

HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

WESTBORO CONDOMINIUM
ASSOCIATION, a Washington Non-Profit
Corporation,

Plaintiff,

v.

COUNTRY CASUALTY INSURANCE
COMPANY et al.

Defendants.

NO. 2:21-cv-00685-BJR

**PLAINTIFF’S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

I. INTRODUCTION

This lawsuit arises out of an insurance claim for hidden damage to exterior sheathing and framing from wind-driven rain. Country Casualty Insurance Company and Country Mutual Insurance Company (collectively referred to as “Country”) insured the Westboro Condominium Association’s (“Association”) buildings from August 19, 2018 to August 19, 2019. In December 2019, after discovering hidden water damage in the exterior walls of the Westboro buildings, the Association tendered a claim to Country.

A subsequent joint intrusive investigation conducted by experts for Country and the Association in June of 2020 confirmed the existence of extensive water damage to sheathing and framing behind the exterior siding of the Westboro buildings. The Association’s expert has opined that the damage was caused by the combination of wind-driven rain and inadequate construction with wind-driven rain being the predominant and initiating cause of the loss.

1 Country issued an all-risk property policy which covers all damage except for what is
 2 excluded. The policy excludes weather conditions but only in conditions not present here such as
 3 when weather causes mudslide or mudflow. Declaration of Daniel Stein (“Stein Dec.”) Ex. D pg.
 4 116-17 ¶ 6.3.a. The policy also has an exclusion for “interior rain”¹ which this Court ruled in
 5 *Greenlake Condo. Ass'n v. Allstate Ins. Co.*, No. C14-1860 BJR, 2015 U.S. Dist. LEXIS 184729,
 6 at *25 (W.D. Wash. Dec. 23, 2015) does not exclude wind-driven rain damage to exterior wall
 7 sheathing and framing at issue here. The fact that Country’s all-risk policy excludes rain and
 8 weather but only in certain inapplicable circumstances evinces Country’s intent to cover wind-
 9 driven rain damage to exterior wall sheathing and framing.

10 Country asserted in its denial letter that its exclusion for “continuous or repeated seepage
 11 or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs
 12 over a period of 14 days or more” (“seepage exclusion”) swallows coverage for wind-driven
 13 rain. Stein Dec. Ex C. pg. 14. However, *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn.
 14 App. 368, 377-78, 901 P.2d 1084 (1995) and multiple Courts in this District disagree with
 15 Country and have ruled that wind-driven rain is a separate and distinct peril from Country’s
 16 seepage exclusion. In addition, Country is not able to meet its burden of proving that its 14 day
 17 or more seepage exclusion even applies because Country’s expert agrees that there were no rain
 18 events that took place over a period of 14 days or more during Country’s policy period and that
 19 the damage at Westboro was otherwise not caused by the presence of a small amount of water,
 20 i.e. moisture.

21 Under Washington’s efficient proximate cause (“EPC”) rule, Country’s policy covers the
 22 loss at Westboro if wind-driven rain is the EPC. However, as recognized in *Vision One, LLC v.*
 23 *Phila. Indem. Ins. Co.*, 174 Wn.2d 501, 519-20, 276 P.3d 300 (2012) and by this Court in
 24 *Greenlake*, the EPC rule is a rule of policy interpretation that operates only in favor of coverage;

25
 26 ¹ Country’s interior rain exclusion states “We will not pay for loss or damage to” (5) “the *interior* of any
 27 building or structure caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or
 not...” (emphasis added). Stein Decl. C pg. 7; Ex D pg. 41.

1 and there is no inverse EPC rule mandating no coverage if an excluded peril is the EPC.
2 “Accordingly, should an insurer wish to exclude otherwise-covered losses that result from a
3 causal chain set into motion by an excluded peril (i.e., include an inverse EPC-rule provision) the
4 insurer must include specific language in the policy to this effect...” *Greenlake*, 2015 U.S. Dist.
5 LEXIS 184729, at *28-29.

6 Here, Country’s policy only excludes damage “caused by or resulting from” inadequate
7 construction. Stein Dec. Ex. D pg. 116-17 ¶ 6.3.c.; Ex G. This “caused by or resulting from”
8 lead-in language in Country’s inadequate construction exclusion is a far cry from “initiates a
9 sequence of events” lead-in language that *Vision One* recognized is inverse EPC language. *See*
10 *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *30. Thus, because Country’s “caused by or
11 resulting from” lead-in language is not an inverse EPC provision, even if inadequate construction
12 is the EPC, there is coverage for damage caused by otherwise-covered wind-driven rain. Given
13 that Country’s Federal Rules of Civil Procedure (“FRCP”) 30b6 witness admitted that inadequate
14 construction **did not** initiate a sequence of events that led to water damage at Westboro (Stein
15 Dec. Ex. H, I), Country could not establish that inadequate construction “initiated a sequence of
16 events” even if it had such inverse EPC language in its inadequate construction exclusion. Thus,
17 it should be undisputed that the damage from wind-driven rain is covered as a matter of law.

