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SUPREME COURT OF THE STATE
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MAX B. SPRAGUE and KRISTA SPRAGUE, *Respondents*

v.

SAFECO INSURANCE COMPANY OF AMERICA, *Petitioner*

Consolidated with

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

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Respondent

**SUPPLEMENTAL BRIEF OF PETITIONER SAFECO
INSURANCE COMPANY OF AMERICA**

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ORIGINAL

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I. INTRODUCTION

Petitioner Safeco Insurance Company of America (Safeco) issued homeowners insurance policies to Max and Krista Sprague. The policies excluded loss caused directly or indirectly by construction defect, rot, and deterioration. Construction defects in the Spragues' decks led to water intrusion, causing rot, and deterioration of the decks, which reached the point of substantial structural impairment. Because the damage to the decks resulted from excluded causes, Safeco denied Spragues' claims for repairs.

Although the trial court upheld the denial of coverage, the Court of Appeals overturned, holding that the substantial structural impairment constituted "collapse" and was a covered ensuing loss. However, an "ensuing loss" is covered only if it resulted from a peril separate and independent from the excluded original peril. Here, there is no dispute that the efficient proximate cause of the deterioration of the Spragues' decks was faulty

construction. There is no separate and independent peril that caused the rot and deterioration. The loss was not covered, and it did not become covered as it progressively got worse.

Moreover, an ensuing loss must be a "covered" loss. In this case, the loss due to deterioration and rot is excluded by the terms of the policies, and characterizing the loss as "substantial impairment" amounting to "collapse" does not change the policy terms and does not justify ignoring the express provisions of the policies.

II. STATEMENT OF THE CASE

Safeco's Petition for Review sets forth the background facts, procedural facts, and pertinent policy language in detail. The key facts are as follows:

The Spragues discovered in 2008 that the supporting structures of their decks had significant problems.¹ They made a claim for coverage from Safeco under their homeowners policy.² Safeco retained experts to inspect the decks, who found rot caused by inadequate flashing,

¹ See, e.g., CP 15.

² Id.

and by lack of ventilation in the support structures.³ The experts opined that the decks reached a state of imminent collapse/substantial impairment of structural integrity before September 2003.⁴ The efficient proximate cause of the damage to the decks was construction defects.⁵ It is not disputed that the decks did not collapse, and there is no damage, except to the decking system.

III. ARGUMENT

A. **As the Courts in *McDonald*, *Wright*, and *Vision One* recognized, an ensuing loss clause cannot be triggered absent damage caused by a separate, independent covered peril.**

For almost 20 years, Washington courts have recognized, both implicitly and explicitly, that an ensuing loss clause can be triggered only by a separate, independent covered peril. There are two interrelated requirements for an ensuing loss exception to apply, neither of which is present in this case. First, the loss must result from a

³ CP 197, at ¶4; CP 217; CP 226. *See also* CP 106-115; CP 213-34.

⁴ *See, e.g.*, CP 225.

⁵ *See, e.g.*, CP 316 at lines 19-21 (Plaintiff acknowledging that the damage to the decks resulted from construction defects, and arguing that the matter hinges on whether collapse is covered).

separate and independent peril; it is not an ensuing loss if its efficient proximate cause was the initial excluded peril. Second, the ensuing loss must be *covered*—that is, it cannot be an excluded loss.

This Court addressed an ensuing loss clause at length in *McDonald v. State Farm Fire and Casualty Co.*⁶ In *McDonald*, the policy excluded coverage for losses caused by defective or inadequate design or repair but also provided, in language like that at issue here, that ensuing losses were covered unless the loss itself was an excluded loss.⁷ The *McDonald* Court found that the exclusion and ensuing loss exception were not ambiguous and that the reasonable interpretation of the ensuing loss clause was that the policy excluded losses caused by faulty construction/defective materials and the uncovered ensuing foundation cracking and earth movement.⁸

Unless there is a separate and independent loss, the exclusion, not the exception, applies. This common sense

⁶119 Wn.2d 724, 837 P.2d 1000 (1992).

