

No. 38411-6-II

FILED
COURT OF APPEALS
DIVISION II

09 OCT -1 PM 2:52

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY JW
DEPUTY

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Appellant

v.

VISION ONE, LLC, VISION TACOMA, Inc., D&D
CONSTRUCTION, INC. and BERG EQUIPMENT AND
SCAFFOLDING CO., INC.

Respondents

BRIEF OF APPELLANT

Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA # 25533
Celeste Mountain Monroe, WSBA #35843
KARR TUTTLE CAMPBELL, P.S.C.
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028
(206) 223-1313

Attorneys for Appellant Philadelphia
Indemnity Insurance Company

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	5
1. The trial court erred as a matter of law in refusing to apply the efficient proximate cause rule to determine Philadelphia’s responsibilities under the insurance contract.....	5
2. The trial court erred as a matter of law when it removed the determination of the cause of the loss from the jury.....	5
3. The trial court erred as a matter of law in applying the resulting loss clause.	5
4. The trial court erred as a matter of law in refusing to dismiss Vision One’s Breach of Contract claim based on the policy’s Impairment of Recovery Rights provision.....	5
5. The trial court erred in (a) failing to restrict the jury’s award of delay damages 90 days; (b) awarding Vision One \$50,000 under the CPA; and (c) awarding Vision One attorney fees for fees associated with the defense of bodily injury claims and for improperly documented and inefficiently performed activities by its counsel.	5
Issues Pertaining to Assignments of Error.....	5
Issue no. 1: Did the trial court incorrectly frame the case for the jury by failing to apply principles of efficient proximate cause and by limiting Philadelphia’s right to present evidence and offer argument about critical policy terms? (Assignment of Error no. 1).....	5

9

Issue no. 2: Was the jury properly instructed on the Breach of Contract claim where the trial court gave no instruction on causation and refused Philadelphia's proposed instruction(CP 7229)?:

Proximate cause is that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred.

(Assignment of Error no. 2).....5

Issue no. 3: Is there "resulting loss" within the meaning of the insurance contract when damage caused by the collapse of the concrete was not separate and distinct from any damage caused by faulty workmanship? (Assignment of Error no. 3).....6

Issue no. 4: Should Vision One's Breach of Contract claim have been dismissed due to the impairment of Philadelphia's recovery rights following Vision One's settlement and release of Berg? (Assignment of Error no. 4).....6

Issue no. 5: Should the scope of coverage under the Extra Expense Endorsement have been limited by the trial court as a matter of law rather than left for interpretation by the jury? (Assignment of Error no. 5).....6

Issue no. 6: Does the Consumer Protection Act establish an overall cap on judicially-imposed damages of \$10,000 or \$10,000 per violation? (Assignment of Error no. 5).....6

Issue no. 7: Should attorney fees be awarded for poorly-segregated, "block-billed" time spent by Vision One's counsel and for fees repaid by Vision One to its liability insurer? (Assignment of Error no. 5).....6

III.	STATEMENT OF CASE	7
	A. Vision One tendered a claim for damages under the Builder’s Risk Policy issued by Philadelphia.	7
	B. Philadelphia retained its own investigators to determine the cause of the collapse. Investigations by Philadelphia and L & I determined that the cause of the collapse was either defective shoring design by Berg or faulty workmanship by D&D, the shoring installer.	8
	C. As a result of Philadelphia’s denial of coverage, litigation ensued.	13
IV.	ARGUMENT	14
	A. The trial court erred as a matter of law in refusing to apply the efficient proximate cause rule to determine Philadelphia’s responsibilities under the insurance contract (Assignment of Error no. 1; Issue no. 1).	14
	B. The trial court erred as a matter of law when it removed the determination of the cause of the loss from the jury (Assignment of Error no. 2; Issue no. 2).	20
	C. The trial court erred as a matter of law in its application of the resulting loss exception to the faulty workmanship exclusion (Assignment of Error no. 3; Issue no. 3).	25
	D. The trial court erred in refusing to dismiss Vision One’s breach of contract claim based upon the impairment of recovery rights clause of the policy (Assignment of Error no. 4; Issue no. 4).	28
	E. The trial court erred in (a) failing to restrict the jury’s award of delay damages to 90 days; (b) awarding Vision One \$50,000 under the CPA; and (c) awarding Vision One attorney fees for fees associated with the defense of bodily injury claims and for improperly documented and inefficiently	

performed activities by its counsel (Assignment of Error no. 5).	32
1. Failure to restrict the jury's award of delay damages to 90 days. (Issue no. 5).....	32
2. The trial court erred in awarding Vision One \$50,000 for alleged CPA violations. (Issue no. 6)	38
3. The court erred in the amount of attorneys' fees awarded to Vision One. (Issue no. 7).....	39
a. Fees billed to and paid by Gemini Insurance.	40
b. Fees for improperly documented and inefficiently performed legal services.	41
V. CONCLUSION	42

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Overton v. Consol. Ins. Co.</i> , 145 Wn.2d 417, 38 P.3d 322 (2002)	17
<i>Alaska Nat'l Ins. Co. v. Bryan</i> , 125 Wn. App 24, 104 P.3d 1 (2004)	17
<i>City of Tacoma v. The William Rogers Company</i> , 148 Wn.2d 169, 60 P.3d 79 (2002)	17
<i>Graham v. Public Employees Mut. Ins. Co.</i> , 98 Wn.2d 533, 656 P.2d 1077 (1983)	19, 20, 24
<i>Findlay v. United Pacific Insurance Company</i> , 129 Wn.2d 368, 917 P.2d 116 (1996)	20
<i>McDonald v. State Farm</i> , 119 Wn.2d 724, 837 P.2d 1000 (1992)	24, 25, 37
<i>Kish v. Insurance Co. of N. Am.</i> , 125 Wn.2d 164, 883 P.2d 308 (1994)	24, 25
<i>Allianz Insurance Company v. Michael G. Impero</i> , 654 F.Supp. 16 (E.D. Wash. 1986)	25
<i>Alton Ochsner Medical Fnd. v. Allendale Mut. Ins. Co.</i> , 219 F.3d 501 (5 th Cir. 2000),	26
<i>Industrial Indem. Co. of Northwest, Inc. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990)	28, 33
<i>Kalamazoo Acquisitions LLC v. Westfield Insurance Co.</i> 395 F.3d 338 (6 th Cir. 2005)	30, 31
<i>Quadrant Corp. v. American States Ins. Co.</i> , 154 Wn. 2d 165, 110 P.3d 733 (2005)	30

