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Washington State Supreme Court

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No. 90651-3

THE SUPREME COURT
STATE OF WASHINGTON

QUEEN ANNE PARK HOMEOWNERS ASSOCIATION,
a Washington non-profit corporation,

Plaintiff-Appellant,

v.

STATE FARM FIRE AND CASUALTY COMPANY,
a foreign insurance company,

Defendant-Appellee

CERTIFICATION FROM THE UNITED STATES
COURT OF
APPEALS FOR THE NINTH CIRCUIT

**[CORRECTED] AMICUS BRIEF ON BEHALF OF
APPLICANTS COMMUNITY ASSOCIATION
PARTNERS LLC AND BLUESTONE AND
HOCKLEY REAL ESTATE SERVICES**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT2

 1. The policy language is the only dispositive “fact”.2

 2. Collapse caused by hidden decay occurs slowly.4

 A. Courts do not supply unwritten requirements
 into insurance policies.....4

 B. “Direct physical loss involving
 collapse...caused by hidden decay” occurs
 earlier than “Direct physical loss involving
 collapse...caused by hidden decay [when
 the building is in danger of immediate
 collapse].”8

 3. The timing of the claim submission does not affect
 the meaning of the term “collapse.”9

 4. Cases cited by State Farm almost uniformly adopted
 the “substantial impairment of structural integrity”
 standard without any requirement of “imminent
 collapse.”11

III. CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Allstate v. Forest Lynn Homeowner's Ass'n, 892 F.Supp. 1310
(W.D.Wash. 1995)..... 13

American Concept Ins. Co. v. Jones, 935 F.Supp. 1220 (D.Utah.
1996)..... 13

*American Nat'l Fire Ins. Co. v. B&L Trucking and Construction
Co.*, 134 Wn.2d 413, 951 P.2d 250 (1988)..... 6

Anderson v. Indiana Lumbermens Mut. Ins. Co., 127 So.2d 304
(1961)..... 13

Ass'n of Unit Owners of Nestani v. State Farm Fire and Cas. Co.,
670 F.Supp.2d 1156 (D. Or.2009)..... 7

Auto Owners Ins. Co. v. Allen, 362 So.2d 176 (1978)..... 13

Bain v. Metropolitan Mortg. Group, Inc., 175 Wash.2d 83, 285
P.3d 34 (2012)..... 3

Beach v. Middlesex Ins. Co., 205 Conn. 246, 532 A.2d 1297
(1987)..... 14

Bradish v. British America Assurance Co., 9 Wis.2d 601, 101
N.W.2d. 814 (1960)..... 14

Campbell v. Norfolk & Dedham Mut. Fire Ins. Co., 682 A.2d 933
(1996)..... 14

Chafin v. Farmers & Mechanics Mut. Ins. Co., 2323 W.Va. 245,
751 S.E.2d 765 (2013)..... 14

Dagen v. Hastings Mut. Ins. Co., 166 Mich.App. 225, 420 N.W.2d
111 (1987)..... 14

Dally Properties, LLC. v. Truck Ins. Exch., 2006 WL 1041985
(W.D.Wash., April 5, 2006)..... 15

