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NO. \_\_\_\_\_

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

VISION ONE, LLC and VISION TACOMA, INC.,

Petitioners.

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Respondent.

PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONERS

Vision One, LLC, and Vision Tacoma, Inc., (“Vision”) ask the Supreme Court to review the decision designated in Part II.

## II. COURT OF APPEALS DECISION

The published Court of Appeals decision at issue was filed on October 19, 2010. 2010 Wn. App. LEXIS 2322. A copy is attached.

## III. ISSUES PRESENTED FOR REVIEW

1. On October 19, 2010, the Court of Appeals, Division II, held in *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 2010 Wash. App. LEXIS 2322, that, under a standard-form all-risk builder’s insurance policy, a “resulting loss” exception to an exclusionary clause does not preserve coverage for the collapse<sup>1</sup> of an above-grade concrete slab. Less than two weeks later, the Court of Appeals, Division I, held that a functionally identical “ensuing loss” clause in a standard-form homeowners policy preserves coverage for a deck collapse. *Sprague v. Safeco Ins. Co.*, 2010 Wash. App. LEXIS 2419. The reasoning of the *Sprague* court would require a different result in the present case. Which of these two published decisions interprets resulting/ensuing loss clauses correctly?

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<sup>1</sup> As discussed *infra* at § B(1), and fn. 11, collapse is a major exposure for construction contractors such as Vision and is generally understood to be covered under all-risk builder’s policies.

2. Must the term “cause,” whenever it appears in an exclusionary clause in an insurance policy, be read as “efficient proximate [meaning predominant] cause” even when the insurer used the narrowing word “sole” to modify “cause” in the exclusion?

3. Does the Extra Expense Endorsement in Vision’s all-risk builders policy add to or limit the policy’s coverage?

#### IV. STATEMENT OF THE CASE

##### A. Background.

This is an insurance coverage case. Vision is the insured under a \$12,500,000 standard-form All Risk Builder’s insurance policy with an Extra Expense Endorsement that Philadelphia Indemnity Insurance Co. (“Philadelphia”) issued for Vision’s mixed-use building project.

Vision was pouring an above-grade concrete walkway slab when shoring equipment beneath the slab failed and the slab collapsed. Vision incurred expenses for cleanup and repairs to the slab and lost sales and profits due to delay. Vision made claim on its policy for those expenses and losses. Philadelphia denied coverage based on two “sole cause” exclusionary clauses. One clause excludes coverage for losses solely and directly resulting from faulty workmanship; the other excludes coverage

for losses solely and directly resulting from defective design.<sup>2</sup> Coverage is preserved if an exception to the “faulty workmanship” exclusion for “resulting loss” applies, but Philadelphia contended that there was no “resulting loss” because the forms, rebar lattice and concrete slab that collapsed were indistinct from the faulty temporary shoring. Vision sued.

B. Litigation in the Superior Court; Appeals.

Philadelphia confirmed during discovery that it stood by its initial reasons for denying coverage. CP 13114. In reliance, Vision moved after discovery for an order in limine precluding Philadelphia from changing its coverage position for trial. The trial court granted the motion. CP 5723. The court also made a pretrial ruling that the shoring was *equipment* which, even if faulty, is a covered cause, as opposed to faulty *workmanship* or *materials*, which are excluded causes. CP 6588 (¶ 1).<sup>3</sup>

In pretrial briefing on coverage issues, Vision showed that Philadelphia’s engineer had acknowledged that the assembly of wood forms, concrete rebar lattice and concrete slab had been separate from the shoring equipment that failed and that there is no indication they had been

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<sup>2</sup> Philadelphia told Vision in its letter denying coverage that “*the only cause of the loss was defective design and faulty workmanship.*” CP 13142 (§ 3, ¶ 1) (Italics in original).

<sup>3</sup> The court agreed with Vision, CP 6173-76, that materials consist of things that are used to build a building and are incorporated into it, while equipment consists of things that are used to build a building but that are not incorporated into it. As the Court of Appeals noted, *Op. at 13, fn. 2*, Philadelphia did not appeal the “shoring is equipment” ruling.

prepared or poured incorrectly.<sup>4</sup> The trial court ruled that the concrete, rebar and wood forms that collapsed (hereafter “the slab”) and for which Vision sought coverage were separate and distinct from the failed shoring.<sup>5</sup> The court further ruled that, because there had been nothing wrong with the slab, losses due to its collapse are covered under a “resulting loss” exception to the policy’s “faulty workmanship” exclusion, and entered summary judgment for Vision on the issue of coverage.<sup>6</sup> The trial court did not reach Vision’s argument, CP 6172-76, 6385-91, that there is coverage as a matter of law even if the collapse was *not* a “resulting loss,” because Philadelphia had admitted, CP 13070 and 13072, after denying coverage based on sole-cause exclusions, that faulty shoring *equipment* had been *a* cause of the slab’s collapse.

After the court’s pre-trial rulings regarding coverage, Philadelphia began arguing that the cause of the slab collapse presents an issue of fact under the “efficient proximate cause” or “predominant cause” rule adopted in *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983), without explaining how it would prove a predominant cause based on the expert testimony it had disclosed during discovery. The trial

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<sup>4</sup> CP 6386-89, 6392-93, 6396, 13075, 13115.

<sup>5</sup> 9/12/08 RP 152-53; CP 7099-100. Vision had not sought coverage for loss of shoring.

<sup>6</sup> 9/12/08 RP 152-53; CP 7099-7100.

court adhered to its ruling limiting Philadelphia to the “sole cause” exclusions on which it had denied coverage (because that had been “what everybody’s been deposed on,” 4/03/08 RP 177-78), and declined to submit the issue of collapse-causation to the jury. 9/16/08 RP 253-54.<sup>7</sup> Issues of damages-causation, bad faith, and CPA violations were tried. A jury awarded Vision \$975,628 in covered losses and \$178,728 in bad faith/CPA damages. The trial court awarded \$50,000 in exemplary damages for CPA violations and \$1,997,818 in attorney fees, litigation expenses, and costs, and entered judgments for a total of \$3,202,174.

Philadelphia appealed the judgment; Vision cross-appealed from a trial court ruling that the policy’s Extra Expense Endorsement limits, rather than adds, coverage for losses due to project delay.

In its published decision, the Court of Appeals reversed and remanded for a new trial for two stated reasons: First, according to the court, the concrete collapse was *not* a “resulting loss” as a matter of law; Second, the “sole cause” exclusions on which Philadelphia based its denial of coverage have to be read as “predominant cause” exclusions and a jury must make a finding as to what the walkway collapse’s predominant cause was. The court did not address the Extra Expense Endorsement.

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<sup>7</sup> See *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864, 454 P.2d 229 (1969) (if an insurer denies liability for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds if the insured was prejudiced by the failure to initially raise the other grounds).

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### A. Summary.

The Supreme Court should accept review for three reasons. First, the Court of Appeals' holding that the slab collapse was *not* a "resulting loss" is irreconcilable with the holding in *Sprague v. Safeco Ins. Co.*, 2010 Wn. App. LEXIS 2419 (Div. I, Nov. 1, 2010), that a deck collapse was covered under a functionally identical "ensuing loss" clause in a standard-form homeowners policy, and reads into Vision's standard-form builders risk policy a modifier – "independent" – that broadens the exclusionary clause to which the "resulting loss" clause is an exception, making a new contract for the parties to the insured's prejudice.

Second, the holding that the "sole cause" exclusions on which Philadelphia relied to deny coverage must be read as "predominant cause" exclusions conflicts with other decisions and broadens the exclusions.

Third, collapse is a major risk faced by construction contractors, such as Vision, who purchase *all-risk* builder's insurance and, because of the implications that the Court of Appeals' "resulting loss" and "predominant cause" holdings have not only for builders but also for insureds under standard-form all-risk homeowners, condominium, and commercial property policies, the decision raises issues of substantial public importance that the Supreme Court should decide.

B. The Court of Appeals’ “Resulting Loss” Holding Warrants Review Under RAP 13.4(b)(1), (2), and (4).

1. The decision in this case conflicts with other decisions of the Court of Appeals and with a decision of the Supreme Court concerning the application of “resulting/ensuing loss” clauses.

As the Court of Appeals recognized, “a resulting loss or ensuing loss provision [in an all-risk insurance policy] is an exception to a policy exclusion” – in this case to a “faulty workmanship” exclusion. *Op. at 14.*<sup>8</sup> *See also Frank Coluccio Const. Co. v. King County*, 136 Wn. App. 751, 777-78, 150 P.3d 1157 (2007) (“[the] provision of coverage for damage caused by the excluded ‘faulty workmanship’ is referred to as an ‘ensuing loss’ provision or a ‘resulting loss’ provision”).<sup>9</sup> The Court of Appeals’ reasoning and holding in this case conflict directly with the reasoning and holding of another published Court of Appeals collapse-loss decision issued 13 days later, *Sprague v. Safeco Ins. Co.*, 2010 Wn. App. LEXIS 2419 (Nov. 1, 2010). The Court of Appeals’ reasoning also conflicts with the reasoning of two other Washington “ensuing loss” decisions,

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<sup>8</sup> The policy language at issue for purposes of “resulting loss” analysis excludes coverage for loss “solely and directly resulting” from faulty workmanship, CP 5971 (¶ C1) and 5978(¶ 3a), but subject to an exception stating that: “But if “loss” by any of the Covered Causes of Loss results, we will pay for that resulting “loss,” CP 5978 (¶ 3a), and “But if loss or damages by a Covered Cause of Loss results, we will pay for the loss or damage caused by that Covered Cause of Loss,” CP 5972(¶ F). The policy defines “Covered Causes of Loss” to mean “Risks of Direct Physical ‘Loss’ to Covered Property,” unless excluded. CP 5974(¶ 4).