<i>Leader Nat. Insurance Co. v. Torres, supra,</i> 113 Wn.2d 366	31, 32
<i>Stolaruk v. Central Nat. Ins. Co.,</i> 522 N.W.2d 670 (Mich. App. 1992)	31
<i>Gibbs v. Hawaiian Eugenia Corp.,</i> 966 F.2d 101 (1992)	31
<i>Krivanek v. Fibreboard Corp.,</i> 72 Wn. App 632, 865 P.2d 527 (1993)	38, 39
<i>Doe v. Puget Sound Blood Ctr.,</i> 117 Wn. 2d 772, 819 P.2d 370 (1991)	38
<i>Aungst v. Roberts Constr.,</i> 95 Wn.2d 439, 625 P.2d 167 (1981)	39
<i>Stigall v. Courtesy Chevrolet-Pontiac,</i> 15 Wn. App. 739, 551 P.2d 763 (1976)	39
<i>Blum v. Stenson,</i> 465 U.S. 886, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984)	41
<i>Bowers v. Transamerica Title Ins. Co.,</i> 100 Wn.2d 581, 675 P.2d 193 (1983)	41

STATUTES

RCW 19.86.090	4, 38, 39
RCW 19.86.20	38, 39
RCW 19.86.030	38
RCW 19.86.140	39

I. INTRODUCTION

Appellant Philadelphia Insurance Company, Inc., (“Philadelphia”) issued a builder’s risk insurance policy to Respondent-Plaintiff Vision One, LLC, (“Vision One”) in connection with the construction of a condominium complex in Tacoma, Washington. During construction, a portion of the first elevated floor collapsed. Vision One tendered a claim to Philadelphia. Philadelphia denied coverage because it determined that the loss was caused by inadequate design and faulty workmanship of the concrete shoring. Litigation ensued among Vision One, Philadelphia, and Defendant Berg Equipment and Scaffolding, Inc. (“Berg”), a key supplier to the construction project. Vision One and Berg settled shortly before trial, but Vision One proceeded to trial against Philadelphia. The trial resulted in a jury verdict in favor of Vision One.

Philadelphia appeals multiple errors of law committed by the trial court in the handling of this case. These trial court’s decisions are not only contrary to settled principles of Washington insurance law, but also created a context in which a jury verdict favoring Vision One was a virtual certainty. Simply stated, the errors of the trial court are as follows:

First, the trial court held that if the collapse was caused by one or more non-excluded events(s) in combination with one or more excluded event(s) the loss was covered. This ruling contradicts principles of efficient proximate cause established by the Washington Supreme Court. Philadelphia sought reconsideration and requested a jury instruction on “efficient proximate cause.” The trial court denied both. As a consequence, the trial court effectively prevented the jury from considering the critically-important “cause of loss” issue as required by Washington law.

The trial court’s failure to apply efficient proximate cause principles and allow the jury to fulfill its proper role had another equally erroneous consequence; the trial court compounded the error by applying the “resulting loss” clause of the insurance contract to restore any coverage that may be excluded under the faulty workmanship exclusion. Philadelphia sought reconsideration and requested a legally-correct jury instruction on the application of the “resulting loss” clause. Again, the trial court denied both. Assignment of Error nos. 1, 2, and 3 address these threshold, intertwined errors of law.

The trial court also committed reversible legal error in its handling of the settlement between Vision One and Berg. Berg was centrally-involved in the construction work at issue in the collapse. If

Philadelphia was found by a jury to owe coverage to Vision One, Philadelphia was entitled to seek recovery from Berg. Upon learning of Vision One's settlement with Berg shortly before trial, Philadelphia sought dismissal of Vision One's claim for Breach of Contract based upon a policy provision prohibiting Vision One from impairing Philadelphia's rights of recovery following a loss. The trial court denied Philadelphia's motion to dismiss and a subsequent motion for reconsideration. In refusing to dismiss the Breach of Contract claim, the trial court ignored an unambiguous policy provision and effectively re-wrote the parties' contract. Whether Berg paid a reasonable amount in settlement or not, the trial court had no legal basis to disregard the Impairment of Recovery Rights policy provision. In doing so the trial court committed reversible error. This issue is addressed in Assignment of Error no. 4.

Finally, the trial court committed reversible error in certain rulings that improperly inflated the damages assessed against Philadelphia. These rulings are addressed in Assignment of Error no. 5 and include the following: (a) the trial court refused to limit Vision One's recovery for delay-related damages to 90 days under the policy's Extra Expense endorsement - the period of delay claimed by Vision One itself; (b) the trial court awarded Vision One \$50,000 in enhanced

damages under the Consumer Protection Act, \$10,000 for each of five violations found by the jury. In doing so, the trial court misinterpreted RCW 19.86.090 authorizes enhanced damages up to a maximum of \$10,000 – not \$10,000 per violation; and (c) substantial portions of the trial court’s award of attorney fees Vision One is contrary to Washington law. For example, the trial court awarded \$1,011,084.59 to Vision One for attorney fees paid by Vision One to Gemini Insurance in connection with the defense of Vision One on bodily injury claims alleged by workers injured in the collapse. This ruling is indefensible. Philadelphia’s policy provided coverage for property-based claims, not bodily injury claims. There is no reason in law or logic why Philadelphia is accountable for attorney fees incurred in the defense of bodily injury claims particularly when Gemini owed Vision One a duty to defend separate and apart from any obligation owed to Vision One by Philadelphia. By convincing the trial court to include the Gemini fees in Philadelphia’s attorney fee petition, Vision One passed on to Philadelphia a financial obligation and risk that Philadelphia never understood. This is contrary to law and must be reversed. The trial court also abused its discretion in allowing Vision One to recover fees it was not entitled to recover, but could not be easily segregated, as a

result of Vision One's "block billing" format, as well as other improper time entries in the records submitted in support of its fee petition.

Each of these Assignments of Error is discussed in detail below.

II. ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in refusing to apply the efficient proximate cause rule to determine Philadelphia's responsibilities under the insurance contract.
2. The trial court erred as a matter of law when it removed the determination of the cause of the loss from the jury.
3. The trial court erred as a matter of law in applying the resulting loss clause.
4. The trial court erred as a matter of law in refusing to dismiss Vision One's Breach of Contract claim based on the policy's Impairment of Recovery Rights provision.
5. The trial court erred in (a) failing to restrict the jury's award of delay damages 90 days; (b) awarding Vision One \$50,000 under the CPA; and (c) awarding Vision One attorney fees for fees associated with the defense of bodily injury claims and for improperly documented and inefficiently performed activities by its counsel.

Issues Pertaining to Assignments of Error

Issue no. 1: Did the trial court incorrectly frame the case for the jury by failing to apply principles of efficient proximate cause and by limiting Philadelphia's right to present evidence and offer argument about critical policy terms? (Assignment of Error no. 1)

Issue no. 2: Was the jury properly instructed on the Breach of Contract claim where the trial court gave no instruction on causation and refused Philadelphia's proposed instruction(CP 7229)?:

Proximate cause is that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred.