<i>Dalton v. Harleysville Worcester Mut. Ins. Co.</i> , 557 F.3d 88 (2d.Cir. 2009).....	6
<i>Ellis Court Apartments Limited Partnership v. State Farm Fire and Casualty Company</i> , 117 Wash.App. 807, 72 P.3d 1086 (2003).....	10
<i>Ercolani v. Excelsior Ins. Co.</i> , 830 F.2d 31 (3d.Cir. 1987).....	15
<i>Government Employees Ins. Co. v. DeJames</i> , 256 Md. 717, 261 A.2d. 747 (1970).....	15
<i>Hudson 500 LLC v. Tower Ins. Co.</i> , 22 Misc.3d 878, 875 N.Y.S.2d. 429 (2008).....	16
<i>Indiana Ins. Co. v. Liaskos</i> , 297 Ill.App.3d 569, 697 N.E.2d. 398 (1998).....	16
<i>Insurance Coverage for Collapse Claims: Evolving Standards and Legal Theories</i> , 35 Tort & Ins. L.J., 57, 60 (1999).....	7
<i>Jenkins v. U.S. Fire Ins. Co.</i> , 185 Kan. 665, 347 P.2d 417 (1959).....	16
<i>Kitsap County v. Allstate Ins. Co.</i> , 136 Wash.2d 567, 964 P.2d 1173 (1998).....	3
<i>Labberton v. General Cas. Co.</i> , 53 Wn.2d 180, 332 P.2d 250 (1958).....	6
<i>Monroe Guar. Ins. Co. v. Magwerks Corp.</i> , 796 N.E.2d 326 (2003).....	16
<i>Morton v. Great Am. Ins. Co.</i> , 77 N.M. 35, 419 P.2d 239 (1996).	16
<i>Nationwide Mut. Fire Ins. Co. v. Tomlin</i> , 181 Ga.App. 413, 352 S.E.2d 612 (1986).	16
<i>Prudential-LMI Ins. v. Superior Court</i> , 51 Cal.3d 674, 274 Cal.Rptr. 387, 798 P.2d 1230 (1990).....	10
<i>Public Employees Mutual Ins. Co. v. Mucklestone</i> , 111 Wn.2d 442, 444, 758 P.2d 987 (1988).....	5

<i>Queen Anne Park Homeowner's Ass'n v. State Farm Fire and Cas. Co.</i> , 763 F.3d 1232 (9th Cir. 2014).....	2, 4
<i>Rankin v. Generali-U.S. Branch</i> , 986 S.W.2d 237 (1998).....	17
<i>Royal Indemn. Co. v. Grunberg</i> , 155 A.D.2d 187, 554 N.Y.S.2d 527 (1990).....	17
<i>Sandalwood Condo. Ass'n at Wildwood, Inc. v. Allstate Ins. Co.</i> , 294 F.Supp.2d 1315 (M.D.Fla. 2003).....	17
<i>Schray v. Fireman's Fund Ins. Co.</i> , 402 F.Supp.2d 1212 (D.Or. 2005)	6
<i>Shields v. Penn. Gen. Ins. Co.</i> , 488 So.2d 1252 (1986).....	18

Other Authorities

<i>Insurance Coverage for Collapse Ins. Claims: Evolving Standards and Legal Theories</i> , 35 Tort & L.J., 57, 60 (1999).....	5
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1. Identity/Interest of Amicus Curiae

Applicants, Community Association Partners LLC and Blue and Hockley Real Estate Services, are real estate service companies that represent the interests of homeowners' associations and property owners, and provide services safeguarding their clients' property interests. Many consumers in Washington have been issued property insurance policies to protect their interests in homes and commercial buildings, including Applicants' clients. Many of those policies fail to define the term "collapse." Appellant's clients may pursue potential "collapse" claims under past, current, or future insurance policies based upon the decision by this Court.

2. Statement of the Case

Amicus Curiae acknowledge the statements of the case in the parties' briefs, while noting that even though the record is important for context, the only dispositive fact is the applicable policy language.

I. INTRODUCTION

This Court accepted a narrow certified question from the Ninth Circuit that is limited to deciding what "collapse" means, when undefined, in a property insurance policy. As such, the current condition of the insured building is not determinative in rendering a decision. Rather, the applicable policy language is dispositive. In addition, the Appellee-

insurer, State Farm Fire and Casualty Company (“State Farm”), asks this Court to write in language to the policy that does not exist—that is, a temporal restriction on coverage. The policy language should be enforced as written, with no temporal restrictions. Moreover, only one meaning of “collapse” should be adopted, regardless of when the insurance claim is submitted. Adopting multiple standards based on when the claim is submitted is unsupported by Washington precedent and would result in an unmanageable system.

II. ARGUMENT

1. The policy language is the only dispositive “fact”.

This Court accepted a certified question from the Ninth Circuit that is limited to deciding what “collapse” means, when undefined, in a property insurance policy. This Court is not deciding whether the insured’s building collapsed. Rather, it is answering a question that has vexed courts for years and affects many insureds presenting a claim for “collapse” when that term is undefined by the insurer.

