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

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VISION ONE, LLC and VISION TACOMA, INC.,

Petitioners,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Respondent.

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SUPPLEMENTAL BRIEF OF  
RESPONDENT PHILADELPHIA  
INDEMNITY INSURANCE COMPANY

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## INTRODUCTION

In *Vision One v. Philadelphia Indem. Ins. Co.*, 158 Wn. App. 91, 241 P.3d 429 (Div. II 2010), *rev. granted*, 171Wn.2d 1001 (2011) (“*Vision One*”) the Court of Appeals held that the trial court misinterpreted the parties’ insurance contract and incorrectly framed the case for the jury. The reasoning of *Vision One* is sound and well-grounded in principles of Washington law. Respondent Philadelphia Indemnity Insurance Company (“Philadelphia”) asks this Court to affirm the decision.

## ARGUMENT

The issues raised by Petitioner Vision One, LLC and Vision Tacoma Inc. (“Vision”) fall primarily into two areas: first, whether traditional rules of efficient proximate cause are altered by the policy; and second, the scope and meaning of the resulting loss exception to the policy’s faulty workmanship exclusion. Both areas are discussed below.

### A. Efficient proximate cause principles apply to this case.

Vision argues that the *Vision One* court “created a new contract” by directing the trial court to apply Washington’s efficient proximate cause doctrine upon remand. (Petition, pg. 18) Vision argues that the efficient proximate cause rule should not apply because of certain policy

language that, in Vision's view, narrows the circumstances in which policy exclusions apply.<sup>1</sup>

Vision is mistaken. Philadelphia's policy suggests no reason to vary from this rule, the well known rules developed by this Court. The "directly and solely" language Vision focuses on is neither novel nor unique. Nor does the language narrow policy exclusion in any respect. Vision even acknowledges that the language phrase is "frequently used" by commercial property insurers. (Petition, pg. 15, n.1) Indeed, the same "directly and solely" language that appears in Philadelphia's policy reflects the recognition that Washington courts rely upon "the efficient proximate rule to determine coverage under an insurance contract." See *Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 20, 990 P.2d 414 (1999). Vision makes no effort to reconcile its position with *Capelouto*.

Moreover, Vision's proposed interpretation of the "directly and solely" language would lead to absurd results. According to Vision, if two excluded perils combine to cause a loss, the loss should be covered because neither peril can be said to have "directly and solely" caused the damage. *Vision One*, 158 Wn. App. at 97-98. This is not a reasonable interpretation of the policy language. In Vision's example, the loss should

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<sup>1</sup> The "directly and solely" policy language challenged by Vision is quoted in Philadelphia's *Brief of Appellant* (pgs. 9-10) filed in the Court of Appeals. It appears in the record at CP 5977-78.

is excluded if either peril occurs. Why should the occurrence of a second excluded event negate the effect of both without regard to the efficient proximate cause rule? Moreover, this Court has held that when the term “cause” appears in an exclusionary clause it is to be read as “efficient proximate cause.” See, e.g., *Safeco Ins. Co. of Am. v Hirschmann*, 112 Wn.2d 621, 629, 773 P.2d 413 (1989). Vision raised the “directly and solely” issue in the course of pretrial arguments over proposed jury instructions. 158 Wn. App. at 97-98. Although the trial court’s “Order on Insurance-Related Issues” misstates the efficient proximate cause rule, even the trial court stopped short Vision’s strained interpretation of the “directly and solely” language.

This Court has developed the efficient proximate cause doctrine for situations where, as here, both covered and excluded perils are alleged to have caused the loss and coverage depends upon which peril is found to be the predominant or efficient proximate cause.<sup>2</sup> The purpose of the rule is to provide a workable framework that for policy interpretation meets the reasonable expectations of both the insured and the insurer. See *Kish*, *supra*, 125 Wn.2d at 172. There is no reason arising from the policy or

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<sup>2</sup> See, e.g., *Kish v. Ins. Co. of N. Amer.*, 125 Wn.2d 164, 170, 883 P.2d 308 (1994); *Graham v. Pub. Emp. Mut. Ins. Co.*, 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).

otherwise to vary from the efficient proximate cause principles long-recognized and well-developed by this Court. Vision's argument should be rejected.