(Assignment of Error no. 2)

Issue no. 3: Is there “resulting loss” within the meaning of the insurance contract when damage caused by the collapse of the concrete was not separate and distinct from any damage caused by faulty workmanship? (Assignment of Error no. 3)

Issue no. 4: Should Vision One’s Breach of Contract claim have been dismissed due to the impairment of Philadelphia’s recovery rights following Vision One’s settlement and release of Berg? (Assignment of Error no. 4)

Issue no. 5: Should the scope of coverage under the Extra Expense Endorsement have been limited by the trial court as a matter of law rather than left for interpretation by the jury? (Assignment of Error no. 5)

Issue no. 6: Does the Consumer Protection Act establish an overall cap on judicially-imposed damages of \$10,000 or \$10,000 per violation? (Assignment of Error no. 5)

Issue no. 7: Should attorney fees be awarded for poorly-segregated, “block-billed” time spent by Vision One’s counsel and for fees repaid by Vision One to its liability insurer? (Assignment of Error no. 5)

III. STATEMENT OF CASE

- A. Vision One tendered a claim for damages under the Builder's Risk Policy issued by Philadelphia.

Vision One was the owner/developer of the Reverie Condominiums, a project dedicated to the construction of a 90 unit condominium in Tacoma, Washington. 9/23 RP 143, 6-10. Vision One contracted with D&D Construction Inc. ("D&D") to install shoring and pour concrete for the project. 9/30 RP 685, 4-10; 9/30 RP 380, 7-8. D&D, in turn, contracted with Berg Equipment & Scaffolding Co., Inc. ("Berg") to provide shoring material for the concrete installation. 9/30 RP 685, 13-18. Berg provided design drawings and specifications for the placement of the shoring. 9/30 RP 770, 5-8.

On October 1, 2005, D&D poured the first elevated floor. 9/23 RP 75, 12-13; 10/1 RP 969, 1-11. After pouring approximately 18 yards of concrete on the southwest corner, the concrete and shoring collapsed. Id. Several workers fell and were injured. 9/23 RP, 7-9. The Department of Labor and Industries ("L & I") shut down the project to conduct an investigation. 10/1 RP 81, 14-19. During that time, Vision One tendered a claim under the Builders Risk Coverage portion of a Commercial Lines Policy issued by Philadelphia. 9/23 RP 122, 21-25; 123, 1-9, 14-17.

B. Philadelphia retained its own investigators to determine the cause of the collapse. Investigations by Philadelphia and L & I determined that the cause of the collapse was either defective shoring design by Berg or faulty workmanship by D&D, the shoring installer.

The Builders Risk Coverage Form states:

A. Coverage

We will pay for direct physical "loss" to Covered Property caused by or resulting from any of the Covered Causes of Loss

1. Covered Property

Covered Property means your property or the property of others for which you are liable, consisting of:

- a. Materials, supplies, machinery, equipment, or fixtures which will become a permanent part of the building, structure, or project at the project site shown in this Coverage Form Declarations; and
- b. Temporary buildings or structures at the project site shown in this Coverage Form Declarations.

2. Property Not Covered

Covered Property does not include:

...

- b. Machinery, tools, equipment, office trailers, and other property not intended to become a permanent part of the buildings, structures, or project;

CP 5973-74.

"Loss" is defined as "accidental loss or damage." CP 5979.

Covered Causes of Loss is defined as follows:

Covered Causes of Loss means Risks of Direct Physical "**Loss**" to Covered Property unless the "**loss**" is excluded in Section B., Exclusions.

CP 5974.

The policy includes these exclusions:

2. *We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event:*
 1. *Directly and solely results in loss or damage; or*
 2. *Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.¹*
 - a. Delay, loss of use, loss of market, or any other consequential loss.

...

^[1] The italicized text is found in the Washington Changes endorsement (CM 01 07 09 00) which replaced the original policy text.

- e. Error, omission, or deficiency in design or specifications.

But we will pay for direct "loss" caused by resulting fire or explosion.

...

- 3. *We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event:*

- 1. *Directly and solely results in loss or damage; or*

- 2. *Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.¹*

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 damage by a Covered Cause of Loss results, we will pay for the loss or damage caused by that Covered Cause of Loss.]

CP 5977-78.

Following the collapse, Vision One sought reimbursement for repair and reconstruction of the affected area. 9/24 RP 394 3-15. In light of the investigators' determination as to the cause of the collapse,

Philadelphia denied coverage based on exclusions for “error, omission, or deficiency in design specifications” and “faulty, inadequate, or defective materials, or workmanship” contained in the policy. CP 6503-6513; CP 2286-2295.

On January 3, 2006, Philadelphia wrote the following to Vision

One:

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. Coverage will exist for any resulting loss caused by another insured event or peril. In this instance, the only peril, which caused the loss, was defective design and faulty workmanship, therefore there is no coverage for Vision One's claims. To the extent any portion of the claim can be considered a resulting loss, other policy exclusions and limitations apply.

While generally not covered because of the above exclusions, claims for unused and destroyed concrete are specifically not covered under the policy. Benefits under the policy require direct physical loss, which is accidental or unintended, to covered property. The intentional destruction of undamaged concrete is not accidental, therefore does not fall within your policy. In any event, even if this destruction of unused concrete was considered an accidental loss to covered property, the policy specifically excludes

damage arising from "loss of use . . . or any other consequential loss" which characterizes this claim for unused concrete.

Further, covered property does not include machinery, tools or other equipment not intended to be a permanent part of the structure. Therefore, claims for damage to the concrete vibrators are not covered.

For the reasons stated above, Philadelphia Indemnity Insurance Co. concludes there is no coverage under the policy it issued to Vision One LLC for this loss.

CP 2286-2290.

Vision One asked Philadelphia to reconsider. 9/29 RP 567, 17-21. On January 27, 2006, Philadelphia reviewed the available information and reiterated and clarified its coverage evaluation (with the italicized language):

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 resulting in the claimed damage. Therefore, the faulty workmanship exclusion bars coverage for*

this loss, and the “resulting loss” provision contained therein does not apply.

Even if the damage for which the insured seeks coverage could be considered “resulting loss” (which it cannot) coverage for that damage is barred by other provisions and exclusions in the Policy. As to the unused and destroyed concrete, the Policy provides coverage only for damage due to direct physical loss, which is accidental, and therefore does not fall within your policy. Additionally, even if this destruction of unused concrete was considered an accidental loss to covered property, the policy specifically exclude damage arising from loss of use...or any other consequential loss,” and the loss related to the unused/destroyed concrete is a consequential loss.

CP 2291-2295.

C. As a result of Philadelphia’s denial of coverage, litigation ensued.

Philadelphia thereafter sought to have its policy rights and duties established in federal District Court by seeking a declaration that no coverage existed under the policy. Ultimately, Philadelphia joined the action in Pierce County Superior Court which included actions brought by Vision One against Philadelphia, as well as with claims brought by personal injury claimants against Vision One, Vision Tacoma, D&D and Berg, and a separate action by Vision One against Berg against D&D.

Shortly after the cases were consolidated, Vision One settled with D&D and obtained an assignment of its claims against Berg. CP 852-853. Then, shortly before trial, Vision One settled with Berg. CP 6719. In response to the settlement, Berg's excess insurance carrier, RSUI, attempted to intervene and block the settlement. CP 6682-87. RSUI's motion was denied. CP 7029-7033. The remaining case, brought by Vision One against Philadelphia, was tried to a jury between September 22, 2008 - October 16, 2008. CP 7451-7452.