This case was certified “because the dispositive issue is the meaning of the term ‘collapse’ in the insurance policy at issue.” *Queen Anne Park Homeowner’s Ass’n v. State Farm Fire and Cas. Co.*, 763 F.3d 1232, 1235 (9th Cir. 2014). This Court “treat[s] the certified question as a pure question of law[.]” *Bain v. Metropolitan Mortg. Group, Inc.*, 175

Wash.2d 83, 90, 285 P.3d 34 (2012). This Court “can answer questions of law but not determine facts.” *Id.* at 115; *see also Kitsap County v. Allstate Ins. Co.*, 136 Wash.2d 567, 577, 964 P.2d 1173 (1998) (“[W]e recognize that when a federal court certifies a question to this court, this court answers only the discrete question that is certified and lacks jurisdiction to go beyond the question presented.”).

State Farm’s theme, repeated numerous times before this Court, however, is that defining “collapse” as “substantial impairment of structural integrity” “makes no sense *in this case*” and “is unreasonable under the facts of *this case*.” *Appellee’s Brief*, p. 42. (Emphasis added). In support, State Farm relies heavily on the *fact* that the insured building is still standing.¹ Whether or not the insured building is still standing, however, attributes an incorrect meaning of the term “collapse” and is not an issue before this Court. Because the meaning of the term “collapse” “may have far-reaching effects on individuals and entities insured under residential and commercial property insurance policies subject to Washington law” (*Queen Ann Park Homeowner’s Ass’n*, 763 F.3d at 1235), this Court should reject State Farm’s attempts to provide a definition of the term “collapse” that is based on the facts in the

¹ State Farm argues that the insured building “in this case” could not be in a state of collapse because it is still standing after 16 years. This argument, or ones like it, is repeated in 20 pages of Appellee’s 42-page brief. *Appellant’s Brief*, pp. 1, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 16, 27, 29, 30, 36, 37, 40, 42, 42.

underlying case. Instead, this Court should provide a meaningful definition of “collapse” that will be useful to insureds and insurers alike, in multiple factual scenarios, when the insurer fails to define the term “collapse.”

2. Collapse caused by hidden decay occurs slowly.

At issue in this case is whether coverage for “collapse” caused by “hidden decay” is triggered by an immanency requirement not found in the policy. Unlike collapse caused by a discrete event—for example, an earthquake—“direct physical loss involving...collapse...caused by hidden decay” takes time to develop. In the context of this policy language, coverage is triggered when decay has affected the structure to the point where its structural integrity is impaired. Adding in unwritten temporal conditions that are inconsistent with collapse caused by slow decay is unsupported by this policy language.

A. Courts do not supply unwritten requirements into insurance policies.

It is a fundamental principal of insurance law—second only to the rule that ambiguities inure to the benefit of the insured—that courts strictly construe policy language written by the insurer, and do not write in language that does not exist. *See Public Employees Mutual Ins. Co. v. Mucklestone*, 111 Wn.2d 442, 444, 758 P.2d 987 (1988) (“The insurer, the drafter of the policy, is primarily responsible for defining the scope of

coverage and ordinarily will not be allowed reformation, especially when to do so would result in denial of coverage.”).

“[Insurance] policies are prepared by skilled lawyers retained by the insurance companies, who through years of study and practice have become expert upon insurance law, and are fully capable of drawing a contract which will restrict the scope of the liability of the company with such clearness that the policy will be free from ambiguity, require no construction, but construe itself. Because of reasons such as these, whenever the contract of insurance is so drawn to be ambiguous, uncertain and to require construction, the courts of this country resolve the doubt in favor of the insured and against the insurer.”

Labberton v. General Cas. Co., 53 Wn.2d 180, 183, 332 P.2d 250 (1958); *American Nat’l Fire Ins. Co. v. B&L Trucking and Construction Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1988) (“[I]f the insurer wished to limit its liability...once a policy is triggered, the insurer could have included that language in the policy.”).

State Farm acknowledges that insurance disputes concerning collapse provisions date back to the 1950’s. *Appellee’s Brief*, p. 16. “The controversy surrounding the definition of ‘collapse’ began prior to 1960. Particularly with this much warning, the insurer is capable of unambiguously limiting collapse coverage if it wishes to do so.” *Schray v.*

Fireman's Fund Ins. Co., 402 F.Supp.2d 1212, 1218 (D. Or. 2005).