B. Vision One's resulting loss analysis is correct.

Vision attacks the *Vision One* court's ruling on "resulting loss" without confronting the trial court's threshold error. The problem that Vision sidesteps is this: in ruling as a matter of law that the concrete slab collapse was a "resulting loss," the trial court effectively told the jury that faulty workmanship caused the loss because "resulting loss" coverage cannot otherwise be triggered. This was a crucial error. In addition to faulty workmanship, Philadelphia had evidence that the collapse occurred due to defective design, an excluded peril that offered no potential for resulting loss coverage.<sup>3</sup> Furthermore, Vision itself argued that "faulty equipment" caused the loss. When evidence supports alternative causes of loss, a trial court may not tell a jury which theory to choose. See *Northwest Bedding Co. v. National Fire Ins. Co.*, 154 Wn. App. 787, 794 (Div. III 2010) (Determining the efficient proximate cause of a loss is generally a question of fact for the fact finder.)  *citing Graham*, supra, 98 Wn.2d at 539. The trial court, however, stepped into the jury's domain in

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<sup>3</sup> The defective design exclusion limits resulting loss coverage to "resulting fire or explosion," neither of which occurred following the slab collapse.

ruling that the collapse was a resulting loss. This error, without more, requires a retrial of the case.

Despite the trial court's fundamental error concerning the role of the jury, Vision argues that *Vision One's* "resulting loss" analysis and the "ensuing loss" discussion in *Sprague v. Safeco Ins. Co.*, 158 Wn. App. 336, 241 P.3d 1276 (Div. I 2010), cannot both be right. (Petition., pgs. 7-9) This issue has little importance if the jury decides that faulty workmanship is not the efficient proximate cause of the collapse because resulting loss is an exception only to the faulty workmanship exclusion. If the jury finds that the efficient proximate cause of the collapse was defective design or faulty equipment, then the scope and trigger of resulting loss coverage is moot.

That said, the *Vision One* court was correct in holding that the collapse cannot be a "resulting loss" even if faulty workmanship ultimately is found to be the efficient proximate cause. Resulting loss exceptions are intended to cover loss attributable an independent, covered peril set in motion by an excluded peril. Resulting loss provisions never restore coverage for damage caused by the initial excluded peril.<sup>4</sup> Here, as the *Vision One* court correctly held, even if faulty workmanship was the

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<sup>4</sup> *Vision One*, 158 Wn. App. at 107, citing James S. Harrington, *Lessons of the San Francisco Earthquake of 1906: Understanding Ensuing Loss in Property Insurance*, 37 Brief 28, 32 (Summer 2008).

initial excluded peril that caused the collapse of the slab and shoring, there was no secondary covered peril leading to a resulting loss. 158 Wn. App. at 107-08. Vision argued that faulty workmanship within the shoring structure was the initial excluded peril and that the collapse of that same shoring structure was an independent covered peril such that the damage to the fallen slab was a resulting loss. The *Vision One* court rejected this argument:

... 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.

158 Wn. App. 108 n.3. (emphasis added). The *Vision One* court was correct. The concrete slab and the shoring that supported it were part of an inseparable system. Vision cannot artificially parse the system components in an attempt to contrive a resulting loss. See *Kish, supra*, 125 Wn.2d at 170 (policyholder may not avoid an exclusion by affixing a label or re-characterizing the event causing the loss.).

The *Vision One* court further explained why resulting loss coverage does not apply in this case:

In short, the fact that the defective shoring structure allegedly damaged separate, non-defective 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.

Thus, even if a jury determines that faulty workmanship caused the collapse, the resulting loss exception does not apply. ....

158 Wn. App. at 110-11. This analysis conforms fully with the decisions of this court and should be affirmed.

C. *Vision One* is unaffected by *Sprague*.

Vision contends that the analysis and holding of *Vision One* cannot be reconciled with the outcome in *Sprague*. Vision is mistaken for several reasons:

First, the *Sprague* court incorrectly analyzed "ensuing loss" and other policy provisions at issue in the case. In *Sprague*, wooden posts supporting a deck decayed due to construction defects and rot, leaving a homeowner's deck in a state of imminent collapse. Construction defects and rot were perils excluded by the homeowner's all-risk policy. However, because collapse was not specifically excluded, the *Sprague* court held that collapse was covered as an ensuing loss. 158 Wn. App. 340-41.