<sup>9</sup> The verbs “result” and “ensue” are synonymous. *See Webster’s Third New Intern’l Dictionary*, p. 756, and *Roget’s Intern’l Thesaurus*, (4<sup>th</sup> ed. 1977) at p. 939.

*McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724,734, 837 P.2d 1000 (1992), and *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274-75, 109 P.3d 1 (2004), which held in favor of insurers, but for a reason that would require a ruling in favor of the policyholder in this case.

*Sprague* held that, because an “ensuing loss” clause in a standard-form all-risk homeowners policy did not specifically exclude collapse, the insureds had coverage for the collapse of decking due to the failure of rot-weakened supporting beams, even though rot damage was excluded:

An ensuing loss provision . . . is an exception to an exclusion and preserves coverage when the loss is caused by an excluded peril. *Sprague* contends that since collapse is not specifically excluded in the policies . . . it is a covered ensuing loss under the policy language: “However, any ensuing loss not excluded is covered.”

Safeco’s . . . policies for *Sprague* are all-risk policies and cover losses to the building and attached deck structures, unless specifically excluded. Safeco’s policy did not exclude collapse as a peril. In *Wright v. Safeco Insurance Company of America*, we opined that an ensuing loss exception preserved coverage for damage from water leaks caused by faulty construction, despite the exclusion for construction defects. However, there the loss claimed was from mold, and mold was itself specifically excluded. Thus, the ensuing loss provision did not operate because there was no covered loss. Unlike *Wright*, the policy language here, excluding loss for construction defects, specifically permits coverage for any ensuing loss not otherwise excluded.

In conclusion, the losses that are faulty construction and rot are not covered, but the “ensuing losses,” those that result from such faulty construction or rot, are covered because

such an ensuing loss is not excluded elsewhere in the policy.

*Sprague*, 2010 Wn. App. LEXIS \*4-\*6 (footnotes omitted).

Like *Sprague*, this case involves an all-risk policy that covers and does not exclude collapse.<sup>10</sup> Under *Sprague*'s analysis, Vision's collapse loss was a "resulting loss" and thus is covered, as the trial court ruled it is. The Court of Appeals in this case reached the opposite conclusion.

The decision that *Sprague* distinguished, *Wright v. Safeco*, 124 Wn. App. at 274-75, held that mold damage is covered under an "ensuing loss" exception to a defective construction exclusion if defective construction causes water damage that in turn causes mold, unless some other policy provision excludes coverage for mold damage. *Wright* held that the "ensuing loss" exception did not preserve coverage, and the insurer prevailed, but that was because the policy had an exclusion for mold damage. Under the reasoning of *Wright*, the concrete slab collapse in this case would be covered because there is no exclusion for collapse in Philadelphia's builder's risk policy. Because the Court of Appeals' reasoning and decision cannot be reconciled with that of the *Sprague*

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<sup>10</sup> And see *Frank Coluccio Const. Co.*, 136 Wn. App. 757 n.1 (explaining that all-risk insurance policies differ from older "named peril" or "specific peril" policies, which exclude risks not specifically listed or named as covered ones), and *Findlay*, 129 Wn.2d at 378 (in all-risk insurance policy, "any peril *that is not specifically excluded* in the policy is an insured peril"). Philadelphia admitted that collapse is covered unless an exclusion applies. CP 13112, 13092.

court, and is inconsistent with the reasoning of *Wright*, the Supreme Court should accept review under RAP 13.4(b)(2).

In *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 837 P.2d 1000 (1992), the court explained that, “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 [but the] uncovered event itself . . . is never covered.* [Emphasis added.]

*McDonald*, 119 Wn.2d at 734. Applying the same reasonable interpretation as in *McDonald*, the “resulting loss” clause in Philadelphia’s policy also says that if an uncovered event (*e.g.*, faulty workmanship) takes place, any resulting loss which is otherwise covered (*e.g.*, collapse of the concrete slab) will remain covered, although the uncovered event itself (loss of faultily-erected shoring), is not covered. As Philadelphia acknowledged, this all-risk builder’s policy excludes coverage for faulty workmanship because it does not want to pay to repair faulty work, CP 13118, but the “resulting loss” clause “gives back” some of the coverage that the exclusion would take away without that exception, CP 13110.<sup>11</sup>

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<sup>11</sup> Vision showed in the trial court, CP 6169, fn. 22, that this is the purpose that such clauses are understood to have in the builder’s risk insurance industry, citing Robert J. Prah, *The Evolution of Collapse Coverage*, a publication of the American Association of Insurance Services (“[C]ollapse is a major exposure for project owners and contractors engaged in construction projects. Buildings or structures in the course of construction are more susceptible to collapse loss than existing buildings or structures. Common perils include wind, faulty workmanship, and design error . . . However, many of these policies provide collapse coverage as an ensuing loss”).

The Court of Appeals referred to the analysis described above (and applied in *Sprague* and, implicitly, in *Wright* and *McDonald*, as well as by the trial court) as the “separate property” test. The Court of Appeals held that the “separate property” test applies only under “resulting/ensuing loss” clauses worded differently from the clause in Philadelphia’s all-risk policy. *Op. at 15-18 and fn. 4.*<sup>12</sup> The court so held despite the fact that Philadelphia had acknowledged that damage to property other than the property on which the faulty workmanship occurred is a covered “resulting loss”<sup>13</sup> – which is another way of stating the “separate property” test discussed by the Court of Appeals.

The Court of Appeals announced that resulting/ensuing loss clauses apply “when an excluded peril causes a separate and *independent* covered peril.” *Op. at 14.* According to the Court of Appeals, Vision’s slab collapse is not “independent” but rather something that results “directly from the initial excluded peril of faulty workmanship” and thus “remains *uncovered*,” *Op. at 15* [italics supplied]. And, according to the Court of Appeals, although loss due to a fire that breaks out after an

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<sup>12</sup> In holding that the trial court should not have applied the “separate property” test, the Court of Appeals failed to respect an interpretation of the “resulting loss” clause made in a trial court order, CP 7099-7100, from which Philadelphia did not appeal. That order held that the collapsed slab for which Vision sought damages had been separate and distinct from the failed temporary shoring underneath it, such that loss of shoring is excluded under the policy’s “faulty workmanship” exclusion but that the “resulting loss” exception preserves coverage for the loss of the nondefective concrete slab.

<sup>13</sup> CP 6543-45 and 13117. Vision made that point in its brief below. *Vision Br. at 26-27.*

earthquake due to a broken gas line would be covered as a “resulting loss” under a policy that excludes coverage for earthquake damage but that covers fire damage (because the fire is “independent” as well as “separate”), the concrete slab collapse here was not “independent” and thus is not covered as a “resulting loss” even though the policy *covers collapse*.<sup>1</sup> To justify this anomalous holding, which the Court of Appeals evidently would apply to any collapse under any kind of property insurance policy, the court distinguished the wording of the “resulting loss” clause in Philadelphia’s policy from clauses in cases, including *Allianz Ins. Co. v. Impero*, 654 F. Supp. 16 (E.D. Wash. 1986), that have held losses to be covered “resulting losses” when property damaged as a result of excluded faulty workmanship was separate from the faultily-built part of the same structure. *Op. at 16-18*. In drawing that distinction, however, the Court of Appeals ignored Philadelphia’s brief (p. 25) acknowledging that its “resulting loss” clause is “*similar*” to the one in *Allianz*.

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<sup>1</sup> The Court of Appeals also sought to explain its distinction between fire and collapse by terming fire “secondary” and collapse “simultaneous.” *Op. at 16, fn. 3* There is no textual support in the policy for, and Philadelphia never advocated, such a distinction. In fact, Philadelphia’s insurance coverage expert, asked about the same hypothetical fire loss and how, if at all, it is different, for purposes of “resulting loss” analysis, from the concrete collapse in this case, responded that “I don’t think it is.” 10/13/08 RP 1242. *See also* fn. 11, discussing the fact that because collapse is such a major risk in the construction industry, it is commonly covered in all-risk builder’s policies such as Philadelphia’s.

The Court of Appeals' "resulting loss" analysis concluded:

In short, the fact that the defective shoring structure allegedly damaged separate, nondefective property does not automatically trigger the resulting loss provision in this case. As discussed above, the resulting loss provision covers damage resulting from an *independent* covered peril, such as fire. If faulty workmanship in the shoring installation caused the shoring structure and concrete slab to collapse, then the damage resulted *directly* from faulty workmanship, not from an *independent* covered peril. Therefore, we hold that the concrete slab collapse does not qualify as a resulting loss under the resulting loss exception to the faulty workmanship exclusion in Vision's insurance contract. [Emphases added.]

