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NO. 85350-9

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE CO.,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF

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ORIGINAL

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does “efficient proximate cause” analysis apply to a coverage dispute when the insurer denied coverage based on a sole-cause exclusion and, if not, were petitioners entitled to coverage as a matter of law because the insurer admitted a third cause of loss, besides the two it had cited as the sole causes?

2. Did the Court of Appeals err by interpolating “independent” and “directly” into an exception to an exclusionary clause in petitioners’ all-risk insurance policy, thereby broadening the exclusion?

II. STATEMENT OF THE CASE

The facts are set out at pages 5 - 21 of the brief Vision One and Vision Tacoma (collectively “Vision”) filed in the Court of Appeals. The facts of special importance are as follows.

Philadelphia stated in January 2006 why it was denying coverage:

The damage to the construction project was a sole and direct result of the marginal shoring design and faulty installation of the shoring. The policy excludes loss caused by deficiency in design and loss caused by faulty workmanship. *While the faulty workmanship exclusion contains an exception for resulting loss from a Covered Cause of Loss, in the present case, the only cause of the loss was defective design and faulty workmanship. There is no separate and independent loss that resulted in the*

claimed damage. CP 13142 (§ 3, ¶ 1) [Italics by Philadelphia; underlining emphasis added.]¹

Philadelphia confirmed in discovery that it stood by its original coverage position. CP 4915; *see* CP 5137-38, 13114 (86-87). After discovery closed, Vision obtained an order in limine precluding Philadelphia from asserting at trial any ground for denying coverage other than those stated above. CP 4915-16 (P); 4/03/08 RP 177-78; CP 5723 (¶ P). Philadelphia did not assign error to that order on appeal.

Philadelphia told the trial court in briefing on coverage issues that the sole-cause exclusions it was relying on to deny coverage “preclude [it] from denying coverage if an excluded event and an [sic] non-excluded event result in loss or damage.”² The trial court ruled that if the slab collapse was due to an excluded cause and a non-excluded cause, Vision would have coverage. 7/18 RP 20-21; CP 6588 (¶ 3). Philadelphia moved for reconsideration, arguing that a jury had to determine the collapse’s “efficient proximate” cause (without ever taking a position as to what it contends the efficient proximate cause was). CP 6605-06, 6659-61. Vision argued that Philadelphia had never argued efficient proximate cause before and that such analysis doesn’t belong in a case where coverage was denied on the ground that certain causes had been the sole or

¹ The exclusionary policy language based on which Philadelphia denied coverage is at CP 5971 (C-1), 5977 (2e), and 5978 (3a).

² 7/18/RP 15-16 (referring to CP 6492) (underlining by Philadelphia).

“only” ones. CP 6621-22, 13142 (§ 3, ¶ 1). Reconsideration was denied. CP 6677-78. The court also ruled, without objection by Philadelphia, 7/18/08 RP 8, 12-13, that, for purposes of the all-risk policy at issue, shoring is “equipment,” not “materials.” CP 6588 (¶ 1). Loss due to faulty equipment is not excluded under Vision’s policy.

Philadelphia urged the trial court to decide, as a legal issue, the question of whether the slab collapse had been a (covered) “resulting loss.” 9/12/08 RP 152-53. The court did; disagreeing with Philadelphia, *see* CP 6494, it ruled (a) that the concrete slab and shoring system had been separate things, and (b) that, because (as Philadelphia’s engineering expert admitted, CP 13075 (199-200), 13115 (90)), there was nothing faulty with the concrete slab, there is coverage for the slab’s collapse as a result of the shoring failure. 9/12/08 RP 153. Philadelphia acknowledged, and the court confirmed, that its ruling meant trial would be limited to the issue of damages (and bad faith). *Id.* 155-56.³

Philadelphia appealed and Vision cross-appealed from judgments totaling \$3,202,602 based on the jury’s findings on damages and bad