⁷*Id.* at 728 n.3.

⁸*Id.* at 734-35.

principle is illustrated by the Court of Appeals' decision in *Port of Seattle v. Lexington Insurance Co.*⁹ In that case, some insurers denied the Port's claim for Y2K coverage because the loss to the Port's computer systems was excluded as an inherent vice. The Port argued that its loss was an ensuing loss and therefore covered. Division I disagreed, holding:

The Port . . . attempts to paint its losses as something other than an excluded loss. The only peril suffered by the Port, however, was the excluded inherent vice. For it to claim that its losses during testing and assessment constitute a separate, covered peril would render the inherent vice exclusion meaningless.¹⁰

As stated in *McDonald*, "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.*"¹¹

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

¹⁰ *Id.* at 913.

¹¹ *McDonald*, 119 Wn.2d. at 734 (emphasis added).

In this matter, the Safeco policies clearly and unambiguously excluded coverage for losses caused directly or indirectly by construction defects. So, not only are construction defects themselves excluded, the losses caused directly or indirectly by faulty construction are excluded. The only exception is the ensuing loss clause, which, like the ensuing loss clause in *McDonald*, can be triggered only by a separate, independent covered loss.

The *McDonald* case has been cited by *Couch* in support of the proposition that faulty workmanship exclusions unambiguously prevent recovery for damages caused by defective work,¹² and *Couch* has noted that the exclusion extends to preclude recovery for ensuing loss directly or indirectly caused by defective workmanship.¹³

Here, there is no separate and independent covered loss. The loss for which the Spragues made claim is deterioration and rot caused by faulty construction. Whether the deterioration is characterized as bad, worse, or

¹² STEVEN PLITT ET AL., *COUCH ON INSURANCE* §153:79 at n.1 (3rd Ed. 2011).

¹³ *Id.* at §153:79.

substantial impairment, it is nevertheless a loss resulting from the peril of faulty construction.

Calling the loss by a different name does not permit a different result. This Court's holding in *Kish v. Insurance Co. of North America*¹⁴ is instructive. In that case, several homeowners made claims under their homeowners policies for water damages. The policies were "all risk" and excluded "flood, surface water, waves, tidal water, overflow of a body of water or spray from any of these whether wind driven or not" (or similar language).

The insureds' houses were damaged when flood waters overtopped protective dikes surrounding a sewage lagoon, the dikes failed, and the houses were inundated with flushed lagoon water. The high water was the result of heavy and continuous rainfall and snowmelt in the mountains. The insureds claimed that the water damage was the result of rain, which was a covered peril (not being specifically excluded). The trial court held that rain was a distinct peril from flood and allowed the matter to proceed

¹⁴ 125 Wn.2d 164, 883 P.2d 308 (1994).

to trial to determine the efficient proximate cause of the loss. This Court reversed, Justice Madsen writing the unanimous decision, holding that rain and flood are not two separate perils. The Court said, "An insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss."¹⁵

What the Spragues, and the Court of Appeals, characterized as "collapse" was indisputably caused by faulty construction that led to water entering the structure, leading to fungus growth, rot, and deterioration. As in *Kish*, affixing a different name to the same thing cannot justify a different result.

Even if the loss is a separate, ensuing loss, not excluded by the same terms as the original loss, the ensuing loss must nevertheless be a *covered* loss. That is, the ensuing loss clause expressly provides that "any ensuing loss *not excluded* or excepted is covered."¹⁶ In *Wright v.*

¹⁵ *Id.* at 170 (quoting *Chadwick v. Fire Ins. Exch.*, 17 Cal. App. 4th 1112, 1117, 21 Cal. Rptr. 2d 871 (1993)).

¹⁶ CP 270; CP 197 at ¶ 7; CP 263-64.