*Op. at 18.* Philadelphia could have – but did not – narrow its “resulting loss” clause with the adjectives “independent” and “directly.” *See Boeing Co. v. Aetna Cas. & Surety Co.*, 113 Wn.2d 869, 887, 784 P.2d 507 (1990) (“the [insurance] industry knows how to . . . write exclusions and conditions. . .”).<sup>15</sup> The Court of Appeals, by reading such adjectives into Vision's policy, violated the principle, recognized in *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 380, 917 P.2d 116 (1996), that courts should not create a new contract for the parties to an insurance policy, not to mention the “basic principle” that exclusionary clauses are construed strictly and narrowly against insurers. *E.g.*, *Ticor Title Ins. Co.* 166 Wn.2d 466, 472, 209 P.3d 859 (2009); *Phil Schroeder, Inc. v. Royal Globe*

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<sup>15</sup> And, ironically, Philadelphia demonstrated *in this policy* that it knew how to draft a “resulting loss” clause more narrowly. A “resulting loss” clause under the design exclusion limits the exception to loss caused by resulting fire or explosion. CP 5977 (2e).

*Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983).

2. The Court of Appeals' treatment of the "resulting loss" clause raises an issue of substantial public interest that the Supreme Court should decide.

As several decisions indicate, standard-form policies that insure homes, condominiums, commercial property, and building projects contain resulting loss" or "ensuing loss" exceptions to exclusionary clauses for faulty workmanship and other excluded causes of loss. *See Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 656 P.2d 1077 (1983) (homeowners policy); *McDonald*, 119 Wn.2d 724 (homeowners policy); *Findlay*, 129 Wn.2d 368 (homeowners policy); *Sprague*, 2010 Wn. App. LEXIS 2419 (homeowners policy); *Frank Coluccio Const.*, 136 Wn. App. 751 (builder's risk policy); *Wright v. Safeco*, 124 Wn. App. 263 (homeowners policy); *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 990 P.2d 414 (1999) (commercial property insurance policy); *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 901 P.2d 1079 (1995), *rev. denied*, 129 Wn.2d 1020 (1996) (policy insuring condominium building). Unrebutted trial testimony established that the wording of the Philadelphia policy regarding faulty workmanship and resulting loss is "pretty standard" for builders risk policies. *Sept. 24, 2008*

*RP at 255*. Philadelphia has not disputed this.<sup>16</sup> Whether *Sprague* or the decision in this case correctly interprets and applies “resulting/ensuing loss” clauses thus presents an issue of substantial public interest that this State’s highest court should decide. The Supreme Court should accept review of the Court of Appeals’ “resulting loss” holding under RAP 13.4(b)(4) as well as under RAP 13.4(b)(1) and (2).

C. The Supreme Court Also Should Review the Court of Appeals’ Holding that the “Sole Cause” Exclusions that Philadelphia Relied on to Deny Coverage Must Be Read as “Predominant Cause” Exclusions.

An “efficient proximate cause rule” applies in property insurance coverage cases where the insurer has denied coverage under an exclusion for a loss “caused by” an excluded cause and the insured maintains that the cause of loss was a different, nonexcluded one. For purposes of plain English and jury instructions, “efficient proximate” means “predominant.” *Graham*, 98 Wn.2d at 538; *Kish v. Ins. Co. of North Am.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994); *Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 814-15, 725 P.2d 957 (1986). The rule was adopted to make it more difficult, not easier, for an insurer to deny coverage.

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<sup>16</sup> The insuring clause and the “resulting loss” language in the Philadelphia policy are standard. See *Miller’s Standard Ins. Policies Anno.*, Vol. I, pp. 206-08 (homeowners); p. 455.6 (commercial property); p. 457.4 (condominium); p. 458.2 (builders risk); and especially pp. 470.2 and 470.5 (all of these types of policy). The “solely and directly” language in Philadelphia’s exclusionary clauses is frequently used, but is not nationwide standard language.

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

*Kish*, 125 Wn.2d at 169 (quoting *Graham*, 98 Wn.2d at 538) (italics added); *see also Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 888, 91 P.3d 897 (2004) (“[c]ourts employ the efficient proximate cause rule *to find coverage* when the initial act is a covered one but somewhere in the chain of causation, an excluded act occurs [italics added]”).

The Court of Appeals quoted *Safeco Ins. Co. v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413 (1989), for the proposition that *Graham* “suggests that whenever the term ‘cause’ appears in an exclusionary clause it must be read as ‘efficient proximate cause.’” *Op. at 12*. Such a statement makes sense in cases like *Hirschmann*, but not where an insurer has chosen, as Philadelphia did, to word its exclusion more narrowly by modifying “cause” with the adjective “sole” or the adverb “solely.”

*Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 773 P.2d 906 (1989), held that an insured is not entitled to have predominant cause analysis applied to an exclusion worded more broadly than a “caused by” exclusion. *Toll Bridge* involved an “arising under” exclusion. The court explained that efficient proximate/predominant cause analysis did not apply because “‘arising out of’ and ‘proximate cause’ describe two

different concepts.” 54 Wn. App. at 406. “Sole cause” describes a concept that is even more different, conceptually, from “proximate [predominant] cause” than “arising under” is. If an insured may not have predominant cause analysis applied to an exclusion worded more broadly than “caused by,” as *Toll Bridge* holds, an insurer ought not to be able to use predominant cause analysis to broaden a more narrowly worded policy exclusion, such as a “sole cause” exclusion. When an insurer promises to insure subject to a narrowly-worded exclusion, principles neither of contract law nor of public policy justify a court broadening the exclusion after the insurer denies coverage based on it.

In declaring that “[w]hen ever covered and excluded perils combine to cause a loss the loss will be covered only if the predominant or efficient proximate cause was a covered peril,” the Court of Appeals ignored Philadelphia’s position that there would be coverage “. . . if an excluded event *and a non-excluded event* result in loss or damage.” CP 6492 (emphasis original). Philadelphia had not qualified its admission that the existence of a non-excluded cause means there is coverage by trying to tie it to a predominant-cause test. In *Findlay*, 129 Wn.2d at 380, the Supreme Court declared that “[t]he efficient proximate cause rule should be applied to enforce the reasonable expectations of the parties *based on the language of the insurance contract and not to create a new contract for*

*the parties.*” (Emphasis added). Ignoring that admonition, the Court of Appeals has created a new contract for Vision and Philadelphia, substituting broader “predominant cause” exclusions for the policy’s “sole cause” exclusions.

The Court of Appeals’ causation-standard holding will not affect the outcome of *this* case if the Supreme Court reinstates the trial court’s ruling that Vision has coverage under the “resulting loss” clause.<sup>17</sup> The decision is published, however, and if the “efficient proximate cause” holding stands, it will require trial courts to read even the most narrowly-worded exclusionary clauses broadly. That result is of such substantial public interest that the Supreme Court should review and reverse both holdings. RAP 13.4(b)(4).

D. In Order to Decide the Scope of Any New Trial, Vision’s Cross-Appeal With Respect to the Extra Expense Endorsement Should Be Addressed, Regardless of Whether the Supreme Court Reverses or Affirms the Court of Appeals.

By cross-appeal, Vision sought a new trial to prove lost profits that the trial court held the Extra Expense Endorsement excludes from rather than adds to the policy’s coverage. The Court of Appeals did not address that issue. The Supreme Court either should address and decide the issue

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<sup>17</sup> The Court of Appeals’ decision inaccurately characterizes Vision as having contended that causation is a question of fact, *see Op. at 13* (quoting CP 6385). Vision contended that whether faulty workmanship was the *sole* cause would be an issue of fact, but that, even if faulty workmanship *was* the sole cause, the collapse is covered as a “resulting loss.” *See, e.g., 7/18/08 RP 40.*

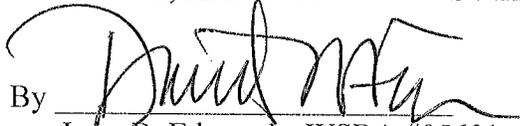
or remand to the Court of Appeals to decide it. RAP 13.7(b).

VI. CONCLUSION

The Supreme Court should grant review. RAP 13.4(b)(1), (2), (4).  
The Court should reverse the Court of Appeals, affirm the trial court's  
"resulting loss" ruling, reinstate the judgments that the trial court entered  
against Philadelphia, and remand for trial of Vision's claim for those  
losses that the trial court held are excluded by the Extra Expense  
Endorsement.

RESPECTFULLY SUBMITTED this 17th day of November,  
2010.

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 17th day of November, 2010, I caused a true and correct copy of the foregoing document, "Petition for Review," to be delivered in the manner indicated below to the following counsel of record:

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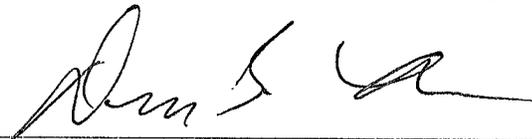
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DATED this 17th day of November, 2010, at Seattle, Washington.