(Internal citations omitted).

Here, State Farm wishes to add unwritten requirements into the policy under the guise of contract interpretation. This attempt should be rejected. State Farm's policy provides coverage for loss "involving...collapse...caused by hidden decay." "By [its] very nature, hidden decay...occur[s] slowly and not as a sudden destructive force." *Dalton v. Harleysville Worcester Mut. Ins. Co.*, 557 F.3d 88, 93 (2d.Cir. 2009); *Insurance Coverage for Collapse Claims: Evolving Standards and Legal Theories*, 35 Tort & Ins. L.J., 57, 60 (1999) ("Collapse claims commonly involve...decay[.] This type of damage takes place over several years; in any event, it does not occur abruptly."); *Ass'n of Unit Owners of Nestani v. State Farm Fire and Cas. Co.*, 670 F.Supp.2d 1156, 1163 (D. Or.2009) (interpreting collapse provision with "sudden" language, and holding that under that provision, "conditions that gradually lead to a collapse are excluded under the Policy[.]").

Here, the State Farm policy does not include any temporal requirements, yet State Farm urges this Court to read them in. "Imminent", like "sudden", is defined to include temporal restrictions that are not present in the State Farm "collapse" provision:

Imminent:

: happening very soon

: ready to take place; especially: hanging threateningly over one's head <was in *imminent* damage of being run over>

www.meriam-webster.com/dictionary/imminent

Compare to

Sudden:

: marked by or manifesting abruptness or haste <a *sudden* departure>

: made or brought about in a short time:
prompt

www.meriam-webster.com/dictionary/sudden

The State Farm policy does not use any temporal language. All that is required is that “hidden decay,” which takes years to develop, causes “collapse,” which is undefined. This Court should not read in requirements to the policy drafted by State Farm where they do not otherwise exist, and that strictly inure to the benefit of State Farm. The ambiguity created by State Farm should favor coverage, not take it away.

B. “Direct physical loss involving collapse...caused by hidden decay” occurs earlier than “Direct physical loss involving collapse...caused by hidden decay [when the building is in danger of immediate collapse].”

State Farm’s attempt to add language not found in the policy highlights what its policy actually covers—that is, “collapse” unrestricted by temporal requirements. With the three analytical collapse frameworks acknowledged by State Farm (1. “actual collapse” – temporally restrictive; 2. “imminent collapse” – temporally restrictive; and 3. “substantial impairment of structural integrity” – no temporal restriction), “substantial impairment of structural integrity” is the only framework that honors the collapse language drafted by State Farm.

If State Farm wanted to limit its coverage for collapse based upon temporal restrictions, it could have done so. That failure, however, cannot inure to State Farm’s benefit, particularly when the result is a forfeiture of coverage. *Public Employees Mutual Ins. Co. v. Mucklestone*, 111 Wn.2d at 444. The insured, as are all insureds faced with collapse provisions that are undefined and with no temporal restrictions, is entitled to have the policy language enforced as written: “hidden decay” results in covered “collapse” when the insured building enters a state of “substantial impairment of structural integrity.” To hold otherwise would allow

insurers to enforce unwritten requirements to the surprise and detriment of their insureds.

3. **The timing of the claim submission does not affect the meaning of the term “collapse.”**

State Farm would have this Court adopt a standard for “collapse” that is somehow dependent upon the timing of the claim. Aside from resulting in an unworkable system in which almost all collapse claims would find their way to the courts, State Farm’s position is inconsistent with Washington precedent. In Washington, as long as there is covered damage during the policy period, there is coverage.

In *Ellis Court Apartments Limited Partnership v. State Farm Fire and Casualty Company*, 117 Wash.App. 807, 72 P.3d 1086 (2003), the parties offered competing views concerning the appropriate trigger of coverage in first-party property policies. In *Ellis Court*, the insurer argued that the “manifestation trigger” should apply. *Id.* at 812. That trigger theory provides that the loss occurs when the damage is discovered. *Id.* at 812; citing *Prudential-LMI Ins. v. Superior Court*, 51 Cal.3d 674, 699, 274 Cal.Rptr. 387, 798 P.2d 1230 (1990).