³ The references to limiting trial to damages caused by the collapse referred to Vision’s coverage claim; the “resulting loss” ruling did not resolve liability issues for purposes of Vision’s claims against Philadelphia for bad faith, which were then tried to the jury. The court entered a written Order On Resulting Loss, CP 7099-7100, and an Order on Faulty Workmanship, CP 7102-03, which precluded Philadelphia from arguing at trial that faulty workmanship was not (and by implication, that defective design alone was) the sole cause of the slab collapse. *See* 9/16/08 RP 253-54 (The Court (to counsel for Philadelphia): “And now you’re going to say, no, it’s not [a cause]?”). On appeal, Philadelphia did not assign error to (or even cite) the Faulty Workmanship order.

faith.⁴ Vision sought a limited new trial to prove lost profits that it was unable to prove because the court ruled during trial that an Extra Expense Endorsement, CP 5985, limits coverage for Vision's claims for "delay, loss of use, loss of market, or any other consequential loss . . . except for the items [listed in the Endorsement]," CP 7105; 9/16/08 RP 304-07. Vision argued that the main policy covers its delay losses, and that the Endorsement provides supplemental coverage of up to \$1 million *more* for certain *kinds* of extra expenses if Vision's \$12.5 million in coverage is exhausted, which did not happen. *Resp. Br. at 54-56.*

Philadelphia's appeal with respect to the trial court's summary ruling that the slab collapse had been a covered "resulting loss" was based on the assertion, made without citation to the record or legal authority, that "the faulty workmanship . . . in the shoring cannot be separated from the faulty workmanship that contributed to the collapse of the concrete [because i]t is one, inseparable system." *Phila. Br. at 27.* The Court of Appeals used different and more elaborate reasoning (discussed below) to reverse the trial court's "resulting loss" holding. *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 158 Wn. App. 91, 241 P.3d 429 (2010). The Court of Appeals did not address Vision's cross-appeal.

⁴ The amount included \$1,997,818 in attorney fees and expenses. CP 12347-49.

III. STANDARD OF REVIEW

Summary rulings are reviewed *de novo*. *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 914, 169 P.3d 1 (2007).

IV. ARGUMENT

A. Predominant Cause Analysis Does Not and Logically Should Not Apply When an Insurer Has Denied Coverage Based on Sole-Cause Exclusions.

The Court of Appeals held that the slab collapse was not a covered “resulting loss” and that the issue of what the “efficient proximate cause” of the slab collapse was must be tried. The Court of Appeals erred in both respects. The judgments against Philadelphia should be reinstated.

The “efficient proximate cause” test 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.⁵ “Efficient proximate” means “predominant.” *Graham v. Pub. Emps. Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983); *Kish v. Ins. Co. of North Am.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994). The test was not adopted to enable insurers to deny coverage. *See 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. . .”).

⁵ Vision’s policy included, but Philadelphia did not deny coverage based on, a “caused by” exclusion. *See* CP 5972 (C2).

Vision argued below that efficient proximate cause analysis is inappropriate when an insurer has relied on sole-cause exclusions to deny coverage. CP 6621-22; *Resp. Br. at 42-43*. It is neither sensible nor fair to allow an insurer that has staked its denial of coverage on two excluded causes being the *sole* and “only” causes of the insured’s loss, but that finds itself on the eve of trial in a factually and legally untenable position, to insist that a jury must decide what the *predominant* cause of loss was. And it would be unjust to allow an insurer not only to switch on the eve of trial from a sole-cause to a predominant-cause position, but to do so without taking a position as to what the predominant cause *was*. *See Resp. Br. at 43*. Under WAC 284-30-330(13), it is an unfair practice for an insurer to “fail[] to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.”

The Court of Appeals quoted *Safeco Ins. Co. v. Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413 (1989), for the proposition that “whenever the term ‘cause’ appears in an exclusionary clause it must be read as ‘efficient proximate cause.’” *Vision One*, 158 Wn. App. at 104. That statement made sense in *Hirschmann* because it was not a case where an insurer used an exclusion with words that expressly modify “cause” with “sole” or “solely” and denied coverage on the ground that excluded causes

were the “*only*” ones. CP 13142 (§ 3, ¶ 1). Under *Toll Bridge Auth. v. Aetna Ins. Co.*, 54 Wn. App. 400, 407, 773 P.2d 906 (1989), an insured may not have predominant cause analysis applied to an “arising out of” exclusion because that phrase and “caused by” describe different concepts. If an insured cannot invoke predominant cause analysis under an exclusion worded more *broadly* than “caused by,” surely an insurer may not use predominant cause analysis to deny coverage under a more *narrowly* worded sole-cause exclusion.