The first problem with *Sprague* is that no cause of the collapse was suggested other than construction defects and rot, both of which were excluded perils. Even with an all-risk policy, the insured bears the burden of proving that a loss falls within the basic grant of coverage. *McDonald v. State Farm*, 119 Wn.2d 724, 731, 837 P.2d 100 (1992). Despite the exclusions, the Court concluded that the collapse was an "ensuing loss" not otherwise excluded. This conclusion was error. In *McDonald*, this Court described the basic scope and purpose of ensuing loss provisions often found in all-risk property insurance policies:

The ensuing loss clause may be confusing, but it is not ambiguous. Reasonably interpreted, the ensuing loss clause says that if one of the specified uncovered events takes place, any ensuing loss which is otherwise covered by the policy will remain covered. The uncovered event itself, however, is never covered.

119 Wn.2d at 734. *See also* 2 Ostrager & Newman, *Insurance Coverage Disputes* § 21.04[f] at 1598-99 (15th Ed. 2010) ("Ensuing loss clauses act as exceptions to property insurance exclusions and operate to provide coverage when, as a result of an excluded peril, a covered peril arises and causes damage.")

The *Sprague* court recognized that the collapse resulted from construction defects and rot.<sup>5</sup> Nevertheless, and contrary to the principles established in *McDonald*, the *Sprague* court skipped past the requirement that a covered peril must occur in the course of an uncovered peril in order for loss ensuing from the covered peril to be covered. In doing so, the court rendered the construction defect and rot exclusions meaningless and effectively transformed the ensuing loss provision into an independent source of coverage.

The *Sprague* court's approach contradicts established precedent. This Court has held that ensuing loss provisions are exceptions to policy exclusions and are not to be interpreted to create coverage. This rule stems from the very structure of an all-risk policy because structure is an important, objective source of meaning and intent. All-risk policies consist of a grant of coverage counterbalanced by coverage exclusions. When ensuing loss language is embedded within an exclusion or set of exclusions (as is true in both *Sprague* and *Vision One*) the language cannot reasonably be interpreted as a grant of coverage. See *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 377, 917 P.2d 116 (1996) citing *McDonald*, *supra*, 119 Wn.2d at 734; *Capelouto*, *supra*, 98 Wn. App. at 16.

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<sup>5</sup> 158 Wn. App. at 337.

*Sprague* is problematic for another reason. The court wrote:

“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.”

158 Wn. App. at 341 (emphasis added). The *Sprague* policy does not support the court’s conclusion. Rather than exclude losses that are faulty construction and rot, the policy excludes losses “caused directly or indirectly” by faulty construction and rot. 158 Wn. App. at 339. The plain and literal language introducing the exclusions extends their reach beyond what the *Sprague* court acknowledged. Reasonably read, the construction defect and rot exclusions should have been held to bar coverage on the facts presented (as the *Sprague* trial court ruled) because either or both of those perils “directly or indirectly” caused the deck collapse.

Second, *Sprague* should be limited to its unique facts. There was evidence in *Sprague* that the insurer’s senior adjuster interpreted the policies to provide coverage.<sup>6</sup> 158 Wn. App. at 342. Although the *Sprague* court did not characterize it as such, this internal assessment

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<sup>6</sup> The policies at issue did not define the term “collapse” although subsequent versions did. The definition of collapse is important in *Sprague* because case involved an imminent collapse, not an actual one. 158 Wn. App. 341-42. There is no dispute in *Vision One* that a collapse occurred.

seemingly operates an admission of coverage. No such admission clouds the issues in *Vision One*.

**CONCLUSION**

The *Vision One* court's decision is correct in its analysis and application of efficient proximate cause principles and resulting loss coverage.

Philadelphia asks that the Court of Appeals' decision in *Vision One* be affirmed.

DATED this 31st day of March, 2011.

KARR TUTTLE CAMPBELL

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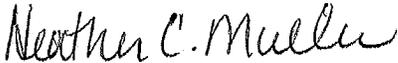
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Certificate of Service

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