadequate flashing at the deck piers and other construction defects.¹⁷ Ms. Lee then wrote the following in Safeco's claim file notes:

It appears from my review of the PET 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...¹⁸

Safeco's contractor estimated the cost of repair to be \$282,980.¹⁹ Ms. Lee promised Krista Sprague that the insurer would review the claim another time²⁰ and then internally requested that reserves be increased to \$291,934 based on the likelihood of coverage.²¹

3. Safeco denies the claim

After a delay from October 2008 through February 2009, Safeco issued a longer, more detailed claim denial letter on February 26, 2009.²² Safeco's claim denial letter says nothing about Safeco's new argument

¹⁶ CP 106 (emphasis added).

¹⁷ CP 109.

¹⁸ CP 171.

¹⁹ CP 117.

²⁰ CP 16 at ¶ 6.

²¹ CP 119.

²² CP 121-35.

advanced in its Petition For Review to this Court – that a loss must be sufficiently “separate and independent” from the excluded cause of loss to be covered as an ensuing loss. After receiving Safeco’s claim denial letter, the Spragues filed suit the next day.²³

V. Argument

A. The Proper Interpretation of the Ensuing Loss Clause is an Issue of Substantial Public Interest.

The Spragues agree that the proper interpretation of the ensuing loss clause as it applies to a construction defect exclusion is an issue of substantial public interest. (Even though Safeco took the exact opposite position in the Court of Appeals when Safeco thought it served its interests to do so.)

The Spragues submit that property owners across our State have a substantial interest enforcing the terms of insurance policies that provide insurance coverage for losses resulting from construction defects. Many catastrophic losses – explosions, fires, collapse losses in fact do not occur but for inadequacies in how a building, structure or piece of equipment is designed or actually constructed. Property owners buy insurance to protect themselves from such catastrophic losses. The proper interpretation of the resulting loss clause to a construction defect exclusion therefore has broad significance to the policy holding public.

²³ CP 3.

The Spragues have therefore been consistent in recognizing the broad significance of the case to the public.²⁴

B. Division II Got It Wrong in *Vision One*.

This Court has already accepted review of *Vision One LLC v. Philadelphia Indemnity Ins. Co.*²⁵ In *Vision One*, the Court of Appeals, Division II got it wrong and improperly created an additional hurdle to insurance coverage. In *Vision One*, Division II held that a collapse loss caused by defective construction was not covered, because the collapse was not sufficiently “separate and independent” enough from the excluded cause of loss.²⁶ The *Vision One* decision creates confusion over resulting loss coverage, and gives insurance companies enough legal cover to deny meritorious claims by asserting that the loss is not “separate enough” or “independent enough” – even though insurers do not actually use the words “separate and independent” as limitations in their policies.

²⁴ See Spragues’ Opening Brief to the Court of Appeals at p. 30. But Safeco has been inconsistent, dismissing the public importance of the case in the Court of Appeals (see Brief of Respondent Safeco to the Court of Appeals at pp. 37-38), but changing its position before this Court in Safeco’s Petition For Review.

²⁵ 158 Wn. App. 91, 241 P.3d 429 (2010), review granted, *Vision One, LLC v. Philadelphia Ind. Ins. Co.*, 171 Wn.2d 1001, 249 P.3d 182 (March 1, 2011) (Table, No. 85350-9).

²⁶ 158 Wn. App. at 107-08.

In *Sprague v. Safeco*,²⁷ Division I of the Court of Appeals got it right. Division I made the common-sense ruling that an all-risk policy that does not exclude collapse should be interpreted to cover collapse. And when collapse results from construction defects, then collapse is a covered resulting loss under policy language that promises to cover any resulting loss that is not excepted or excluded by the policy.

In short, this Court should reverse the *Vision One* decision from Division II and this Court should affirm the *Sprague v. Safeco* decision from Division I.

C. Division I's Decision In *Sprague v. Safeco* Is Consistent With Prior Decisions of the Supreme Court and Court of Appeals.

Safeco erroneously asserts that Division I's decision in *Sprague v. Safeco* is inconsistent with the prior decision of this Court and the Court of Appeals. But as the Spragues explained before the Court of Appeals, there is nothing inconsistent between *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992) and a holding that Safeco's all-risk policies cover collapse caused by construction defects.²⁸ In *McDonald*, — this Court noted that any ensuing loss which is otherwise covered by the policy will remain covered. *Id.* at 734. But there was no coverage in

²⁷ *Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 241 P.3d 1276 (2010).

²⁸ See Spragues' Reply Brief to the Court of Appeals at pp. 3-7.

McDonald because both the cause of loss (defective construction) and the resulting losses (earth movement and foundation cracking) were excluded by the policy.²⁹ That simply is not the case in *Sprague v. Safeco*, where collapse is “otherwise covered” by the Safeco policy and therefore collapse should “remain covered” when it results from construction defects. *McDonald*, at 734.

Similarly, there is no merit to Safeco’s argument that Division I’s decision in *Sprague v. Safeco* is inconsistent with *Kish v. Insurance Company of North America*, 125 Wn.2d 164, 883 P.2d 308 (1994). If anyone here is playing the forbidden “characterization game,” it is Safeco’s coverage attorneys, because everyone else – Safeco’s engineers, Safeco’s adjuster, and the Spragues – concluded that the loss here rose to the level of a “collapse.” Only Safeco’s coverage attorneys have labored strenuously to characterize the loss as something other than collapse – calling the loss nothing more than “rot” or “construction defects.” But Safeco cannot avoid its promise to cover collapse by merely characterizing the loss as some lesser-included constituent part. If Safeco had wanted to exclude coverage for collapse, it would have been very easy for Safeco to do so.

²⁹ 119 Wn.2d at 728, fn. 1, 2, and 3. “The trial court properly determined that the ‘ensuing losses’ of foundation cracking and earth movement were not covered perils.” *Id.* at 735.

Finally, the Spragues disagree that the *Port of Seattle v. Lexington* decision³⁰ has any relevant application to *Sprague v. Safeco*. The facts of *Port of Seattle*, involving a claim for costs incurred before the year 2000 to fix the Y2K computer programming problem, are simply too far removed to offer a meaningful analogy.

VI. Conclusion

The Spragues acknowledge that the proper interpretation of ensuing loss clauses to construction defect exclusions involves an issue of substantial public interest. And the Spragues also recognize that Division II's decision in *Vision One* if it were left to stand would throw ensuing loss coverage into a quagmire. *Vision One* would unfairly destroy coverage for many property owners throughout the state. Accordingly, the Spragues acknowledge that there are grounds for this Court to allow review of *Sprague v. Safeco*, but the Spragues urge this Court to use its review to affirm the Court of Appeals Division I's correct decision.

³⁰ 111 Wn. App. 901, 48 P.3d 334 (2002).

RESPECTFULLY SUBMITTED this 20th day of April, 2011.

FOSTER PEPPER PLLC

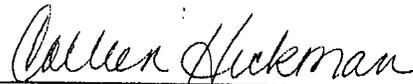


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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I cause a true and correct copy of the Spragues' Answer to Petition for Review to be served via legal messenger on the 20th day of April, 2011 to Ms. M. Colleen Barrett, Barrett & Worden, P.S., Fourth & Blanchard Building, 2101 - 4th Avenue, Ste. 700, Seattle, Washington 98121.



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Max B. Sprague and Krista Sprague v. Safeco Insurance Company of America

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Here is Spragues' Answer to Petition for Review.

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