The Court of Appeals, by declaring that “[w]henver 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,” ignored the position Philadelphia itself had taken (and which it had not qualified with a reference to “predominant” cause), *i.e.*, that there would be coverage under Vision’s policy “if an excluded event *and a non-excluded event* result in loss or damage.” CP 6492. The Court of Appeals gave short shrift to the fact that the insurance policy at issue here is an *all risk* policy, and thus “covers all risks that are not specifically excluded [unlike] ‘named perils’ or ‘specific perils’ policies, which exclude all risks not specifically named.” *Frank Coluccio Const. Co. v. King County*, 136 Wn. App. 751, 757 n.1, 150 P.3d 1147 (2007).

Findlay v. United Pac. Ins. Co., 129 Wn.2d 368, 380, 917 P.2d 116 (1996), 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.” 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.

B. The Court of Appeals Rewrote the “Resulting Loss” Clause in Vision’s Policy to Broaden the Exclusion for Faulty Workmanship.

The Court of Appeals recognized, at least conceptually, that “[a] resulting loss or ensuing loss provision [in an all-risk insurance policy] is an exception to a policy exclusion.” *Vision One*, 158 Wn. App. at 107. In this case, it is an exception to a “faulty workmanship” exclusion.⁶ CP 5972, 5978 (3a). The court then went on to unilaterally edit the policy’s resulting loss clause, narrowing it and broadening the exclusion. Its decision announces that resulting/ensuing loss clauses apply “when an excluded peril causes a separate and *independent* covered peril,” and holds that Vision’s slab collapse was not “independent” of, but rather something

⁶ See also *Frank Coluccio Const.*, 136 Wn. App. at 777-78 (“[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”). The verbs “result” and “ensue” are synonymous. See *Webster’s Third New Intern’l Dictionary*, p. 756, and *Roget’s Intern’l Thesaurus*, (4th ed. 1977) at p. 939. Philadelphia itself used the terms interchangeably. See, e.g., CP 5836, 5846, 5851, 5855-58, 6361, 6363, 6938, 6946-48.

that resulted “*directly from* the initial excluded peril of faulty workmanship” and thus “remains uncovered.” *Vision One*, 158 Wn. App. at 107-08 (italics added). The Court of Appeals, all in the same decision, impermissibly added words to Vision’s policy, widened an insurance policy exclusion, and disregarded what Philadelphia itself acknowledged about the policy. The Supreme Court should reverse for those reasons and because an “independence/directness” test for resulting and ensuing loss clauses, which are common in all-risk builder’s and homeowners’ policies, will only lead to confusion and more coverage litigation.

The Court of Appeals sought to distinguish 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 recognized losses to be covered “resulting” or “ensuing” losses when property damaged as a result of faulty workmanship was separate from the faultily-built part of the same structure. *Vision One*, 158 Wn. App. at 109-110 (terming such decisions as reflecting use of a “separate property” test, *id.* at 110). In doing so, the Court of Appeals ignored the stipulation in Philadelphia’s brief (p. 25) that its “resulting loss” clause is “*similar*” to that in *Allianz*. Unrebutted trial testimony established that the wording of Vision’s policy regarding faulty workmanship and resulting loss is “pretty standard” for builders risk policies. 9/24/08 RP 255

The Court of Appeals also explained its decision in Philadelphia's favor by offering an analogy that Vision's policy language does not support and that Philadelphia itself disclaimed. According to the Court of Appeals, a fire that starts after an earthquake breaks a gas line would be covered as a "resulting loss" under a policy excluding earthquake damage but covering fire damage (because, according to the Court of Appeals, the fire would be "independent" of as well as "separate" from the gas line break), but the concrete slab collapse here was not "independent" and thus is not covered as a "resulting loss" *even though Vision's policy covers collapse. Vision One*, 158 Wn. App. at 107-08. The Court of Appeals sought to explain its distinction between the hypothetical fire and the collapse of Vision's concrete slab by terming fire "secondary" and collapse "simultaneous." *Id.* at 108 *fn.* 3. But there is no textual support in the policy for a distinction based on independence, secondariness, or simultaneity. 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, testified "I don't think it is." 10/13/08 RP 1242. And, as for a distinction based on simultaneity, the Court of Appeals assumed, fallaciously, that the faulty workmanship occurred when the shoring

failed, when in fact, had the court consulted the record,⁷ it would have realized that the shoring was erected weeks before the concrete pour. CP 1779 (¶ 15), 6393-94, 132085(78).