\_\_\_\_\_  
Dena S. Levitin, Legal Assistant

*EXHIBIT 1*

***Vision One, LLC v. Philadelphia Indem. Ins. Co.,***

\_\_ Wn. App. \_\_\_\_, \_\_ P.3d \_\_\_\_,  
2010 Wn. App. LEXIS 2322 (Oct. 19, 2010)

FILED  
COURT OF APPEALS  
DIVISION II

OCT 19 AM 10:21  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

VISION ONE, LLC; and VISION TACOMA,  
INC.,

Respondents/Cross Appellants,

v.

PHILADELPHIA INDEMNITY  
INSURANCE COMPANY,

Respondent/Cross Appellant

And

D&D CONSTRUCTION, INC.,

Respondent.

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D&D CONSTRUCTION, INC.,

Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO.,  
INC.,

Respondent.

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MATTHEW THOMPSON,

Respondent,

v.

D&D, INC., a Washington corporation; BERG  
EQUIPMENT & SCAFFOLDING CO., INC., a  
Washington corporation; VISION ONE, LLC,  
a Washington limited liability corporation; and  
VISION TACOMA, INC., a Washington  
corporation,

Respondents.

No. 38411-6-II

(Consolidated with 41021-4-II)

PUBLISHED OPINION

No. 38411-6-II (Consolidated  
with No. 41021-4-II)

RSUI,

Appellant/Intervenor.

ARMSTRONG, P.J. — Shoring equipment supporting a poured concrete slab collapsed during the construction of a condominium complex being developed by Vision One LLC and Vision Tacoma Inc. (collectively Vision). Philadelphia Indemnity Insurance Co., Vision's insurance company, denied Vision's insurance claim and Vision sued Philadelphia for breach of contract, bad faith, and violations of the Consumer Protection Act (CPA). The trial court ruled that the concrete slab collapse was covered under the "resulting loss" exception to the policy's faulty workmanship exclusion. A jury found that Philadelphia acted in bad faith and committed five CPA violations.

Vision also sued D&D Construction Inc., the contractor responsible for the concrete work, and D&D sued Berg Equipment and Scaffolding Co., the contractor responsible for supplying the shoring equipment. Vision settled with D&D and Berg and the settlement released Berg from liability. Philadelphia moved to dismiss Vision's breach of contract claim, contending that Vision breached the insurance contract by impairing Philadelphia's recovery rights against Berg. The trial court denied Philadelphia's motion.

Philadelphia appeals (1) the trial court's denial of its motion to dismiss Vision's breach of contract claim, (2) the trial court's ruling that the concrete slab collapse is covered as a resulting loss, and (3) the measure of damages and attorney fees. Vision cross-appeals, also assigning error to the measure of damages. Because material facts regarding the cause of the collapse remain in dispute, we reverse the judgment against Philadelphia and remand for a jury to

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determine causation. We also hold as a matter of law that the concrete slab collapse is not a resulting loss under the faulty workmanship resulting loss provision.

## FACTS

### I. COLLAPSE AND INSURANCE CLAIM

In 2005, Vision began developing a condominium complex in Tacoma. Vision contracted with D&D for the concrete work and D&D contracted with Berg for shoring equipment to temporarily support the poured concrete slabs. On October 1, 2005, D&D poured a concrete slab and the shoring structure collapsed. After receiving Vision's insurance claim, Philadelphia hired BT & Associates to determine the cause of the collapse.

A structural engineer examined the shoring design drawings and concluded that the design was adequate for supporting the poured concrete but that "at best, this shoring design is marginal and it doesn't allow for any inadequacies in the shoring installation." Clerk's Papers (CP) at 6110, 6112. BT & Associates also inspected the shoring equipment and identified numerous flaws with the shoring installation, including: missing cross-braces, overextended tubes, tilting shoring towers, and inadequately supported base plates placed on unlevel surfaces.

The report concluded:

The marginal shoring design alone may not have caused the . . . collapse . . . . We suggest that this factor in combination with various shoring installation problems identified in this report, on a more likely than not basis, caused the shoring to collapse . . . .

CP at 6118.

Vision's insurance policy covers all "direct physical 'loss,'" unless the loss is expressly excluded. CP at 5973-74. The policy expressly excludes loss caused by defective design and loss caused by faulty workmanship. But the faulty workmanship exclusion provides coverage

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for resulting losses: “[If] loss by any of the Covered Causes of Loss results, we will pay for that resulting ‘loss.’” CP at 5978.

Based on these exclusions and the report from BT & Associates, Philadelphia denied Vision’s claim in a letter dated January 3, 2006:

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.

CP at 13,136. Vision asked Philadelphia to reconsider, and Philadelphia clarified its evaluation in a letter dated January 27, 2006:

While the faulty workmanship exclusion contains an exception for resulting loss from a Covered Cause of Loss, in [this] case, the only cause of the loss was defective design and faulty workmanship. There is no separate and independent loss that resulted in the claimed damage. Therefore, the faulty workmanship exclusion bars coverage for this loss, and the “resulting loss” provision contained therein does not apply.

CP at 13,139 (emphasis omitted).

## II. LITIGATION BETWEEN VISION AND PHILADELPHIA

In March 2006, Vision sued Philadelphia in Pierce County Superior Court. In pretrial hearings regarding proposed jury instructions, the parties disagreed over the meaning of several policy provisions. The parties asked the trial court to interpret the disputed provisions as a matter of law and submitted extensive briefing on the issues.

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with No. 41021-4-II)

Vision argued that if there were two excluded causes of loss, then the collapse would be covered because neither "directly and solely" caused the collapse. CP at 6,388-91. In response, Philadelphia argued:

The significance of the "directly and solely" language is not to preclude Philadelphia from denying coverage if two or more excluded events occur. It is to preclude Philadelphia from denying coverage if an excluded event and a[] non-excluded event result in loss or damage.

CP at 6,492. At a hearing on this issue, Philadelphia clarified that an additional efficient proximate cause analysis is required if the loss was caused by an excluded event and a nonexcluded event. Relying on the language in Philadelphia's brief, the trial court ruled:

Order on Insurance-Related Issues:

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.

Report of Proceedings (RP) (July 18, 2008) at 18; CP at 6,587. Philadelphia moved for reconsideration, asking 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." CP at 6,603-06. The trial court denied the motion.

The parties also disagreed over whether the concrete collapse qualified as a "resulting loss" under the faulty workmanship resulting loss provision. CP at 6,960-7,009. The trial court ruled that because the shoring equipment and concrete slab were "separate and distinct," the concrete collapse was covered under the resulting loss provision:

Order on Resulting Loss:

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

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resulting loss or damage caused by the concrete collapse is covered by the policy language.

CP at 7,099-7,100.

Philadelphia again moved for reconsideration, arguing that a jury must determine the efficient proximate cause of the collapse before the trial court can rule that the loss is covered under the faulty workmanship resulting loss provision. The trial court denied the motion, stating: "We've been over whether there needs to be one cause or two, or multiple causes. If there is a cause that should be covered, then it's all going to be covered." RP (Sept. 16, 2008) at 19. The trial court then ruled:

**Order on Faulty Workmanship:**

Philadelphia is precluded, by its prior position taken, from arguing at trial that faulty workmanship was not a cause of the collapse. Because the Court has already ruled that any resulting loss or damage caused by the concrete collapse is covered by the policy language, the only issues remaining for trial are: (1) causation; (2) bad faith; and (3) damages.

CP at 7,102-03.

A jury found that the concrete collapse caused \$251,023 in repair and reconstruction expenses and \$724,605 in expenses due to delay. The jury also found that Philadelphia acted in bad faith and committed five CPA violations, causing \$178,728 in damages. The trial court awarded Vision a principal judgment of \$1,148,428, an additional \$50,000 for the five CPA violations, and \$1,997,818 for attorney fees and costs.

**III. SETTLEMENT BETWEEN VISION AND BERG**

Before trial, Vision settled with D&D and Berg. The settlement included a judgment against Berg that Vision agreed to attempt to satisfy only against Berg's excess insurer, Royal.

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Specialty Underwriting, Inc. (RSUI).<sup>1</sup> The settlement also released Berg from liability. Philadelphia moved to dismiss Vision's breach of contract claims, arguing that the settlement breached the insurance contract by impairing Philadelphia's potential recovery rights against Berg. The trial court approved the settlement and denied Philadelphia's motion, ruling:

Philadelphia Insurance having denied coverage and having paid nothing [to Vision] is not entitled to any subrogation or other interest in this settlement [between Vision and Berg]. If Philadelphia prevails on coverage, it is not prejudiced by this settlement. If Philadelphia does not prevail, it is in material breach of its insuring obligations and is not entitled to subrogation in light of such breach.

CP at 484.

## ANALYSIS

### I. IMPAIRMENT OF RECOVERY RIGHTS

Philadelphia first contends that the trial court should have dismissed Vision's breach of contract claim, arguing that Vision clearly breached the insurance policy by settling with Berg, thereby impairing Philadelphia's recovery rights against Berg. The insurance policy provides: "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.'" CP at 5,979. We review the trial court's interpretation of insurance policy provisions de novo. *Bowers v. Farmers Ins. Exch.*, 99 Wn. App. 41, 44, 991 P.2d 734 (2000) (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d

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<sup>1</sup> RSUI intervened and challenged the reasonableness of the settlement. RSUI appealed the trial court's denial of its motion to continue the reasonableness hearing and the court's ruling that the settlement was reasonable. Their appeal has been severed from this appeal and will be decided in a separate opinion.