Additional facts pertinent to the Assignments of Error are presented below in their relevant contexts.

IV. ARGUMENT

- A. The trial court erred as a matter of law in refusing to apply the efficient proximate cause rule to determine Philadelphia's responsibilities under the insurance contract (Assignment of Error no. 1; Issue no. 1).

On a pre-trial motion in limine, Vision One asked the trial court to prohibit Philadelphia from offering any reason for denying coverage that was not specified in its January 2006 denial letters. CP 4915. Philadelphia opposed Vision One's motion on the grounds it had expressly reserved the right to assert, in the future, "any rights and defenses they may have under any applicable policy of insurance, regulation or law." CP 5007. The trial court granted the motion

holding that “Philadelphia is precluded from offering reasons other than those in the first three paragraphs of section 3 Coverage Determinations in the (denial) letter dated January 3 and January 27, 2006.” CP 5720.

The trial court later conducted a hearing to discuss insurance-related jury instructions. 7/18 RP 4-90. Among the issues addressed was the significance of the following policy language:

C. [L]oss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event:

1. **Directly and solely** results in loss or damage; or
2. **Initiates a sequence of events that results in loss or damage**, regardless of the nature of any intermediate or final event in that sequence.

...

But if loss or damage by a Covered Cause of Loss results, we will pay for the loss or damage caused by that Covered Cause of Loss.

CP 5971.

Although Philadelphia had broadly reserved its right to rely on applicable policy provisions, and despite Washington law placing the burden squarely upon Vision One to prove coverage initially, the trial

court ruled that Philadelphia could not rely on the “sequence of events language” because it was not mentioned in the denial letters. 7/18 RP at 75, 5-9. The trial court also rejected Philadelphia’s request to apply the efficient proximate cause principles, ruling instead that:

If it is found that the loss was caused by one or more non-excluded event(s) in combination with one or more excluded event(s); the loss is covered.

7/18 21, 1-6; CP 6588.

On reconsideration, Philadelphia asked the trial court to amend its ruling to state:

If there are two or more causes of loss, the policy provides coverage if the efficient proximate cause of the loss is a covered cause of loss. If the efficient proximate cause of the loss is excluded, there is no coverage for the loss.

CP 6606.

At the hearing, Philadelphia explained to the trial court:

With regards to whether we’re expanding the – expanding the denial of coverage beyond that’s in the letter, that’s absolutely incorrect. What this is a statement of the law, Your Honor. We’re not adding any more causes of loss. We’re just saying that what the definition of cause is, should be the legal definition of efficient proximate cause.

9/8 RP 13, 6-14.

The trial court rejected Philadelphia's request to instruct the jury according to Washington law on efficient proximate cause and instead decided that an instruction would be given using a standard definition of proximate cause. 9/8 RP 13, 6-14; 18, 16-19.

The interpretation of an insurance policy is a question of law. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002). On appeal, this court reviews the trial court's interpretation de novo. *Alaska Nat'l Ins. Co. v. Bryan*, 125 Wn. App 24, 30, 104 P.3d 1 (2004). Conclusions of law are also reviewed de novo. *City of Tacoma v. William Rogers Company*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002).

Here, the trial court found as a matter of law that:

If it is found that the loss was caused by one or more non-excluded event(s) in combination with one or more excluded event(s); the loss is covered.

CP 6588.

This conclusion cannot be reconciled with the express terms of the insurance policy or established Washington law which demands that in cases involving multiple causes of loss, the predominant cause of loss be resolved by the a jury.

As an initial matter, the trial court erred in precluding Philadelphia from relying on the entire insurance contract rather than simply the provisions quoted verbatim in Philadelphia's January letters

to Vision One. No principle of law requires an insurer to set forth verbatim all provisions of a policy or risk the right to rely upon them. Philadelphia was entitled to rely on all relevant provisions throughout the course of litigation, to include, if it so chose, the provision on "sequence of events." This is particularly true, whereas here, competing experts disputed the predominate cause.

From the inception of litigation, the cause of loss was vigorously disputed. Vision One attempted to demonstrate that the cause of the loss was inadequate design in its pursuit of its own claims against Berg while denying assertions of faulty workmanship. Similarly Berg, as the shoring supplier and layout designer, disputed all claims of inadequate design, arguing that faulty workmanship was the sole cause. For its part, Philadelphia contended that both inadequate design and faulty workmanship were contributing factors. Although Philadelphia determined that both events were excluded, a finding by the jury that defective design was the efficient, predominant cause would have eliminated any need to determine whether the resulting loss provision restored coverage because resulting loss coverage applies to damages attributable to fault workmanship but not to defective design. In light of the competing arguments about the predominant cause of loss, the trial

should have allowed Philadelphia to argue its case under the policy's "sequence of events" and "directly and solely" provisions.

Second, the failure of the trial court to allow Philadelphia to fully explain its coverage position was made worse by the trial court's failure to deal with the competing causes of loss according to Washington's efficient proximate cause principles which apply when multiple causes of loss are asserted to explain the source of physical damage.

In cases where multiple causes of loss exist, some of which are covered and some excluded, efficient proximate cause principles require a fact finder to identify the predominant (or efficient) cause of loss to determine the existence of coverage. In *Graham v. Public Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983), the Washington Supreme Court explained that:

Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the "proximate cause" of the entire loss.

It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regard as the proximate cause, not necessarily the last act in a chain of events.

See also *Findlay v. United Pacific Insurance Company*, 129 Wn.2d 368, 372, 917 P.2d 116 (1996). The trial court's determination not to allow Philadelphia to rely on all portions of its policy, combined with its failure to follow principles of efficient proximate cause established in *Graham*, left Philadelphia materially prejudiced in the presentation of its defense. The trial court's refusal to apply efficient proximate cause led to improper jury instructions, and a legally-incorrect confusion of the roles of judge and jury constituting reversible error, discussed in further detail below.

B. The trial court erred as a matter of law when it removed the determination of the cause of the loss from the jury (Assignment of Error no. 2; Issue no. 2).

This trial court's failure to follow Washington's efficient proximate cause rule resulted in its subsequent error of removing the questions of what cause the collapse from the jury.

The policy states:

[We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event:

....

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

CP 5978.

Vision One proposed to have the jury determine whether “faulty, inadequate or defective workmanship result(ed) in loss of or damage to property other than the faulty workmanship itself.” CP 7011. Philadelphia objected on the ground that whether the resulting loss clause restored coverage is a determination for the trial court to make as a matter of law if, but only if, the jury determines the efficient (i.e., predominant) cause of loss and that cause is faulty workmanship. 9/8 RP 39-40. The trial court reserved ruling. Id. at 49-50.