Safeco Insurance Co. of America,¹⁷ Division I reviewed an exclusion with an ensuing loss clause under facts similar to the present facts. In *Wright*, construction defects caused water leaks that led to mold and resultant mold damage.¹⁸ The Safeco policy excluded losses caused directly or indirectly by construction defects but provided that an “ensuing loss not excluded” was covered.¹⁹ The insured argued that the water leaks were an ensuing loss that caused mold damage such that the mold damage was covered.²⁰ The Court of Appeals rejected this argument because, under the terms of the policy, mold damage was excluded:

Under the ensuing loss exception to the defective construction exclusion, where

¹⁷ 124 Wn. App. 263, 109 P.3d 1 (2004).

¹⁸ *Id.* at 266-70.

¹⁹ *Id.* at 273. The Safeco construction defect exclusion and ensuing loss exception in *Wright* is substantively identical to the Safeco construction defect exclusions and ensuing loss exceptions in this matter, with only minor changes appearing in the policy language after 1999. Compare *Wright*, 124 Wn. App. at 273 (“However any ensuing loss not excluded or excepted in this policy is covered.”), with *Sprague v. Safeco Ins. Co. of Am.*, 158 Wn. App. 336, 340, 241 P.3d 1276 (2010) (“However, any ensuing loss not excluded or excepted in this policy is covered.”). The Court of Appeals was incorrect when it said the exclusion/exception in *Wright* differed from the exclusion/exception in this case. See *Sprague*, 158 Wn. App. at 341.

²⁰ *Wright*, 124 Wn. App. at 274.

defective construction [an excluded peril] caused water damage that in turn caused mold [an ensuing loss], the mold damage is covered *if it is not specifically excluded* by some other provision in the policy. *Because Wright's policy contains a provision that specifically excludes damages caused by mold, the ensuing loss provision of the exclusion in Wright's policy does not cover mold damages.*²¹

Neither the language nor the intent of the ensuing loss exception permits a court to ignore the exclusions in the policy.

The loss here was caused by an excluded peril, construction defects. Rot and deterioration are excluded losses under the terms of the policy. Characterizing the condition as collapse does not change the fact that rot and deterioration are explicitly excluded.

Here, the only damages are rot and deterioration. There is no ensuing damage resulting from the rot and deterioration. No additional new peril caused a covered loss. The ensuing loss clause simply does not come into play here.

²¹ *Id.* at 274-75 (emphasis added).

B. The Court in the consolidated case of *Vision One* correctly recognized that an ensuing loss must be caused by an independent covered peril.

The Division II opinion in *Vision One, LLC v. Philadelphia Indemnity Co.*²² supports Safeco's position that a separate cause of loss is necessary to trigger the ensuing loss clause. The policy provision at issue in *Vision One* excluded loss caused by or resulting from faulty workmanship with an exception "if loss by any of the Covered Causes of Loss results." There, assuming the excluded cause of the cement slab's collapse was faulty workmanship, the policy's ensuing loss clause would not be triggered because there was no separate, independent result. As Division II stated, "Here, assuming faulty workmanship caused the shoring and concrete slab to collapse, faulty workmanship was the initial excluded peril and collapse was the result. There was no independent covered peril (such as fire) that caused a covered resulting loss."²³

Established Washington Supreme Court precedent, as well as a logical reading of the insurance contract, compel

²² 158 Wn. App. 91, 241 P.3d 429 (2010)

²³ *Id.* at 107-08.

the conclusion that there is no coverage for the Spragues' rotted decks under Safeco's policy.

C. Under the "separate property test," the Safeco ensuing loss clauses would not be triggered because the Spragues' deck did not actually collapse or cause damage to anything.