The insured argued that the “injury-in-fact trigger” should apply. “Under this trigger, collapse occurs at the point in time when decay or rot first causes substantial impairment of structural integrity, even if a policy

has expired before the loss is uncovered.” *Id.* at 813. Therefore, even though the State Farm policy was expired when the damages were discovered and a claim was made, the court upheld coverage for Ellis Court because covered collapse damages occurred during the State Farm policy period.

Here, however, State Farm argues that because the building is still standing (facts which should not be considered by this Court), it is somehow evidence that the insured building did not actually collapse (not the standard for collapse in this policy). *See* Appellee’s Brief, p. 14. (“Even if ‘substantial impairment of structural integrity’ were reasonable under some facts, it cannot be reasonable here. Buildings still standing straight and true at least 14 years...after allegedly ‘collapsing’ without any suggestion that actual falling down or caving in is imminent, cannot have collapsed in 1998.”). There is no support in the policy drafted by State Farm, nor any support in Washington law, to apply one meaning of “collapse” when a claim is submitted during the policy period and another when a claim is submitted after the policy period.

The relevant inquiry in first-party property cases in which “collapse” is undefined is: did the insured building enter a state of “substantial impairment of structural integrity” during the policy period? If that answer is “yes,” then there is coverage. But applying a different

standard just because a building is “still standing 16 years later” is unsupported by the policy and Washington law.

4. **Cases cited by State Farm almost uniformly adopted the “substantial impairment of structural integrity” standard without any requirement of “imminent collapse.”**

State Farm spends six pages (Appellee’s Brief, pp. 23-29) discussing the *facts* of 25 “collapse” cases. As noted above, aside from the policy language, the *facts* of this case—and the facts of the 25 cases cited by State Farm—should not form the basis for this Court’s decision. Rather, the policy language is dispositive. As shown below, in each of the 25 cases cited by State Farm, “collapse” was undefined. In each of those cases, no temporal restrictions were provided in the insurance policies. Only one case—a South Carolina case—adopted the “imminent collapse” standard; every other case adopted the “substantial structural impairment of structural integrity” standard.

CASE	POLICY LANGUAGE	SISI ² ADOPTED?	IMMINENT COLLAPSE ADOPTED?
<i>Allstate v. Forest Lynn Homeowner’s Ass’n</i> ³	“risk of direct physical loss involving collapse...caused by hidden decay”; “collapse” undefined	Yes	No

² “Substantial impairment of structural integrity”

³ *Allstate v. Forest Lynn Homeowner’s Ass’n*, 892 F.Supp. 1310 (W.D.Wash. 1995).

CASE	POLICY LANGUAGE	SISI ² ADOPTED?	IMMINENT COLLAPSE ADOPTED?
<i>American Concept Ins. Co. v. Jones</i> ⁴	“direct physical loss...involving collapse...caused by...”; “collapse” undefined	Yes	No
<i>Anderson v. Indiana Lumbermens Mut. Ins. Co.</i> ⁵	“Collapse of building(s)”; “collapse undefined”	Yes	No
<i>Auto Owners Ins. Co. v. Allen</i> ⁶	“Loss by collapse shall mean only the collapse of the building or any part thereof”; “collapse undefined”	Yes	No
<i>Beach v. Middlesex Ins. Co.</i> ⁷	“collapse of a building”; “collapse undefined”	Yes	No
<i>Bradish v. British America Assurance Co.</i> ⁸	“Collapse of buildings(s) or any part thereof”; “collapse” undefined	Yes	No
<i>Campbell v. Norfolk & Dedham Mut. Fire Ins. Co.</i> ⁹	“direct physical loss...involving collapse...caused by...hidden decay”; “collapse” undefined	Yes	No

⁴ *American Concept Ins. Co. v. Jones*, 935 F.Supp. 1220 (D.Utah. 1996).

⁵ *Anderson v. Indiana Lumbermens Mut. Ins. Co.*, 127 So.2d 304 (1961).

⁶ *Auto Owners Ins. Co. v. Allen*, 362 So.2d 176 (1978).

⁷ *Beach v. Middlesex Ins. Co.*, 205 Conn. 246, 532 A.2d 1297 (1987).