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

[T]he 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.]

Vision One, 158 Wn. App. at 110-111. Philadelphia certainly *could* have narrowed its "resulting loss" clause (and broadened its faulty workmanship exclusion) by actually using the adjective "independent" and/or the adverb "directly," but it did not do so. 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 . . .").⁸ Courts should not create new contracts for parties to insurance policies, *Findlay*, 129 Wn.2d at 380, and it is a "basic principle" that exclusions are

⁷ Since Philadelphia had not made a simultaneity argument on appeal, Vision had not pointed that out to the court.

⁸ 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). Philadelphia also used the word "direct" in that resulting loss clause and elsewhere, *e.g.*, CP 5977 (f1), but not in the resulting loss clause at issue in this case.

construed strictly and narrowly against insurers, e.g., *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009); *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983). The Court of Appeals erroneously ignored those basic rules of insurance law.

Moreover, the Court of Appeals' adoption of an "independent/directly" test and rejection of a separate-property test will serve, unwisely, to sow confusion and foster coverage disputes. The business of insurance is "affected by the public interest." RCW 48.01.030. Whether there is coverage should depend on how policies are worded, not on whether judges or juries think a disaster and its admitted cause were "independent" enough.

The Court of Appeals failed to appreciate the purpose of resulting loss clauses even though Philadelphia itself had explained that purpose of the clause in Vision's policy to the trial court in this lawsuit: a "resulting loss" clause "gives back" some of the coverage that an exclusion takes away; Philadelphia doesn't want to repair bad workmanship, CP 13110(31), 13118 (116-17); damage to a portion of a building that did not include faulty workmanship is a covered resulting loss, CP 6543-44; if an electrician miswires a building causing a fire, the cost to repair the defective wiring isn't covered, but the fire damage is, CP 13117. Vision

never made claim for loss of the shoring system, so Philadelphia was not asked to pay for the faulty workmanship.

In *Sprague v. Safeco Ins. Co.*, 158 Wn. App. 336, 241 P.3d 1276 (2010), an ensuing loss clause was applied as the clause in this case ought to have been. *Sprague* holds that, because an “ensuing loss” clause in an all-risk homeowners policy did not exclude collapse, the insureds had coverage for the collapse of decking due to the failure of rot-weakened support beams, even though coverage for rot damage was excluded:

Safeco’s . . . policies for *Sprague* . . . cover losses to the building and attached deck structures, unless specifically excluded. Safeco’s policy did not exclude collapse as a peril.

* * *

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 . . .

Sprague, 158 Wn. App. at 340-41 (footnotes omitted).

Like *Sprague*, this case involves an all-risk policy that covers collapse.⁹ Although the “resulting loss” and “ensuing loss” clauses in this case and *Sprague* are not worded identically, their meanings do not differ. The policy in *Sprague* said concisely that an ensuing loss is covered unless excluded: “However, any ensuing loss not excluded is covered.” *Sprague*,

⁹ And see *Findlay*, 129 Wn.2d at 378 (in all-risk insurance, “any peril that is not specifically excluded in the policy is an insured peril” [italics by the court]). Philadelphia admits that collapse is covered. CP 13112, 13092.

158 Wn. App. at 340. Vision's policy is worded more baroquely. It defines "Covered Causes of Loss" as "Risks of Direct Physical 'Loss' to Covered Property unless the 'Loss' is excluded under Section **B, Exclusions**," CP 5974 (underlining added for emphasis; bolding in original), and provides, in the faulty workmanship exclusion that:

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.

Vision One, 158 Wn. App. at 106; CP 5972, 5978.

A decision that *Sprague* distinguished, *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 274-75, 109 P.3d 1 (2004), is also instructive. It 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 damage, unless some other provision excludes mold damage coverage. *Wright* held that an "ensuing loss" exception did not preserve coverage because the policy had an exclusion for mold damage. Conversely, because Philadelphia did not issue a policy with a collapse-loss exclusion, Vision's concrete slab collapse *is* covered.