In its Petition for Review and at the Court of Appeals, Vision One has urged the application of the so-called "separate property test" for determining whether an ensuing loss is triggered.²⁴ Amicus BOMA/NAIOP urges similarly.²⁵ And both cite to cases from other jurisdictions for the proposition that *Vision One* was incorrectly decided.²⁶ As the preceding sections make clear, this is not the law in Washington. Even if it were the law in Washington, Safeco must prevail under the facts of this case because there was no loss to separate property. The loss claimed by the Spragues is to their decks, the same property that was defectively constructed. It is not separate

²⁴ See, e.g., Petition for Review filed by Vision One at 10-12; *Vision One*, 158 Wn. App. at 437-39.

²⁵ See Amicus Petition of Building Owners and Managers Association and NAIOP-Washington State Chapter at 5-8.

²⁶ See, e.g., *id.* at 5 n.8; *Vision One*, 158 Wn. App. at 437, 438 n.4.

property to which the rule proposed by Vision One and Amicus could apply. There is no claim that the decks fell down and caused damaged to separate property. Accordingly, under the "separate property test" there would be no coverage for the Spragues' claims.²⁷

²⁷ See *Allianz Ins. Co. v. Impero*, 654 F. Supp. 16, 17-18 (E.D. Wash. 1986) ("Had the wall, as a result of the deficiencies in the concrete, collapsed and caused damage to some other portion of the work, or to equipment of a subcontractor or similar thing, we would have a different case."); *Laquila Constr., Inc. v. Travelers Indem. Co. of Ill.*, 66 F. Supp. 2d 543, 546 (S.D.N.Y. 1999) (holding an ensuing loss clause was not triggered, and stating "[H]ad the fifth floor slab in HRH's building collapsed and damaged machinery, plumbing and electrical fixtures, or even neighboring property, such losses-wholly separate from the defective materials themselves-would qualify as non-excluded ensuing losses under Travelers' policy."); *Narob Dev. Corp. v. Ins. Co. of N. Am.*, 219 A.D.2d 454, 454, 631 N.Y.S.2d 155 (1995) (finding a resulting loss provision was not at issue when the collapse of a free-standing wall did not cause subsequent or collateral loss/damage); *Montefiore Med. Ctr. v. Am. Protection Ins. Co.*, 226 F. Supp. 2d 470, 479 (S.D.N.Y. 2002) ("Under New York law, Plaintiff would only be entitled to coverage under an exception for ensuing loss only if and to the extent that it could prove that 'collateral or subsequent' damage occurred to other insured property as a result of the collapse... The ensuing loss provision is thus inapplicable.") (internal citations omitted); See also *Vermont Elec. Power Co., Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 72 F. Supp. 2d 441 (D. Vt. 1999); and *Alton Ochsner Med. Found. v. Allendale Mut. Ins. Co.*, 219 F.3d 501 (5th Cir. 2000).

*Alton Ochsner Medical Foundation v. Allendale Mutual Insurance Co.*²⁸ presents a perfect example. In *Alton*, a contractor made a claim for cracks in reinforced caps that were part of a foundation, and the carrier denied coverage based on exclusions for cracking and faulty workmanship.²⁹ Subsequently, an engineer concluded that new cracking and widening of prior cracks resulted in “material impairment of structural integrity” of the structure.³⁰ The insurer brought suit, and summary judgment was granted in favor of the carrier. The Fifth Circuit Court of Appeals accepted review and affirmed the grant of summary judgment.³¹

The policy at issue contained exclusions for faulty workmanship, construction, or design and for settling, cracking, and shrinking of foundations.³² These exclusions included ensuing loss clauses providing that, if physical damage not excluded resulted, then the resulting damage

²⁸ 219 F.3d 501 (5th Cir. 2000).

²⁹ *Id.* at 502-03.

³⁰ *Id.* at 503-04.