On September 12, 2008, the Friday before *voir dire* was scheduled to begin, the Court announced sua sponte that it had made a determination of resulting loss. 9/12 RP 150-12. The trial court concluded:

“As a matter of law, for purposes of the faulty workmanship resulting loss clause in the contract between Vision One and Philadelphia, the shoring equipment is separate and distinct from the concrete, rebar and wood forms. Thus, any resulting loss or damage cause by the concrete collapse is covered by the policy language.”

CP 7099-7100.

In reaching this conclusion, the Court found there was no evidence of defects with the concrete product, therefore the collapse of the shoring equipment and the collapse of the concrete itself could be considered distinct events for purposes of coverage. 9/12 RP 153,22-25; 154,1-11.

The difficulty presented by this case is that the trial court concluded there was a “resulting loss” before the jury had even determined that faulty workmanship is the efficient proximate cause. In the context of this case, there can be no resulting loss unless there is a finding of faulty workmanship as the efficient proximate cause. Accordingly, the trial essentially left the jury no alternative but to conclude that faulty workmanship was the predominant cause. No other conclusion would validate the trial court’s finding of “resulting loss” under the policy.

In light of the trial court’s pre-trial rulings regarding causation, Philadelphia proposed a curative instruction to help frame the issues and allow argument consistent with Washington law. Philadelphia’s proposed instruction read:

Proximate cause is that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event and without which that event would not have occurred. (CP 7229)

As to resulting loss, Philadelphia's proposed instruction(s) read:

[Vision One bears] the burden of establishing it suffered a covered resulting loss.

CP 7218.

For loss or damage to fall without a resulting loss exception to the faulty workmanship or defective material exclusion, physical damage that is "distinct and separable" from the excluded damage must occur. The damage must be different in kind, not merely different in degree.

CP 7219.

Philadelphia's proposed instructions were denied. Instead, the

Court gave the following instruction, Instruction No. 10:

In this case, the Court has determined that Philadelphia has breached the insurance contract with Vision One and Vision Tacoma. As a result, the court has determined the shoring equipment is separate and distinct from the concrete. *As a result, the court has determined that the collapse of the concrete is a "resulting loss" under the faulty workmanship resulting loss clause in the contract between Vision One and Philadelphia. Because of this ruling, the Court has determined that any resulting loss or damage caused by the concrete collapse is covered by the policy language.* You do not need to consider resulting loss in connection with the design exclusion. (emphasis added) CP 7260

This instruction is confusing and misstates Washington law. It fails to properly instruct the jury on the law and its role in determining the cause of loss. Indeed, it forced the jury to conclude that faulty workmanship was the efficient proximate cause. This was an improper of the jury's role by the trial court. It is for the jury, not the trial court, to consider the evidence and determine the cause or causes of loss. *McDonald v. State Farm*, 119 Wn.2d 724, 732, 837 P.2d 1000 (1992).

Because of its failure to apply the efficient proximate cause rule from *Graham*, the jury was left without complete and sufficient guidance. Under *Graham*, the trial court should have instructed the jury to determine the cause or causes of the collapse and determine the predominant cause. See *Kish v. Insurance Co. of N. Am.*, 125 Wn.2d 164, 883 P.2d 308 (1994). If the predominant cause was excluded (i.e. inadequate design), then further consideration of resulting loss would have been unnecessary. Instead, the trial court pre-judged the availability of resulting loss coverage and essentially told the jury what conclusion to reach as to the cause of loss. This was improper and constitutes reversible error. The trial court's failure to adhere to settled principles of law embedded reversible error into the case before the jury even began its deliberations and constitutes reversible error.

C. The trial court erred as a matter of law in its application of the resulting loss exception to the faulty workmanship exclusion (Assignment of Error no. 3; Issue no. 3).

Even if faulty workmanship was the efficient proximate cause of the collapse, the trial court erred in finding a “resulting loss.”

In interpreting an insurance policy, every clause or word is deemed to have some meaning; furthermore, a policy’s terms should never be assumed to be superfluous or to have been inserted idly. *Kish, supra*. A resulting or ensuing loss clause is an exception to the faulty workmanship provision and must be interpreted in that context. In *McDonald v. State Farm, supra*, the court explained:

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. . . . [T]he intent of the ensuing loss clause is not to enlarge the list of items covered under the policy.

Id.

In *Allianz Insurance Company v. Michael G. Impero*, 654 F.Supp. 16, 18 (E.D. Wash. 1986), the Court interpreted policy provisions similar to those at issue here and held for the insurer:

[W]hen a contractor assumes the obligation of completing a structure in accordance with plans and specifications and fails to perform properly, he cannot recover under the all-risk policy for the cost of making good his faulty work. Clearly such a result is not contemplated ... and is clearly within the exclusion referred to above.

Similarly, in *Alton Ochsner Medical Fnd. v. Allendale Mut. Ins. Co.*, 219 F.3d 501 (5th Cir. 2000), the Court held there was no coverage under facts similar to those in this case. In *Alton Ochsner*, plaintiff-insured was in the process of constructing a fifteen-story building supported by groups of concrete piles with each group covered by a pile cap. Prior to completion of the tower, cracking in some pile caps led Plaintiff to spend \$130,000 to repair the cracks and place a “concrete jacket” around one group of piles. *Id.* at 503. Several years later, while construction was still ongoing, the discovery of additional cracking prompted further investigation which suggested that further reinforcement was necessary. *Id.*

The plaintiff submitted a claim for coverage under its all-risk insurance policy, which the insurer denied under the policy’s exclusions for “faulty workmanship” and “cracking.” The plaintiff then filed suit, alleging that the cracking of the pile caps “was caused by design error and faulty construction methods.” *Id.*

On cross-motions for summary judgment the court granted the insurer's motion and found no coverage due to the "faulty workmanship" exclusion, thereby rejecting the insured's view that the "ensuing loss" exception within that exclusion reinstated coverage. Significantly, the Court held that for loss or damage to fall within the ensuing loss exception to the faulty workmanship exclusion, physical damage that is "distinct and separable" from the excluded damage must occur and the insured had not identified any 'resulting damage' because "the only cost that would be associated with restoration of the structural integrity of the tower is the cost of repairing the design and construction deficiencies of the foundation." *Id at 505*. Put differently, "diminished structural integrity is indistinguishable from the diminished capacity of the foundation resulting directly and only from deficient design or construction or a combination of both." *Id. at 508*.

Similarly, in this case, Vision One did not suffer any subsequent loss which was "separate and distinct" from the excluded loss. The faulty workmanship that contributed to the collapse of the shoring cannot be separated from the faulty workmanship that contributed to the collapse of the concrete. It is one, inseparable system. Therefore, there can be no resulting loss. The trial court's interpretation that the resulting loss clause was triggered was error and should be reversed.

D. The trial court erred in refusing to dismiss Vision One's breach of contract claim based upon the impairment of recovery rights clause of the policy (Assignment of Error no. 4; Issue no. 4).