The Court of Appeals erred in distinguishing *Allianz*, 654 F. Supp. 16; *Laquila Constr., Inc. v. Travelers Indem. Co.*, 66 F. Supp.2d 543 (S.D.N.Y. 1999); and *Narob Dev. Corp. v. Ins. Co. of N. Am.*, 631

N.Y.S.2d 155 (1995),¹⁰ as cases that involved “a different type of resulting loss provision.” *Vision One*, 158 Wn. App. at 437-39. The court asserted (a) that “the policies in [those] cases exclude the cost of *repairing* faulty workmanship but provide coverage for any loss resulting *directly* from faulty workmanship [italics by the court],” and (b) that [Vision’s] policy “covers damage resulting from an independent covered cause but does not cover damage resulting directly from faulty workmanship. *Id.* at 438.

That reasoning is unfounded. In none of the three decisions (*Allianz, Laquila, Narob*) did the resulting loss clause at issue use the words “directly” or “direct,” much less in the inclusive-of-coverage sense that the Court of Appeals attributes to it. Nor does Vision’s resulting loss clause use either word (or “independent”), much less in an *exclusive-of-coverage* sense. Indeed, the Court of Appeals prefaced its characterization of Vision’s clause with the phrase “*[i]n other words*”¹¹ – which is exactly Vision’s point: the Court of Appeals *added* “other words.”

Because the trial court properly applied the “resulting loss” clause, it also was correct in ruling, summarily, that Vision has coverage. Philadelphia, having spent nearly three years insisting that faulty workmanship was one of two sole and “only” causes, could hardly have

¹⁰ Those and other resulting/ensuing loss authorities and cases were the subject of briefing in the Court of Appeals, both before and after oral argument. *Resp. Br. at 28-31; Resp. to Court’s Oral Argument Inquiry, at 2-8.*

¹¹ *Vision One*, 158 Wn. App. at 110.

changed its position to assert that defective design had been the sole cause.¹² If Philadelphia *had* sought, at trial, to assign sole-cause status to defective design, its prior and longstanding admission that faulty workmanship had been *a* cause would have meant defective design *cannot be* the sole cause; the court would have found coverage as a matter of law for that reason as well, or instead.

C. The Trial Court's Grant of Summary Judgment to Vision One on the Question of Coverage May and Should Be Affirmed on a Ground that Was Raised but Not Addressed Below.

An insurer may not deny a claim based on a policy exclusion unless it refers to the exclusion in its denial. WAC 284-30-380(1). Philadelphia denied coverage on the ground that defective design and faulty installation of the shoring system had been “the only cause” of the collapse of Vision’s above-grade concrete slab. CP 13142 (§ 3, ¶ 1). Philadelphia confirmed its position at its officer’s deposition on March 6, 2008, more than two years after issuing the coverage-denial letters and at the end of discovery. CP 4915; *see* CP 5137-38, 13114 (86-87). On appeal, Philadelphia did not assign error to the order in limine, CP 5723 (¶ P), that precluded it from changing the basis for its denial of coverage at trial. Philadelphia also acknowledged in briefing on coverage issues that its “sole cause” policy exclusions were meant “to preclude [it] from

¹² The trial court so ruled, CP 7102-03, and Philadelphia did not assign error to (or cite) that Order in either of its appellate briefs.

denying coverage if an excluded event and an [sic] non-excluded event result in loss or damage.” CP 6492 (underlining by Philadelphia).