³¹ *Id.*

³² *Id.* at 504.

would be covered.³³ Like the Spragues, the insured in *Alton* did not dispute that damage resulted from faulty construction/design or that the cracking exclusion was implicated.³⁴ Yet, the insured (again like the Spragues) asserted that the damage was covered, arguing that the more severe cracking that resulted in the finding of “material impairment of structural integrity” was non-excluded resulting physical damage, triggering the ensuing loss exception to the exclusions.³⁵ The Court rejected this argument and stated:

To fall back within coverage as “resulting physical damage,” the policy contemplates damage that is different in kind, not merely different in degree. Ochsner accepts that cracking or defective construction, i.e., minor or “*immaterial* impairment,” of the foundation is excluded from coverage, but then suggests that “*material* impairment of structural integrity” is covered. We perceive no basis in the policy for this proffered dichotomy. ***Rather, we conclude that direct harm from cracking or faulty design or construction is excluded (no matter how severe it is) “unless physical damage not excluded by this Policy results,” that is, unless damage of a different kind—a kind that is not excluded—results.*** The

³³ *Id.*

³⁴ *Id.*

³⁵ Compare, *Alton*, 219 F.3d at 505 with CP 318 at Ins. 3-5.

word "results" supports this interpretation: "Impairment of structural integrity" does not "result" from cracking or faulty construction of the foundation; the cracked foundation *is* the impaired structural integrity, i.e., the inability of the faulty foundation to support the structure. To put it another way, the minor damage to the foundation does not "cause" the more severe structural impairment. The cracking *is* the impairment; they are synonymous.³⁶

Just like the cracking in *Alton*, the rot and deterioration here did not *result* in the substantial impairment. They *are* the impairment and are losses excluded by the Safeco policies.

D. There was no admission of coverage. Any arguments to the contrary should be ignored.

In its opinion, the *Sprague* Court quoted an internal report by the Safeco adjuster where she wrote, in part, "[w]ill await coverage counsel's recommendation, but I suspect that this loss will be covered."³⁷ Philadelphia Indemnity has pointed to this quotation as a possible admission of coverage that distinguishes *Viston One* from this matter. That is an inaccurate conclusion.

³⁶ *Id.* at 506 (italics original; emphasis in bold italics added).

³⁷ *Sprague*, 158 Wn. App. at 342.

First, the quotation is from an internal memo and specifically notes that the adjuster was awaiting the recommendation of legal counsel regarding coverage.³⁸ And second, Philadelphia Indemnity ignores the context in which the statement was made. Safeco denied coverage, and the same adjuster who wrote the internal memo explained that she had discussed the possibility of whether "imminent collapse" would result in coverage and ultimately concluded that it did not:

I would like to take this opportunity to also clarify some of the talking points I have made with you over the last few months in hope of finding coverage for your claim. I have discussed the possibility of whether imminent collapse conditions would trigger coverage. It turns out that this issue does not apply to the policies in place over the years for your property. Some forms offered collapse coverage and did not define it. In your case, where collapse coverage has been provided, it has been clearly defined as outlined above.³⁹

Safeco never extended coverage, nor admitted coverage existed, for the Spragues' deck damage. The

³⁸ *Id.* See also CP 171.

³⁹ See CP 135. See also CP 121-135.

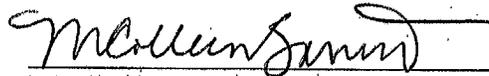
adjuster looked for a way to extend coverage, but ultimately determined no coverage existed.

IV. CONCLUSION

Here, the initial cause of loss (construction defects) and all resulting losses (rot, deterioration) were specifically excluded. The only damage that ensued was caused directly or indirectly by excluded construction defects. The only losses were excluded rot and deterioration, regardless of their characterization. Division I erred when it concluded that there was ensuing loss covered by the policies. Even if the "separate property test" advocated by Vision One and Amicus BOMA/NAIOP applied in Washington, Safeco's policies do not cover the Spragues' loss. The only damage was to the decks themselves caused by excluded perils including construction defects and rot. The *Sprague* decision should be reversed.

Respectfully submitted this 11th day of August, 2011

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