⁸ *Bradish v. British America Assurance Co.*, 9 Wis.2d 601, 101 N.W.2d. 814 (1960).

⁹ *Campbell v. Norfolk & Dedham Mut. Fire Ins. Co.*, 682 A.2d 933 (1996).

CASE	POLICY LANGUAGE	SISI ² ADOPTED?	IMMINENT COLLAPSE ADOPTED?
<i>Chafin v. Farmers & Mechanics Mut. Ins. Co.</i> ¹⁰	“direct physical loss...involving collapse...caused by...hidden decay”; “collapse” undefined	Yes	No
<i>Dagen v. Hastings Mut. Ins. Co.</i> ¹¹	“collapse” due to “hidden decay”; “collapse” undefined	Yes	No
<i>Dally Properties, LLC. v. Truck Ins. Exch.</i> ¹²	“direct physical loss...caused by collapse”; “collapse” undefined	Yes	No
<i>Dalton v. Harleysville Worcester Mut. Ins. Co.</i> ¹³	“collapse” caused by “hidden decay”; “collapse” undefined	Yes	No
<i>Ercolani v. Excelsior Ins. Co.</i> ¹⁴	“risk of direct physical loss...involving collapse...caused by...hidden decay”; “collapse” undefined	Yes	No
<i>Government Employees Ins. Co. v. DeJames</i> ¹⁵	“collapse of building(s) or any part thereof”; “collapse” undefined	Yes	No

¹⁰ *Chafin v. Farmers & Mechanics Mut. Ins. Co.*, 2323 W.Va. 245, 751 S.E.2d 765 (2013).

¹¹ *Dagen v. Hastings Mut. Ins. Co.*, 166 Mich.App. 225, 420 N.W.2d 111 (1987).

¹² *Dally Properties, LLC. v. Truck Ins. Exch.*, 2006 WL 1041985 (W.D.Wash., April 5, 2006).

¹³ *Dalton v. Harleysville Worcester Mut. Ins. Co.*, 557 F.3d 88 (2d.Cir. 2009).

¹⁴ *Ercolani v. Excelsior Ins. Co.*, 830 F.2d 31 (3d.Cir. 1987).

¹⁵ *Government Employees Ins. Co. v. DeJames*, 256 Md. 717, 261 A.2d. 747 (1970).

CASE	POLICY LANGUAGE	SISI ² ADOPTED?	IMMINENT COLLAPSE ADOPTED?
<i>Hudson 500 LLC v. Tower Ins. Co.</i> ¹⁶	“direct physical loss...caused by collapse...caused by...hidden decay”; “collapse” undefined	Yes	No
<i>Indiana Ins. Co. v. Liaskos</i> ¹⁷	“collapse of a building or any part of a building”; “collapse” undefined	Yes	No
<i>Jenkins v. U.S. Fire Ins. Co.</i> ¹⁸	“collapse of building(s) or any part thereof”; “collapse” undefined	Yes	No
<i>Monroe Guar. Ins. Co. v. Magwerks Corp.</i> ¹⁹	“risk of direct physical loss involving collapse caused only by...hidden decay”; “collapse” undefined	Yes	No
<i>Morton v. Great Am. Ins. Co.</i> ²⁰	“collapse of building(s) or any part thereof”; “collapse” undefined	Yes	No
<i>Nationwide Mut. Fire Ins. Co. v. Tomlin</i> ²¹	“collapse of a building or any part thereof”; “collapse” undefined	Yes	No

¹⁶ *Hudson 500 LLC v. Tower Ins. Co.*, 22 Misc.3d 878, 875 N.Y.S.2d. 429 (2008).

¹⁷ *Indiana Ins. Co. v. Liaskos*, 297 Ill.App.3d 569, 697 N.E.2d. 398 (1998).

¹⁸ *Jenkins v. U.S. Fire Ins. Co.*, 185 Kan. 665, 347 P.2d 417 (1959).

¹⁹ *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 796 N.E.2d 326 (2003).

²⁰ *Morton v. Great Am. Ins. Co.*, 77 N.M. 35, 419 P.2d 239 (1996).

²¹ *Nationwide Mut. Fire Ins. Co. v. Tomlin*, 181 Ga.App. 413, 352 S.E.2d 612 (1986).