Because Philadelphia’s investigating engineer, Brenda Toole, admitted in discovery that faulty shoring *equipment* – an unexcluded cause of loss under the policy – had been among the slab collapse’s contributing causes, CP 13070 (50-52), Vision argued that Philadelphia’s admission of the causal role of faulty equipment established that its reason for denying coverage was incorrect. CP 6171-73 (quoting the testimony of record at CP 13070 (50-52)).¹³ The trial court granted summary judgment as to policy coverage on an alternative ground, *i.e.*, that the slab collapse had been a “resulting loss” and thus was covered. CP 9/12/08 RP 152-53; CP 7099-7100. However, as Vision pointed out below, *Resp. Br. at 33*, an appellate court may affirm a trial court ruling, including a grant of summary judgment, on any ground supported by the record, *Estep v. Hamilton*, 148 Wn. App. 246, 255-56, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027 (2009), even if the trial court did not consider the ground, *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). Under the circumstances, where Philadelphia took an explicit “only cause” coverage position; stood by it through discovery; confirmed that a nonexcluded

¹³ Philadelphia did not repudiate Toole’s testimony. Toole testified at trial of Vision’s bad faith claim against Philadelphia, and acknowledged that she had reported to Philadelphia before it denied coverage that faulty equipment had contributed to the slab collapse. 9/24/08 RP 163-65, 171, 180-84, 207.

cause would mean coverage; and admitted that faulty equipment was a cause of the slab collapse, the only just thing to do is affirm the grant of summary judgment as to coverage based on that ground, which the trial court was offered but did not reach.¹⁴

D. Vision's Cross-Appeal Should Be Addressed and Decided.

There was a "delay" exclusion in Vision's all-risk policy, *see* CP 5977 (2a), but, as Philadelphia acknowledged, it excludes losses involving physical harm to property but not financial consequences of physical events.¹⁵ The trial court interpreted the Extra Expenses Endorsement in Vision's policy as a *limitation on*, instead of as a *supplement to*, coverage for consequential losses, allowing Vision to recover only delay losses of the types listed in the Endorsement. CP 7105. The ruling effectively dismissed claims that Vision had lost several million dollars due to project delay resulting from the slab collapse.¹⁶ But Philadelphia's policy excludes coverage by specifying what is *not* covered. *E.g.* CP 5976 (¶ B)(1). *See Boeing*, 113 Wn.2d at 887 ("the [insurance] industry knows how to protect itself and it knows how to write exclusions and conditions"). The court should have held, as Vision argued, CP 6177-78,

¹⁴ Vision also maintains, *see* CP 6166, *fn. 15*, but did not argue on appeal that there is coverage simply because, as a matter of logic, an insurer ought not to be able to deny coverage based on two "sole cause" exclusions.

¹⁵ CP 6550-51, 6529-30, 13093 (71-73).

¹⁶ CP 3347, 2259-60, 5528-38, 5542-43, 5550-55.

9/16/08 RP 302, 305, that the Endorsement grants coverage of up to \$1 million more for certain kinds of expenses if Vision exhausts the \$12.5 million coverage limit. If the Endorsement is ambiguous, it must be construed in favor of Vision. *E.g., Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 161 P.3d 406 (2007), *rev. denied*, 163 Wn.2d 1055 (2008).

The Supreme Court may address and decide the issue or remand to the Court of Appeals to decide it. RAP 13.7(b). Vision asks the Supreme Court to decide to save yet another round of briefing, argument and delayed finality in a dispute that has already lasted more than five years, and to reinstate the judgment against Philadelphia but remand for trial the issue of whether delay losses that Vision was not permitted to prove in 2008 are ones it incurred because of the slab collapse and project delay.

E. Vision Should Be Awarded Its Attorney Fees on Appeal.

Vision requests an award of its attorney fees and expenses on appeal and on review pursuant to *Olympic S. S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and RAP 18.1(b).

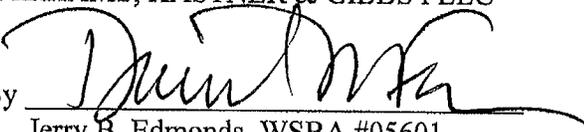
V. CONCLUSION

For the foregoing reasons, the Court of Appeals should be reversed; the judgment in Vision's favor should be reinstated, but the delay-loss claims that remain adjudicated due to the trial court's Extra

Expenses Endorsement ruling should be tried; and Vision should be awarded its attorney fees and expenses for appeal and review.

RESPECTFULLY SUBMITTED this 31st day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 31st day of March, 2011, I caused a true and correct copy of "Petitioners' Supplemental Brief," to be delivered in the manner indicated below to the following counsel of record:

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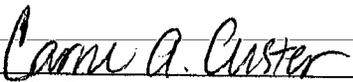
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