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724, 730-31, 837 P.2d 1000 (1992)).

The issue is whether Philadelphia may enforce the policy's impairment of recovery rights provision against Vision after denying Vision's claim. The parties have not cited any Washington cases addressing this issue. But many other jurisdictions have considered this issue and agree that when an insurer denies liability and the insured settles with the tortfeasor, the insurer is estopped from claiming that the insured breached the policy by impairing the insurer's recovery rights. See, e.g., *Havanich v. Safeco Ins. Co. of Am.*, 557 F.2d 948, 950-52 (2d Cir. 1977); *Stephens v. State Farm Mut. Auto. Ins. Co.*, 508 F.2d 1363, 1366 (5th Cir. 1975), *abrogated on other grounds by Holyfield v. Members Mut. Ins. Co.*, 572 S.W.2d 672 (Tex. 1978); *Calhoun v. State Farm Mut. Auto. Ins. Co.*, 62 Cal. Rptr. 177, 179-81 (Cal. Ct. App. 1967); *Liberty Mut. Ins. Co. v. Flitman*, 234 So. 2d 390, 392-93 (Fla. Dist. Ct. App. 1970); *Cnty. Title Co. v. Safeco Ins. Co. of Am.*, 795 S.W.2d 453, 461-62 (Mo. Ct. App. 1990); *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 84 (Minn. 2004); *Sexton v. Cont'l Cas. Co.*, 816 P.2d 1135, 1138 (Okla. 1991); *Roberts v. Fireman's Ins. Co. of Newark*, 101 A.2d 747, 749-50 (Pa. 1954); *Childs v. Allstate Mut. Ins. Co.*, 117 S.E.2d 867, 871 (S.C. 1961); see generally 16 LEE R. RUSS, COUCH ON INSURANCE § 224:148 (3d. ed. 2005). As the Fifth Circuit explained in *Stephens v. State Farm Mutual Auto Insurance Co.*:

The rationale behind holding to this particular waiver theory is that a claimant should not be required to approach his insurer, hat in hand, and request consent to settle with another when he has already been told, in essence, that the insurer is not concerned, and he is to go his way. It is difficult to see why an insurer should be allowed, on the one hand, to deny liability and thus, in the eyes of the insured, breach his contract and, at the same time, on the other hand, be allowed to insist that the insured honor all his contractual commitments. When the denied liability does not, in fact, exist, no harm can be done the insurer by the insured's settlement with a third party. When the denied liability does exist (as may be later adjudicated), admittedly the subrogation rights of the insurer could be

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compromised by settlement. However . . . the denial is a breach of contract on the part of the insurer and its breach should, by rights, relieve the insured of the punitive effects of his failure to comply with consent provisions of the insurance policy.

*Stephens*, 508 F.2d at 1366.

Philadelphia argues that we should enforce the policy's impairment of recovery rights provision despite the wealth of persuasive authority to the contrary, relying on *Leader National Insurance Co. v. Torres*, 113 Wn.2d 366, 779 P.2d 722 (1989), and *Kalamazoo Acquisitions, LLC v. Westfield Insurance Co.*, 395 F.3d 338 (6th Cir. 2005). Both *Leader* and *Kalamazoo* are distinguishable from this case.

In *Leader*, our Supreme Court held that a settlement between an insured and a tortfeasor does not extinguish the insurer's subrogation rights where (1) the tortfeasor *knows of the insurer's payment* and right of subrogation, (2) the insurer does not consent, and (3) the settlement does not exhaust the tortfeasor's assets. *Leader*, 113 Wn.2d at 373-74 (emphasis added). Philadelphia acknowledges the key distinction between *Leader* and this case—Philadelphia denied Vision's claim and has never made a payment to Vision. Thus, the first *Leader* requirement has not been met.

In *Kalamazoo*, the insured first settled with the tortfeasor for less than the amount of actual damages and then submitted a claim to the insurer for the remaining balance. *Kalamazoo*, 395 F.3d at 340. The Fifth Circuit held that the insured had breached the policy's subrogation clause and was therefore precluded from demanding that the insurer pay the balance. *Kalamazoo*, 395 F.3d at 344-45. Thus, the insured in *Kalamazoo* breached the contract first by extinguishing the insurer's recovery rights before submitting an insurance claim. Here, Vision submitted a claim to Philadelphia and settled with Berg only after Philadelphia denied the claim.

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As explained in *Stephens*, if the denied liability does exist, then Philadelphia breached the contract first by denying Vision's claim. If the denied liability does not exist, then Philadelphia has not been harmed by Vision's settlement. *See Stephens*, 508 F.2d at 1366.

Accordingly, we affirm the trial court's denial of Philadelphia's motion to dismiss Vision's breach of contract claim. Based on the persuasive authority discussed above, Philadelphia is estopped from claiming that it was released from liability when it denied Vision's insurance claim and Vision settled with Berg.

## II. RESULTING LOSS RULING

Philadelphia next assigns error to the trial court's resulting loss ruling, arguing (1) the trial court erred by finding coverage as a matter of law before a jury determined the efficient proximate cause of the collapse and (2) the concrete slab collapse is not a "resulting loss" under the resulting loss exception to the faulty workmanship exclusion. CP at 5,978.

### A. Estoppel

As a threshold matter, Vision argues that an order in limine precludes Philadelphia from arguing that the efficient proximate cause rule applies in this case. The order provides: "Philadelphia is precluded from offering reasons other than those in the first three paragraphs of section 3 Coverage Determinations in the letter dated January 3 and January 27, 2006." CP at 5,723. When an insurer denies coverage for one reason, with knowledge of other reasons for denying coverage, the insurer may be precluded from raising new grounds for denying coverage under traditional principles of estoppel. *See Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63, 1 P.3d 1167 (2000); *Bosko v. Pitts & Still, Inc.*, 75 Wn.2d 856, 864, 454 P.2d 229 (1969). But, as discussed below, the efficient proximate cause rule is a rule of insurance contract

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construction, not a new ground for denying coverage. See *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn. App. 368, 374-75, 901 P.2d 1079 (1995). Thus, the order in limine does not prevent us from applying the efficient proximate cause rule when interpreting the insurance contract in this case.

Vision also argues that Philadelphia is not entitled to a jury determination of causation because Philadelphia asked the trial court to determine coverage as a matter of law. A party may not maintain inconsistent positions in judicial proceedings. See *Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P.2d 886 (1969). "It is not as strictly a question of estoppel as it is a rule of procedure based on manifest justice and on a consideration of orderliness, regularity and expedition in litigation." *Mueller*, 1 Wn. App. at 409. Here, Philadelphia asked the trial court to interpret the faulty workmanship resulting loss provision and determine whether the concrete slab collapse qualifies as a resulting loss. The scope of a policy's coverage is distinct from the issue of causation. *Sunbreaker*, 79 Wn. App. at 374; see also *Churchill v. Factory Mut. Ins. Co.*, 234 F. Supp. 2d 1182, 1187 (W.D. Wash. 2002). Parties may ask the trial court to resolve questions of law regarding insurance policy interpretation before the jury resolves questions of fact regarding causation, as Philadelphia did in this case.

B. Efficient Proximate Cause

Turning to the merits of Philadelphia's arguments, we begin with an overview of the principles governing insurance contract interpretation. An insurer is liable under an insurance contract when a covered peril causes a loss. *Bowers*, 99 Wn. App. at 44. Under an all-risk insurance policy, any peril that the policy does not specifically exclude is a covered peril. *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996) (citing *Villella v. Pub.*

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*Employees Mut. Ins. Co.*, 106 Wn.2d 806, 816, 725 P.2d 957 (1986)). A court determines coverage by characterizing the perils contributing to the loss and determining which perils the policy covers and which it excludes. *Bowers*, 99 Wn. App. at 44 (citing *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 170, 883, P.2d 308 (1994)). A trial court's interpretation of insurance policy provisions is a matter of law, which we review de novo. *Bowers*, 99 Wn. App. at 44 (citing *McDonald*, 119 Wn.2d at 730-31).

Whenever the term "cause" appears in an exclusionary clause, it must be read as "efficient proximate cause." *Safeco Ins. Co. of Am. v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413 (1989) (citing *Villella*, 106 Wn.2d at 815-16; *Graham v. Pub. Employees Mut. Ins. Co.*, 98 Wn.2d 533, 656 P.2d 1077 (1983)). The efficient proximate cause of a loss is "the predominant cause which sets into motion the chain of events producing the loss . . . not necessarily the last act in a chain of events." *Graham*, 98 Wn.2d at 538. Whenever covered and excluded perils combine to cause a loss, the loss will be covered only if the predominant or efficient proximate cause was a covered peril. See *Kish*, 125 Wn.2d at 170; *McDonald*, 119 Wn.2d at 732; *Graham*, 98 Wn.2d at 538; *Sunbreaker*, 79 Wn. App. at 378-79. Determining the cause of a loss is a question of fact for the fact finder, unless "the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion." *Graham*, 98 Wn.2d at 539.