Vision One reached a settlement with Berg shortly before trial. Berg and Vision One moved to have the settlement declared reasonable and to extinguish any rights of recovery Philadelphia had against Berg. CP 6178-36. Philadelphia opposed the motion for multiple reasons grounded in Washington law and the terms of the policy. CP 6876; 6900-6930. In particular Philadelphia argued that although Vision One and Berg are free to settle, if the settlement included a full release of Berg such that Philadelphia would lose rights of recovery in the event the jury found coverage, the settlement necessarily impair Philadelphia's recovery rights against Berg. *Id.* The trial court disagreed and held, among other rulings, that it had inherent authority to conduct a reasonableness hearing, that the settlement was reasonable, and that Philadelphia's rights of recovery against Berg were extinguished. 9/15 RP 210-13; CP 7029. Philadelphia renewed its motion for judgment as a matter of law following the jury verdict. CP 7500-7503. Again, Philadelphia's motion was denied. CP 9358-9361.

In reviewing a trial court's decision to deny a motion for directed verdict or judgment n.o.v., this Court applies the same standard as the trial court. *Industrial Indem. Co. of Northwest, Inc. v. Kallevig*, 114

Wn.2d 907, 915-16, 792 P.2d 520 (1990). A directed verdict or judgment n.o.v. is appropriate if, “when viewing the material evidence most favorable to the nonmoving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.” *Id.*

The Philadelphia policy unequivocally states, as a Condition of coverage, that Vision One may not impair Philadelphia’s rights of recovery following a “loss:”

5. Impairment of Recovery Rights

If by any act or agreement after a ‘loss’ you impair our right to recover from others liable for the ‘loss,’ we will not pay you for that ‘loss.’ In the event of any ‘loss,’ you will immediately make claim in writing against any other party that had custody of the property. (emphasis added)

CP 5979.

Condition 5 cannot simply be ignored or read out of the policy. Its meaning and effect are clear: when Vision One chose to settle and release Berg, Vision One impaired Philadelphia’s rights of recovery and forfeited its claim to coverage. Vision One cannot be allowed to seek enforcement of the insurance contract on one hand while disavowing its provisions on the other. The Washington Supreme Court has held repeatedly that insurance policies are construed as contracts. A policy is

considered as a whole and unambiguous policy language must be enforced as it is written.²

Other courts have enforced impairment provisions in the context of first-party commercial insurance losses. In *Kalamazoo Acquisitions LLC v. Westfield Insurance Co.*, 395 F.3d 338 (6th Cir. 2005) the owners of a commercial building hired a contractor to raise the ceiling of the building's top floor. During construction work, rain water entered the building through openings created by the contractor. The owner assessed the cost of repair at \$357,968 but later settled for \$208,188 and released the contractor from further liability. The owner then notified its property insurer of the contractor's release and demanded payment for \$149,780 – the difference between the cost of repair and amount in settlement. The property insurer denied coverage based on the release of the contractor.³ The owner sued for breach of contract and the District Court entered summary judgment for the owner in part because

² See, e.g., *Quadrant Corp. v. American States Ins. Co.*, 154 Wn. 2d 165, 170, 110 P.3d 733 (2005).

³ The policy provision at issue stated in part: "If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. ..." *Kalamazoo*, 395 F.3d at 342.

of its assumption that the insurer conceded, or waived, its impairment of subrogation defense.⁴

On appeal, the *Kalamazoo* Court reversed and directed the entry of judgment for the insurer. The Court held there was no waiver and that by settling with and releasing the contractor, the owner “is legally precluded from demanding that [the property insurer] pay the balance.”⁵

These cases are consistent with Washington law addressing the subrogation interests of insurers. In *Leader Nat. Insurance Co. v. Torres, supra*,⁶ the Washington Supreme Court held that a release between an insured and a third-party tortfeasor does not extinguish the insurer’s subrogation rights if the tortfeasor knows of the insurer’s payment and right of subrogation, the insurer does not consent, and the settlement does not exhaust the tortfeasor’s assets.⁷ Philadelphia recognizes that the present case differs from *Leader* in that Philadelphia

⁴ 395 F.3d at 339-341.

⁵ 395 F.3d at 344. See also *Stolaruk v. Central Nat. Ins. Co.*, 522 N.W.2d 670 (Mich. App. 1992) (insured breached policy provision by entering into consent judgment and release impairing insurer’s rights of subrogation); *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101 (1992) (insured’s release of third-party that impairs marine insurer’s subrogation rights bars insured’s action on the policy unless the insurer suffers no prejudice.)

⁶ 113 Wn.2d 366.

⁷ 113 Wn.2d 373-74.

made no payment to Vision One pending resolution of the coverage dispute, but the principles underlying *Leader* remain equally applicable.

In settling with Berg, Vision One and the trial court undermined Philadelphia's bargained-for right to be excused from paying for loss attributable in whole or in part to Berg. For this reason, Philadelphia respectfully requests the court reverse and remand the judgment and dismiss Vision One's breach of contract claim.

- E. The trial court erred in (a) failing to restrict the jury's award of delay damages to 90 days; (b) awarding Vision One \$50,000 under the CPA; and (c) awarding Vision One attorney fees for fees associated with the defense of bodily injury claims and for improperly documented and inefficiently performed activities by its counsel (Assignment of Error no. 5).
1. Failure to restrict the jury's award of delay damages to 90 days. (Issue no. 5)

At the close of evidence, Philadelphia moved for directed verdict as to the applicable coverage period for delay damages under the Extra Expense Endorsement ("the Endorsement"). 10/15 RP 1353-1372. The court denied Philadelphia's motion. 10/15 RP 1372. After trial, Philadelphia moved for Judgment as a Matter of Law as to the applicable coverage period for delay damages under the Extra Expense Endorsement ("the Endorsement"). CP 7495-7497. Philadelphia argued that the court should limit Vision One's recovery period to 90 days because this was the length of the construction delay asserted by Vision

One itself at trial and, therefore, should be taken as the total number of days for which coverage was afforded under the policy. *Id.* The court denied Philadelphia's motion. CP 9358-9361. In so doing, the court erred in allowing the jury to interpret and apply the coverage provisions of the insurance policy, which ultimately resulted in an error in the jury's assessment of the amount of recovery. This Court reviews the trial court's decision de novo. *Industrial Indem. Co. of Northwest, Inc.*, 114 Wn.2d 907 at 915-16.

The amount of delay damages recoverable under Philadelphia's Builder's Risk Policy is expressly limited by the Extra Expense Endorsement (the "Endorsement"). According to its terms, Vision One must first establish a causal relationship between the expenses incurred and a Covered Cause of Loss, which in this case was held to be the collapse of the concrete materials. As stated in Paragraph 1(a):

We will pay such necessary Extra Expenses you incur as the result of the project being delayed beyond the "scheduled date of completion." The delay must be directly caused by any of the Covered Causes of Loss under the Builder's Risk Coverage Form. (Emphasis added).

CP 5985.