CASE	POLICY LANGUAGE	SISI ² ADOPTED?	IMMINENT COLLAPSE ADOPTED?
<i>Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co.</i> ²²	“risks of direct physical loss involving collapse...caused by...hidden decay”; “collapse” undefined	No	Yes
<i>Rankin v. Generali-U.S. Branch</i> ²³	“risk of direct physical loss involving collapse...caused only by...”; “collapse” undefined	Yes	No
<i>Royal Indemn. Co. v. Grunberg</i> ²⁴	“direct physical loss...involving collapse...caused only by...”; “collapse” undefined	Yes	No
<i>Sandalwood Condo. Ass’n at Wildwood, Inc. v. Allstate Ins. Co.</i> ²⁵	“risk of direct physical loss involving collapse...caused only by...hidden decay”; “collapse” undefined	Yes	No
<i>Schray v. Fireman’s Fund Ins. Co.</i> ²⁶	“direct physical loss...involving collapse...caused only by...hidden decay”; “collapse” undefined	Yes	No

²² *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner Ins. Co.*, 350 S.C. 268, 565 S.E.2d 306 (2002).

²³ *Rankin v. Generali-U.S. Branch*, 986 S.W.2d 237 (1998).

²⁴ *Royal Indemn. Co. v. Grunberg*, 155 A.D.2d 187, 554 N.Y.S.2d 527 (1990).

²⁵ *Sandalwood Condo. Ass’n at Wildwood, Inc. v. Allstate Ins. Co.*, 294 F.Supp.2d 1315 (M.D.Fla. 2003).

²⁶ *Schray v. Fireman’s Fund Ins. Co.*, 402 F.Supp.2d 1212 (D.Or) 2005).

CASE	POLICY LANGUAGE	SISI ² ADOPTED?	IMMINENT COLLAPSE ADOPTED?
<i>Shields v. Penn. Gen. Ins. Co.</i> ²⁷	“collapse of buildings or any part thereof”; “collapse” undefined	Yes	No

Policy language controls the interpretation of insurance policies. When “collapse” is undefined and there are no temporal requirements, the appropriate standard is “substantial impairment of structural integrity.” Whether an insured building is in a state of “substantial impairment of structural integrity” is a question for the jury.

III. CONCLUSION

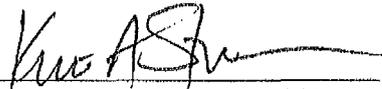
Applying the policy language drafted by State Farm highlights that the meaning of collapse is “substantial impairment of structural integrity.” State Farm drafted a policy that provides coverage for collapse caused by hidden decay (a slow process) with no temporal restrictions. This Court

²⁷ *Shields v. Penn. Gen. Ins. Co.*, 488 So.2d 1252 (1986).

should reject State Farm's attempt to write in to the policy language which is inconsistent with itself and which does not otherwise exist.

Dated this 4th day of December 2014.

BALL JANIK LLP

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Appellant,

v.

STATE FARM FIRE AND
CASUALTY COMPANY,

Appellee.

No. 90651-3

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on December 4, 2014 a true and correct copy of the documents listed below were caused to be served on all counsel of record in this matter by emailing and placing the same in the U.S. Postal Service to the address of each such counsel:

1. Motion for Leave to File a Corrected Amicus Brief on Behalf of Applicants Community Association Partners LLC and Bluestone and Hockley Real Estate Services; and

2. Corrected Amicus Brief on Behalf of Applicants Community Association Partners LLC and Bluestone and Hockley Real Estate Services

Dated this 4th day of December, 2014.

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Cc: 'todd@harperhayes.com'; 'devon@heffernanlawgroup.com'; 'monica@heffernanlawgrouop.com'; 'pokano@rmlaw.com'; 'jim.derriglaw@me.com'; 'jhampton@bpmlaw.com'; 'dsyhre@bpmlaw.com'; Sturm, Kyle

Subject: Case No. 90651-3, Queen Anne Park HOA v. State Farm Fire and Casualty Company

I am attaching the following documents:

1. Motion for Leave to File a Corrected Amicus Brief on Behalf of Applicants Community Association Partners LLC and Bluestone and Hockley Real Estate Services
2. Certificate of Service



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