Here, the trial court ruled: "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 at 6,587. After determining that the concrete slab collapse qualified as a resulting loss, the trial court relied on this ruling to find coverage as a matter of law, reasoning: "If there is a cause that

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should be covered, then it's all going to be covered." RP (Sept. 16, 2008) at 19; CP at 7,099-7,100. These rulings contradict the efficient proximate cause rule by allowing coverage as long as at least one of the contributing causes was a covered peril. As discussed above, whenever covered and excluded perils combine to cause a loss, the loss is covered only if the predominant or efficient proximate cause was a covered peril. See *Kish*, 125 Wn.2d at 170; *McDonald*, 119 Wn.2d at 732; *Graham*, 98 Wn.2d at 538; *Sunbreaker*, 79 Wn. App. at 378-79.

Furthermore, the resulting loss provision at issue is specifically an exception to the faulty workmanship exclusion. It applies only if faulty workmanship caused the collapse. Thus, when the trial court ruled that the collapse was covered under the resulting loss provision, it essentially ruled that the collapse was caused by faulty workmanship. But determining the cause of the collapse is a question of fact for the jury, unless the facts are undisputed. See *Graham*, 98 Wn.2d at 539.

The parties disputed the cause of the collapse throughout their extensive pretrial briefing: Philadelphia argued that the collapse was caused by faulty workmanship and defective design (two excluded perils); while Vision argued that faulty equipment (a covered peril) also contributed to the collapse.<sup>2</sup> Vision also argued: "[T]here most definitely is a dispute among the parties' experts as to whether faulty workmanship caused the collapse. . . . It most certainly is not an issue to be ruled on as a matter of law." CP at 6,385. Finally, neither party moved for summary judgment on the issue of causation, as would be appropriate if the material facts were undisputed. See CR 56.

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<sup>2</sup> The trial court ruled that faulty equipment is a distinct peril from faulty materials and faulty workmanship and, therefore, is not excluded by the policy. Philadelphia does not contest this ruling.

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

C. Resulting Loss Provision

We next consider whether the concrete slab collapse qualifies as a resulting loss under the faulty workmanship resulting loss provision. The insurance policy states: “We will not pay for ‘loss’ caused by or resulting from . . . [f]aulty, inadequate, or defective materials, or workmanship. . . . But if loss by any of the Covered Causes of Loss results, we will pay for that resulting loss.” CP at 5,971, 5,978. The trial court interpreted this provision to mean that loss to property that is separate and distinct from the defective property is covered as a resulting loss:

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 caused by the concrete collapse is covered by the policy language.

CP at 7,099-7,100. We review a trial court's interpretation of insurance policy provisions de novo. *Bowers*, 99 Wn. App. at 44 (citing *McDonald*, 119 Wn.2d at 730-31).

A resulting loss or ensuing loss provision is an exception to a policy exclusion. *McDonald*, 119 Wn.2d at 734; *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274, 109 P.3d 1 (2004). The provision applies when an excluded peril causes a separate and independent covered peril. See *Weeks v. Co-Operative Ins. Co.*, 817 A.2d 292, 296 (N.H. 2003) (quoting

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*Acme Galvanizing v. Fireman's Fund Ins.*, 270 Cal. Rptr. 405, 411 (Cal. Ct. App. 1990)). Damage resulting from the covered peril is then covered under the resulting loss provision, while damage resulting from the initial excluded peril remains uncovered. *See Weeks*, 817 A.2d at 296 (quoting *McDonald*, 119 Wn.2d at 734).

For example, following the destruction caused by the 1906 San Francisco earthquake, gas-fed fires broke out and caused even more damage across the city. Most property insurance policies excluded earthquake damage but covered fire damage. Because an excluded peril (earthquake) caused an independent covered peril (fire), the resulting fire damage was covered as a "resulting loss." But earthquake damage remained uncovered. *See James S. Harrington, Lessons of the San Francisco Earthquake of 1906: Understanding Ensuing Loss in Property Insurance*, 37 The Brief 28, 29 (American Bar Association 2008).

Here, assuming faulty workmanship caused the shoring and concrete slab to collapse, faulty workmanship was the initial excluded peril and the collapse was the loss. There was no independent covered peril (such as fire) that caused a covered resulting loss. The collapse resulted directly from the initial excluded peril of faulty workmanship, and loss resulting directly from the initial excluded peril remains uncovered. *See McDonald*, 119 Wn.2d at 734.

In a similar case, *Acme Galvanizing Co. v. Fireman's Fund Insurance Co.*, a defective kettle ruptured, spilling molten zinc and damaging surrounding equipment. *Acme Galvanizing*, 270 Cal. Rptr. at 407. The insured argued that the damaged equipment was covered under the policy's ensuing loss provision. *Acme Galvanizing*, 270 Cal. Rptr. at 410-11. But the California Court of Appeals held: "Here, there was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture. The spillage of molten zinc was part of

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the loss directly caused by such peril, not a new hazard or phenomenon.” *Acme Galvanizing*, 270 Cal. Rptr. at 411. Likewise, if faulty workmanship caused the shoring and concrete slab to collapse, then the collapse was part of the loss caused directly by faulty workmanship. There was no peril “separate from and in addition to the initial excluded peril,” and loss caused directly by the initial excluded event is never covered.<sup>3</sup> *Acme Galvanizing*, 270 Cal. Rptr. at 411; see also *McDonald*, 119 Wn.2d at 734.

Vision contends that the concrete slab collapse is a resulting loss because the defective shoring structure is separate and distinct from the nondefective concrete slab. But Vision relies on a line of cases interpreting a different type of resulting loss provision. See *Allianz Ins. Co. v. Impero*, 654 F. Supp. 16 (E. D. Wash. 1986); *Laquila Constr. Inc. v. Travelers Indem. Co. of Illinois*, 66 F. Supp. 2d 543 (S.D.N.Y. 1999); *Narob Dev. Corp. v. Ins. Co. of N. Am.*, 631 N.Y.S.2d 155 (N.Y. App. Div. 1995).

In *Laquila*, an insured contractor poured a defective concrete slab floor and sought to recover the cost of replacing the floor. *Laquila*, 66 F. Supp. 2d at 544. The contractor’s insurance policy excluded the “[c]ost of making good faulty or defective workmanship or material,” but covered “physical damage resulting from such faulty or defective workmanship or material.” *Laquila*, 66 F. Supp. 2d at 544. The District Court for the Southern District of New York held:

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<sup>3</sup> In supplemental briefing, Vision argues that the faulty workmanship in the shoring structure was the initial excluded peril, the collapse of the shoring structure was an independent covered peril, and the damaged concrete slab was a resulting loss. We disagree. If faulty workmanship was the initial excluded peril then the simultaneous collapse of the shoring and concrete slab was the loss. Had the collapse triggered a secondary covered peril, such as a fire, then damage caused by the fire would be covered as a resulting loss.

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[H]ad the fifth floor slab . . . collapsed and damaged machinery, plumbing and electrical fixtures, or even neighboring property, such losses—wholly separate from the defective materials themselves—would qualify as non-excluded “ensuing losses” under [the] policy. Instead, Laquila’s claim for coverage here is no more than an attempt to recover for the excluded costs of making good its faulty or defective workmanship.

*Laquila*, 66 F. Supp. 2d at 546.

In *Narob*, a retaining wall collapsed due to defective workmanship. *Narob*, 631 N.Y.S.2d at 155. The insured’s policy excluded “any loss caused by or resulting from . . . deficiency in workmanship or materials as respects the cost of making good such . . . deficiency,” but covered “resulting physical loss caused by or to the Covered Property.” *Narob*, 631 N.Y.S.2d at 155 (emphasis omitted). The Court of Appeals in New York held that the resulting loss exception did not apply in this case because “there was no collateral or subsequent damage or loss as a result of the collapse of the free-standing retaining wall.” *Narob*, 631 N.Y.S.2d at 156.

Finally, in *Allianz*, an insured contractor installed a defective concrete wall. *Allianz*, 654 F. Supp. at 17. The policy excluded the “[c]ost of making good faulty or defective workmanship” but provided coverage for “damage resulting from such faulty or defective workmanship.” *Allianz*, 654 F. Supp. at 17. The District Court for the Eastern District of Washington reasoned:

The defective concrete caused no damage to any other portion of the structure, other persons or property. The sole claim is for the cost of correcting the deficiencies in the wall. Had the wall, as a result of the deficiencies in the concrete, collapsed and caused damage to some other portion of the work, or to equipment of a subcontractor or some similar thing, we would have a different case.

*Allianz*, 654 F. Supp. at 18.