Once causation is established, the Endorsement provides coverage for the following expenses:

- (1) Construction loan interest;
- (2) Real estate and property taxes;
- (3) Architect, engineering and consultant fees;
- (4) Legal and accounting fees;
- (5) Insurance premiums for the Builder's Risk Coverage Form; and
- (6) Advertising and promotional expenses.

Id.

Coverage for such expenses however, is restricted to expenses incurred during a particular time frame. More specifically, the Endorsement states that coverage is limited to those damages sustained:

- (1) During the period of time between the "scheduled date of completion" and the actual date the project is complete with reasonable speed and similar quality; *and*
- (2) That are over and above what would have been incurred had there been no "loss."

Id.

The phrase "scheduled date of completion" is defined as the earlier of the following dates: (1) the completion date as stated in the construction contract; or (2) the policy's expiration date. CP 5986-87.

At trial, *Vision One itself* argued that the actual construction delay caused by the concrete collapse was 90 days. 9/24 RP 354, 21-22; 377, 8-20. Vision One did not, however, limit their claimed damages

under the Extra Expense Endorsement to 90 days as required by the policy. Instead, Vision One maintained the applicable coverage period under the Extra Expense Endorsement was October 1, 2006 through May 2007, which is the expiration date of the original policy through the last extension of the same policy. Vision One contended its interpretation of the applicable coverage period was appropriate because the Endorsement covers delay damages incurred up to the “actual date the project is complete,” and completion, from Vision One’s perspective, is best represented by the expiration date of the builder’s risk extension. 9/30 RP 846-847.

However, Vision One failed to demonstrate that its need to extend the builder’s risk policy was caused by the concrete collapse, as opposed to the need to remedy the faulty erection of the shoring throughout the affected floor or by other unrelated delays. This is a critical failure in the chain of causation. In fact, Vision One’s expert, Mr. Pederson, testified that some of the construction delays extending the project into May 2007 were due to factors beyond the collapse:

Q (Ms. Monroe):...So – I think it’s not only your testimony, but the testimony of various people from Vision One, Vision Tacoma that the duration of the delay was 90 days, correct?

A (Mr. Pederson): Yes.

Q: Okay.

A: On construction?

Q: On construction.

A: I believe so.

.....

A: I should restate that.

Q: Okay?

A: They believe that it's 90 days at the start of Sheetrock and framing which was impacted by the collapse. The project may have slipped after that ---

Q: And -

A: for a variety of reasons. I don't know all of them.

.....

Q: So there may be some delay, in your mind, after that point (Sheetrock), on top of the 90 days, but you don't know for what reason.

A: I have not investigated that.

Q: Okay. So, you don't have an opinion one way or the other whether that additional delay is the result of the collapse.

A: I have not investigated it. I've always worked on the assumption there was a 90-day delay up to Sheetrock.

10/1 RP 910-12.

Vision One was not entitled to recover delay related damages incurred beyond those attributable to the 90 day construction delay. Coverage for Extra Expenses is limited to (1) damages directly caused by the concrete collapse and (2) damages above and beyond what would have been incurred had their been no loss. Accordingly, Vision One's

computation of a seven month period for delay damages is inconsistent with the express language of the policy.

The error in Vision One's computations was compounded by the Court's decision to allow the jury to interpret the scope of coverage under the Endorsement. Courts, not juries, should establish scope of coverage as a matter of law. *McDonald*, 119 Wn.2d at 730. In denying Philadelphia's Motion for Directed Verdict on the Extra Expense issue, the Court abdicated its responsibility to limit coverage under the Endorsement to the period supported by the evidence and the terms of the policy. There is no legal or factual basis for the jury to have awarded Vision One over seven months of delay damages for additional builders risk premiums, advertising/promotional expenses and real estate/property taxes. The trial court should have limited coverage under the Endorsement to 90 days. In failing to do so, it committed reversible error. The portion of the jury's award regarding Extra Expense should be reversed or modified to \$479,896.00, as opposed to the \$718,677.00 awarded by the jury.⁸

⁸ Attached at Appendix A is a copy of the chart originally included in Philadelphia's motion for directed verdict on Extra Expenses at CP 7499.

2. The trial court erred in awarding Vision One \$50,000 for alleged CPA violations. (Issue no. 6)

The appellate court reviews a trial court's award of damages for abuse of discretion. *Krivanek v. Fibreboard Corp.*, 72 Wn. App 632, 636, 865 P.2d 527 (1993). Abuse of discretion occurs when the court's exercise of discretion is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Doe v. Puget Sound Blood Ctr.*, 117 Wn. 2d 772, 819 P.2d 370 (1991).

The jury found five CPA violations. 10/21 RP 1531, 11-18. The trial court awarded Vision One \$10,000 for each violation for a total of \$50,000.00. CP 7451-52. In light of the statutory authority, the court's award was manifestly unreasonable.

RCW 19.86.090 allows, but does not require, a court to increase an award of damages "to an amount not to exceed three times the actual damages sustained" but in no event may the increase exceed \$10,000:

Any person who is injured in his or her business or property by a violation of [RCW 19.86.020 - .060], or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of [RCW 19.86.030-.060] may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and

the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars... (emphasis added)

The plain language of RCW 19.86.090 states that the “increased damage award” may not exceed \$10,000. Nothing in the statute suggests the cap applies to each violation. The legislature specified an “each violation” standard in RCW 19.86.140 but that provision applies only to actions brought by the Attorney General and is not at issue here. See *Aungst v. Roberts Constr.*, 95 Wn.2d 439, 442, 625 P.2d 167 (1981); *Stigall v. Courtesy Chevrolet-Pontiac*, 15 Wn. App. 739, 740-41, 551 P.2d 763 (1976).

In so much as the trial court’s award is inconsistent with the controlling statute, the trial court abused its discretion. Philadelphia respectfully requests the court reduce the CPA award to \$10,000.00.

3. The court erred in the amount of attorneys’ fees awarded to Vision One. (Issue no. 7)

Again, the appellate court reviews a trial court's award of damages for abuse of discretion. *Krivanek*, 72 Wn. App 632 at 636, 865.

a. Fees billed to and paid by Gemini Insurance.

As part of its attorney fee petition, Vision One sought \$1,011,084.59 for amounts billed to and paid by Gemini Insurance. CP 9390-10581. The "Gemini" portion of the fee petition was improperly included in Vision One's fee petition as a matter of law.

Vision One was insured by Gemini for personal injury claims. 9/30 RP 794, 19-22. Coverage also extended to D&D under the project. Gemini was not paying for the "coverage" issues as between Vision One and Philadelphia. Because Vision One was specifically named in the personal injury cases for its own independent negligence, Gemini was obligated to respond and defend paying the whole defense. Vision One has no right to reimbursement for those fees. The reason Vision One was sued was for its role as general contractor and Developer, not because of Philadelphia's denial. Awarding those fees benefits no one other than Vision One's liability insurer (who paid the fees) pursuant to its independent contractual duties owed to Vision One.

For these reasons, the trial court abused its discretion in awarded Vision One the fees incurred by Gemini. Philadelphia respectfully requests the Court eliminate the \$1,011,084.59 in fees awarded to Vision One.