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Thus, the policies in these cases exclude the cost of *repairing* faulty workmanship, but provide coverage for any loss resulting *directly* from faulty workmanship. See *Laquila*, 66 F. Supp. 2d at 544; *Narob*, 631 N.Y.S.2d at 155; *Allianz*, 654 F. Supp. at 17. Therefore, if faulty workmanship directly damages nondefective property, then that damage is covered as a resulting loss. See *Laquila*, 66 F. Supp. 2d at 546; *Narob*, 631 N.Y.S.2d at 156; *Allianz*, 654 F. Supp. at 18. In contrast, the policy in this case excludes damage *resulting from* faulty workmanship, but provides coverage when “loss *caused by any of the covered causes* of loss results” from faulty workmanship. CP at 5,978 (emphasis added). In other words, this policy covers damage resulting from an independent covered cause, but does not cover damage resulting directly from faulty workmanship. Because *Laquila*, *Narob*, and *Allianz* interpret a different type of resulting loss provision, the reasoning in those cases does not apply here.<sup>4</sup>

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

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<sup>4</sup> In supplemental briefing, Vision also relies on *Alton Ochsner Medical Foundation v. Allendale Mutual Insurance Co.*, 219 F.3d 501 (5th Cir. 2000) and *Montefiore Medical Center v. American Protection Insurance Co.*, 226 F. Supp. 2d 470 (S.D.N.Y. 2002). Those cases are also distinguishable. The court in *Alton Ochsner* interpreted a resulting loss provision as covering physical damage to separate and distinct property. But the resulting loss provision in that case did not expressly require an independent covered peril, as the provision here does. See *Alton Ochsner*, 219 F.3d at 504-06. While the court in *Montefiore* interpreted a resulting loss provision similar to the provision in this case, the court relied on *Laquila* for the proposition that a resulting loss provision “covers loss caused to other property wholly separate from the defective property itself.” *Montefiore*, 226 F. Supp. 2d at 479 (citing *Laquila*, 66 F. Supp. 2d at 545). As discussed above, *Laquila* interprets a different type of resulting loss provision and the “separate property” test does not apply here.

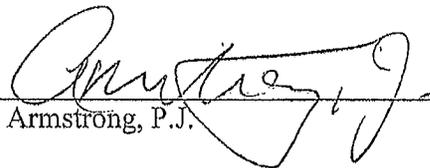
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workmanship, not from an independent covered peril. Therefore, we hold that the concrete slab collapse does not qualify as a resulting loss under the resulting loss exception to the faulty workmanship exclusion in Vision's insurance contract.

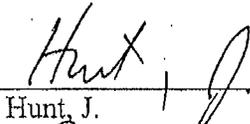
Thus, even if a jury determines that faulty workmanship caused the collapse, the resulting loss exception does not apply. But we still remand to the trial court for a jury to determine causation because Vision has argued that faulty equipment, a covered peril, contributed to the collapse. Thus, the collapse will be covered only if the jury determines that faulty equipment caused the collapse (or, if the jury determines that multiple perils caused the collapse, that faulty equipment was the efficient proximate cause).

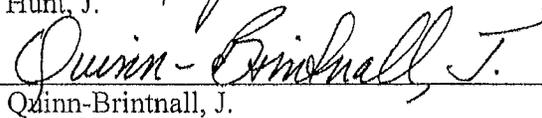
Because we reverse and remand for a new jury trial, we do not reach the issues regarding the award of damages and attorney fees.

We reverse the judgment against Philadelphia and remand for a jury to determine causation.

  
Armstrong, P.J.

We concur:

  
Hunt, J.

  
Quinn-Brintnall, J.

*EXHIBIT 2*

**Sprague v. Safeco Ins. Co.**,  
\_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_,  
2010 Wn. App. LEXIS 2419 (Nov. 1, 2010)



LEXSEE 2010 WASH APP LEXIS 2419

MAX B. SPRAGUE ET AL., *Appellants*, v. SAFECO INSURANCE COMPANY OF AMERICA,  
*Respondent*.

No. 63933-1-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

*2010 Wash. App. LEXIS 2419*

July 13, 2010, Oral Argument  
November 1, 2010, Filed

**PRIOR HISTORY:** [\*1]

Appeal from King County Superior Court. Docket No: 09-2-10684-3. Judgment or order under review. Date filed: 07/14/2009. Judge signing: Honorable James D Cayce.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Respondent denied coverage to appellants because the cause of the loss was defective workmanship and rot, both of which were excluded from coverage under the insurance policy. Appellants argued that collapse was an ensuing loss and thus covered. Both parties moved for summary judgment. The King County Superior Court (Washington) granted summary judgment to respondent. Appellants challenged the trial court's judgment.

**OVERVIEW:** Appellants' home had been insured with respondent since 1992. Appellants extensively remodeled the home and installed decks. The decks were supported by six fin walls that were covered with an exterior insulating and finishing system. In March 2008, appellants discovered decay in the fin walls and filed a claim with respondent. Respondent hired an independent expert to investigate the claim. The independent expert investigation revealed that the decayed wood posts in each of the six piers supporting appellants' multi-level decks resulted in a substantial impairment of structural

integrity and were in a state of imminent collapse. The independent expert also determined that the conditions were present and occurred prior to 2003. The policy specifically excluded damage as a result of construction defects and rot, but it did not exclude the ensuing losses that resulted from faulty construction or rot. Also, the policy did not exclude collapse in its pre-2003 policies. Finally, the findings of respondent's own experts showed that the building was in a state of imminent collapse and that there was substantial impairment to the structure of the building sufficient to establish collapse.

**OUTCOME:** The appellate court reversed the trial court's judgment and remanded the case to the trial court.

**LexisNexis(R) Headnotes**

*Insurance Law > General Liability Insurance > Coverage > Products & Workmanship  
Insurance Law > Property Insurance > Exclusions > Named Perils*

*Insurance Law > Property Insurance > Homeowners Insurance > Personal Property*

[HN1] A homeowner's all-risk insurance policy that does not cover losses to an excluded peril may, nonetheless, cover losses resulting from that excluded peril under an ensuing loss clause.

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

*Insurance Law > Claims & Contracts > Policy Interpretation > Appellate Review*

[HN2] Interpretation of an insurance contract is a matter of law, reviewed de novo.

*Insurance Law > Property Insurance > Obligations > Losses*

[HN3] In analyzing coverage, Washington follows the efficient proximate cause rule. Under that rule, the predominant cause of the loss determines coverage.

*Insurance Law > General Liability Insurance > Coverage > Products & Workmanship*

*Insurance Law > Property Insurance > Exclusions > Named Perils*

[HN4] An ensuing loss provision is an exception to an exclusion and preserves coverage when the loss is caused by an excluded peril.

*Insurance Law > Property Insurance > General Overview*

[HN5] For purposes of property insurance policies, the growing majority of jurisdictions have assigned the more liberal standard, substantial impairment of structural integrity, to the use of collapse in insurance policies, as opposed to the minority view, which requires that the structure actually fall down.

*Insurance Law > Claims & Contracts > Costs & Attorney Fees > General Overview*

[HN6] An award of attorney fees is required in any legal action where an insurer compels an insured to assume the burden of legal action, to obtain the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue.

#### SUMMARY:

##### WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** Insureds under an all-risk homeowner's policy sought coverage for losses related to the imminent collapse of the home resulting from construction defects and rot in the multilevel decks attached to the home.

**Superior Court:** The Superior Court for King County, No. 09-2-10684-3, James D. Cayce, J., on July 14, 2009, entered a summary judgment in favor of the insurer.

**Court of Appeals:** Holding that the losses for which the insureds sought coverage under their policy were not excluded perils under the policy language and that the record is sufficient to establish "collapse" of the home, the court *reverses* the judgment and *remands* the case for further proceedings.

#### HEADNOTES

##### WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Insurance -- Construction of Policy -- Question of Law or Fact -- Standard of Review.** The interpretation of an insurance contract is a matter of law, which is reviewed de novo.

[2] **Insurance -- Claim for Loss -- Causation -- Efficient Proximate Cause Rule -- Predominant Cause -- In General.** The efficient proximate cause rule is used to determine whether a loss is covered under an insurance policy. Under this rule, the predominant cause of the loss determines coverage.

[3] **Insurance -- Exclusions -- Ensuing Loss Provision -- Nature.** Ensuing loss provisions are exceptions to policy exclusions.

[4] **Insurance -- Exclusions -- Ensuing Loss Provision -- Ensuing Loss Not Excluded Under Policy.** A loss ensuing from an excluded peril can be covered under an insurance policy if the ensuing loss is not itself excluded from coverage under the policy.

[5] **Insurance -- All-Risk Insurance -- Scope of Coverage -- In General.** An all-risk insurance policy covers all losses unless a specific exclusion applies.

[6] **Insurance -- Exclusions -- Construction Defects or Rot -- Resulting Collapse -- Ensuing Loss Provision -- Collapse Not Excluded Under Policy.** Under an all-risk property insurance policy covering a building and attached structures that excludes coverage for construction defects and rot but does not exclude coverage for collapse of the building or its attached structures, the collapse of the building or its attached structures resulting from a construction defect or rot is a

covered loss.

**[7] Insurance -- Construction of Policy -- Meaning of Words -- Undefined Terms -- Term Defined in Later Issued Policies.** The meaning of an undefined term in an insurance policy is not controlled by a definition included in later policies issued by the same insurer.

**[8] Insurance -- Property Damage -- Collapse -- What Constitutes -- Determination By Insurer's Experts.** For purposes of an insurance policy that covers losses resulting from the collapse of the insured building or attached structures, absent a contrary definition in the policy, "collapse" includes substantial impairment of structural integrity that places the building or structure in a state of imminent collapse.

**[9] Insurance -- Expenses of Insured -- Insured's Action To Obtain Benefit of Policy -- In General.** An insured who is compelled to assume the burden of legal action to obtain the full benefit of its insurance policy is entitled to recover its attorney fees, regardless of whether the duty to defend is at issue.

**COUNSEL:** John P. Zahner (of *Foster Pepper, PLLC*), for appellants.

M. Colleen Barrett and Kevin J. Kay (of *Barrett & Worden, PS*), for respondent.

**JUDGES:** AUTHOR: C. Kenneth Grosse, J. WE CONCUR: Ann Schindler, J., Anne Ellington, J.

**OPINION BY:** C. Kenneth Grosse

**OPINION**

¶1 GROSSE, J. -- [HN1] A homeowner's all-risk insurance policy that does not cover losses to an excluded peril may, nonetheless, cover losses resulting from that excluded peril under an ensuing loss clause. Here, the home was in a state of collapse and the homeowner's insurance policy did not specifically exclude collapse. The policy, however, covered ensuing loss. In our judgment, collapse was a covered ensuing loss resulting from the perils of construction defects and rot, even though those perils were themselves excluded. We reverse and remand.

**FACTS**

¶2 Max and Krista Sprague (collectively Sprague) purchased their home in 1987, and it has been insured with Safeco Insurance Company of America (Safeco) continuously since 1992. <sup>1</sup> From 1995 to 1996, Sprague extensively [\*2] remodeled the home and installed the decks that are the subject of this dispute. The decks are supported by six "fin walls" that are covered with Dryvit (Exterior Insulating and Finishing System). In March 2008, Sprague discovered decay in these fin walls and filed a claim with Safeco. Safeco hired an independent expert, Pacific Engineering Technologies (Pacific), to investigate the claim. Pacific's investigation revealed that the decayed wood posts in each of the six piers supporting Sprague's multi-level decks resulted in a substantial impairment of structural integrity and were in a state of imminent collapse. Pacific also determined that these conditions were present and occurred prior to 2003. <sup>2</sup> Pacific attributed the decayed wood framing to a combination of

- o Inadequate flashing between the deck beams and the deck piers

- o Possible inadequate flashing between the deck guard rails and the deck piers

- o Inadequate ventilation of the deck piers.

The policy specifically excluded damage as a result of construction defects and rot.

<sup>1</sup> Safeco Policy Number OH635096 between September 1992 and September 2008.

<sup>2</sup> The year 2003 marked the time that Safeco prospectively limited collapse coverage.

¶3 The [\*3] pertinent provisions of the homeowner's insurance policy provide:

**SECTION I - PROPERTY COVERAGES**  
**BUILDING PROPERTY WE COVER**  
**COVERAGE A - DWELLING**

We cover:

1. the dwelling on the residence premises shown in the Declarations used principally as a private residence, including structures attached to the dwelling; and

2. materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the residence premises.

...

**BUILDING LOSSES WE COVER**

We insure for accidental direct physical loss to property described in **Building Property We Cover** except as limited or excluded.

**BUILDING LOSSES WE DO NOT COVER**

We do not insure or cover loss caused directly or indirectly by any of the following excluded perils:

...

**5. loss caused by:**

a. wear and tear, marring, deterioration;

...

c. smog, rust, mold, wet or dry rot;

...

g. birds,

vermin, rodents, insects or domestic animals

...

Under items 1. through 5., any ensuing loss not excluded is covered.

...

**7. Water Damage,** meaning

a. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

...

**14. Weather Conditions.** [\*4] A weather condition which results in:

...

c. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these,

whether or  
not driven  
by wind;

15. **Planning,  
Construction or  
Maintenance,** meaning  
faulty, inadequate or  
defective:

...

b.  
design,  
specifications,  
workmanship,  
repair,  
construction,  
renovation,  
remodeling,  
grading,  
compaction;

c.  
materials  
used in  
repair,  
construction,  
renovation  
or  
remodeling;  
or

d.  
maintenance;

of property whether on or  
off the **insured location** by  
any person or organization.  
However, any ensuing loss  
not excluded or excepted in  
this policy is covered.

parties moved for summary judgment and the trial court  
granted summary judgment to Safeco. Sprague appeals.

#### ANALYSIS

[1-4] ¶5 [HN2] Interpretation of an insurance contract is a matter of law, reviewed de novo.<sup>3</sup> [HN3] In analyzing coverage, Washington follows the efficient proximate cause rule.<sup>4</sup> Under this rule, the predominant cause of the loss determines coverage.<sup>5</sup> [HN4] An ensuing loss provision, however, [\*5] is an exception to an exclusion and preserves coverage when the loss is caused by an excluded peril.<sup>6</sup> Sprague contends that since collapse is not specifically excluded in the policies extant between 1999 and 2003, it is a covered ensuing loss under the policy language: "However, any ensuing loss not excluded is covered."

<sup>3</sup> *McDonald v. State Farm Fire and Cas. Co.*, 119 Wn.2d 724, 730-31, 837 P.2d 1000 (1992).

<sup>4</sup> *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 372, 917 P.2d 116 (1996).

<sup>5</sup> *See Graham v. Pemco*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).

<sup>6</sup> *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274, 109 P.3d 1 (2004).

[5, 6] ¶6 Safeco's pre-2003 policies for Sprague are all-risk policies and cover losses to the building and attached deck structures, unless specifically excluded.<sup>7</sup> Safeco's policy did not exclude collapse as a peril. In *Wright v. Safeco Insurance Company of America*, we opined that an ensuing loss exception preserved coverage for damage from water leaks caused by faulty construction, despite the exclusion for construction defects.<sup>8</sup> However, there the loss claimed was from mold, and mold was itself specifically excluded. Thus, the ensuing loss provision did not operate because there [\*6] was no covered loss.<sup>9</sup> Unlike *Wright*, the policy language here, excluding loss for construction defects, specifically permits coverage for any ensuing loss not otherwise excluded.

<sup>7</sup> *See Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 757 n.1, 789-90, 150 P.3d 1147 (2007) ("All-risk insurance covers all risks that are not specifically excluded in the terms of the contract, and takes the opposite approach of traditional policies, sometimes called 'named perils' or 'specific perils' policies, which exclude all risks not specifically named.").

¶4 Safeco denied coverage because the cause of the loss was defective workmanship and rot, both of which were excluded from coverage. Sprague argued that collapse was an ensuing loss and thus covered. Both

8 124 Wn. App. 263, 109 P.3d 1 (2004).

9 Wright, 124 Wn. App. at 274-75.

[7] ¶7 In conclusion, the losses that are faulty construction and rot are not covered, but the "ensuing losses," those that result from such faulty construction or rot, are covered because such an ensuing loss is not excluded elsewhere in the policy. Since Safeco's own experts have testified that the damage to the fin walls has placed the decks in a state of imminent collapse, there is no factual dispute. The fact that Safeco defined collapse to mean actually falling down in later policies is immaterial to the case at bar. Because the parties are in agreement that the damage [\*7] occurred prior to 2003, the later definition of collapse does not apply.

[8] ¶8 Washington has not decided the meaning of "collapse" as used in insurance policies.<sup>10</sup> As noted in *Mercer Place Condominium Association v. State Farm Fire and Casualty Company*, [HN5] "[a] growing majority of jurisdictions have assigned the more liberal standard, 'substantial impairment of structural integrity,' to the use of 'collapse' in insurance policies, as opposed to the minority view, which requires that the structure actually fall down."<sup>11</sup> Indeed in *Mercer*, State Farm and its policy holder agreed that collapse "would be interpreted to mean 'substantial impairment of structural integrity.'"<sup>12</sup> The *Mercer* court noted that this same interpretation had been adopted by State Farm in prior claims involving a collapse clause.<sup>13</sup>

10 *Mercer Place Condo. Ass'n v. State Farm Fire and Cas. Co.*, 104 Wn. App. 597, 602, 17 P.3d 626 (2000).

11 104 Wn. App. 597, 602 n.1, 17 P.3d 626 (2000).

12 104 Wn. App. at 600.

13 104 Wn. App. at 600.

¶9 Here, Safeco's own expert, Pacific, determined that there was a "substantial impairment of structural integrity" to the fin walls and that they were in "a state of imminent collapse." The report itself, [\*8] defined

imminent collapse as occurring "when the structural supporting elements/assemblies are so severely damaged that even the reserve strength due to the safety factors built into the building code allowable capacities is exhausted." Safeco's own senior adjuster stated in her report:

It appears from my review of the [Pacific] report that the conditions of significant structural impairment and imminent collapse existed prior to the point in time that the Safeco policy forms changed and defined the term collapse.

Will await coverage counsel's recommendation, but I suspect that this loss will be covered."

For purposes of the pre-2003 policies, we hold that the findings of Safeco's own experts that the building was in a state of imminent collapse and that there was substantial impairment to the structure of the building were sufficient to establish collapse in the present case.

#### Attorney Fees

[9] ¶10 Because Sprague is entitled to coverage under the Safeco policy, Sprague is entitled to attorney fees under *Olympic Steamship Company v. Centennial Insurance Company* [HN6] ("an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action, to obtain [\*9] the full benefit of his insurance contract, regardless of whether the insurer's duty to defend is at issue").<sup>14</sup>

14 117 Wn.2d 37, 53, 811 P.2d 673 (1991).

¶11 We reverse and remand.

ELLINGTON and SCHINDLER, JJ., concur.

Washington Insurance Law (2d ed.)