- b. Fees for improperly documented and inefficiently performed legal services.

The trial court ordered Vision One to segregate amounts attributable to unrelated matters, unsuccessful theories and otherwise non-compensable tasks from its \$2.47 million dollar fee petition. CP 12327-28. Vision One made little effort to comply stating it could not perform the segregation with precision in light of the “block billing” format. The trial court ultimately discounted Vision One’s request by 20% and awarded Vision One \$1,997,818.00, finding that it was “virtually impossible for this Court to determine the amounts that should be deducted from the total recovery requested.” CP 12347-49. As it did at the trial level, Philadelphia now asks this court to dismiss the trial court’s entire award of fees.

Vision One has the burden to demonstrate that its fee petition was reasonable. This burden was not met by the minimal segregation efforts Vision One made. *Blum v. Stenson*, 465 U.S. 886, 897, 79 L. Ed. 2d 891, 104 S. Ct. 1541 (1984); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983). It was Vision One’s burden to segregate. The only asserted reason Vision One was unable to do so was because of the block billing format chosen by its own counsel. Vision One, not Philadelphia, should bear the consequence of

its own attorneys billing methods. The judgment should be reversed or modified as it concerns Vision One's attorney fees to **\$707,650.84**, the amount Philadelphia calculated on its own review of Vision One billing statements and as set forth in its opposition to Vision One's petition.⁹

V. CONCLUSION

The trial court's refusal to allow Philadelphia to rely on all portions of its insurance contract with Vision One, combined with its failure to follow principles of efficient proximate cause materially prejudiced Philadelphia's presentation of its defense. The jury was improperly instructed and the respective roles of the jury and the trial court were profoundly confused. Further, in taking the issue of causation away from the jury, the court improperly interpreted the resulting loss clause and effectively told the jury what conclusion to reach on causation. The errors of the trial court were substantial and require reversal of the judgment.

Additionally, in settling with Berg, Vision One and the trial court undermined Philadelphia's bargained-for right to be excused from policy obligations under the Impairment of Recovery Rights provision. Apart from all other issues in this case, the trial court should have dismissed Vision

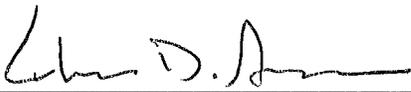
⁹ Attached hereto at Appendix B is a chart detailing Philadelphia's proposed calculation originally included in its Memorandum and Opposition to Vision One's fee

One's Breach of Contract claim following Vision One's settlement with Berg. Philadelphia respectfully requests the court reverse and remand the judgment to cure this error of law.

In the alternative, Philadelphia respectfully requests this Court amend the judgment in light of numerous errors in amounts awarded to Vision One and its attorneys, including: (a) an award of delay damages exceeding 90 days; (b) an award of \$50,000 for CPA damages and (c) an award of attorney fees for fees associated with the defense of bodily injury claims and for improperly documented and inefficiently performed activities by its counsel.

Respectfully submitted this 29th day of July, 2008.

KARR TUTTLE CAMPBELL

By: 
Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Celeste Monroe, WSBA #35843
Attorneys for Philadelphia Indemnity
Insurance Company

segregation. CP 11794-99.

APPENDIX A

Category of Extra Expense	Amount Awarded by Jury for 7 month delay	Amount Recoverable Under Policy for 90 day delay
Construction Loan Interest	\$327,607.00	\$327,607.00
Insurance Premium for Builders Risk	\$71,663.00	\$27,843.00
Advertising and Promotional Expenses	\$305,816.00	\$110,922.00
Real Estate/Property Tax	\$13,591.00	\$13,527.00
Total	\$718,677.00	\$479,896.00

APPENDIX B

Vision One's Original Fee Request	\$2,495,749.63
Amount Segregated by Vision One (per 2/13/09 order)	\$120,670.18
SUBTOTAL	\$2,375,079.45
Elimination of Gemini Fees/Costs	\$1,011,084.59
SUBTOTAL	\$1,363,994.86
Total Reduction for Corporate/Clerical/BI Work	\$42,049.00
Total Reduction for Unsuccessful Claims Identified by Vision One	\$47,658.00
Total Reduction for Unsuccessful Claims Not Identified by Vision One	\$144,142.50
Reduction for Non-descriptive Entries	\$88,053.00
Reduction for Multiple Attendance	\$3,599.00
Reduction for Time Spent on Status Reports	\$9,905.00
Reduction for Jury Instructions	\$42,547.00
Reduction for Trial Fees	\$82,000.00
SUBTOTAL	\$904,041.36
Reduction for Supplemental Fee Request	\$87,000.00
SUBTOTAL	\$817,041.36
Reduction of 20% on difference between amount requested by Vision One (1.3 million) and Philadelphia's Segregation (\$817,041.36) for Block Billing to include reduction on costs	\$109,390.52
PROPOSED FEE AWARD	\$707,650.84

FILED
COURT OF APPEALS
DIVISION II

09 OCT -1 PM 2:52

STATE OF WASHINGTON
BY _____
DEPUTY

No. 38411-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Appellant

v.

VISION ONE, LLC, VISION TACOMA, Inc., D&D
CONSTRUCTION, INC. and BERG EQUIPMENT AND
SCAFFOLDING CO., INC.

Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2009, I caused to be served a copy of *Brief of Appellant* by E-Mail and ABC Legal Messenger on the following:

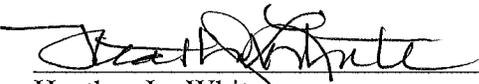
Daniel W. Ferm (dferm@williamskastner.com)
Jerry Edmonds (jedmonds@williamskastner.com)
Teena Killian (tkillian@williamskastner.com)
Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union Street, Ste. 4100
Seattle, WA 98101
Tel: 206.628.6600
Fax: 206.628.6611
Counsel for D&D, Vision One, and Vision Tacoma

I hereby certify that on the 1st day of October, 2009, I caused to be served a copy of *Brief of Appellant* by E-Mail on the following

Daniel F. Mullin (dmullin@mullinlawgroup.com)
Tracy A. Duany (tduany@mullinlawgroup.com)
Mullin Law Group PLLC
101 Yesler Way, Ste. 400
Seattle, WA 98104
Phone: 206.957.7007
Counsel for Berg Equipment & Scaffolding, Inc.

Dennis J. Perkins (dperklaw@seanet.com)
Attorney at Law
1570 Skyline Twr.
10900 NE 4th St.
Bellevue, WA 98004
Phone: 425.455.5882
Counsel for Berg Equipment & Scaffolding Co., Inc.

Michael D. Helgren (MHelgren@mcnaul.com)
David R. East (DEast@mcnaul.com)
Barbara H. Schuknecht (BSchuknecht@mcnaul.com)
McNaul Ebel Nawrot & Helgren
600 University St., Ste. 2700
Seattle, WA 98101-3143
Phone: 206.467.1816
Counsel for RSUI


Heather L. White