18 Further, following *Vision One*, in *Greenlake* this Court recognized that the Court need
19 not pick either inadequate construction or wind-driven rain as the EPC but rather could find that
20 “the damage was caused by a combination of rain and inadequate construction (which would
21 permit coverage...” *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *27. Here, like the policy in
22 *Greenlake*, Country applies an anti-concurrent causation provision which excludes loss or
23 damage that “occurs **concurrently** or in any sequence” to certain irrelevant exclusions in its
24 policy but not to its inadequate construction exclusion. Stein Decl. Ex D. pg. 54 ¶ B.1; 134 ¶
25 B.1.a. This demonstrates that Country was aware of the concurrent causation doctrine, knew how
26 to exclude concurrent causes, but chose not to exclude damage caused by the combination of
27

1 wind-driven rain and inadequate construction. Country's policy thus covers the damage at
2 Westboro caused by the combination of wind-driven rain and inadequate construction.

3 Finally, Country includes a resulting loss clause in its inadequate construction exclusion
4 which covers damage from a "Covered Cause of Loss" that results from inadequate construction.
5 Stein Dec. Ex. D pg. 116-17 ¶ 6.3.c. As noted by this Court in *Greenlake*, the resulting loss
6 clause makes it even clearer that there is coverage for water damaged sheathing and framing
7 even if inadequate construction is the EPC. *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *13-
8 15; 26.

9 The Association believes that under the undisputed evidence in this case including that:
10 (1) there was new incremental and progressive² wind-driven rain damage to sheathing and
11 framing during Country's policy period (Stein Dec. Exs. R-S; Declaration of Kris Eggert
12 ("Eggert Dec.") ¶ ¶ 9-19); (2) inadequate construction did not initiate a sequence of events that
13 led to water damage at Westboro or initiate the wind-driven rain events that caused the damage
14 (Stein Dec. Exs. H-I; Eggert Dec. ¶ ¶ 23-25); and (3) wind-driven rain and inadequate
15 construction **had to occur at the same time** for there to be damage (Stein Dec. Ex. N pg. 40:18-
16 24; Eggert Dec. ¶ 22), that the Court should grant summary judgment that the damage to
17 sheathing and framing at Westboro from wind-driven rain is covered as a matter of law.

18 However, to the extent the Court finds that there are issues of fact, the Court should still
19 as in *Greenlake* interpret the coverage provided by Country's policy and determine that
20 Country's policy: (1) covers wind-driven rain as a separate and distinct peril; (2) covers damage
21 if the EPC is wind-driven rain or the combination of wind-driven rain and inadequate
22 construction; and (3) provides coverage if the EPC is inadequate construction and the loss
23 otherwise involves covered wind-driven rain. The Court should determine that there is no
24

25 ² Based upon their observations from the joint intrusive investigation, the Association and Country's experts
26 agree that there was damage to sheathing and framing from rainwater and that the damage to sheathing and framing
27 was incremental and progressive with new damage occurring during Country's policy period. As set forth in Section
V.H below, this satisfies Country's requirement that loss or damage commence during Country's policy period.
Country is jointly and severally liable for the entire \$6,263,445 cost of repair. Stein Dec. Exhibit BB.

1 coverage only if the EPC is inadequate construction and the sole resulting loss is an excluded
2 peril.³

3 II. STATEMENT OF FACTS

4 Westboro Condominiums consists of seventeen (17) two-story, wood framed, residential
5 buildings, with a total of 68 units, located in Federal Way, Washington. Eggert Dec. ¶ 4. The
6 exterior siding consists of cedar and fiber cement lap siding with cedar trim. *Id.* The exterior
7 wall consists of siding, over weather resistive barrier (“WRB”) over ThermoPly structural
8 sheathing and pressboard sheathing, and framing. *Id.* The framing is hidden from view by the
9 sheathing, the sheathing is hidden from view by the WRB and the WRB is hidden from view by
10 the siding. *Id.* ¶ 5.

11 In December 2019 Evolution Architecture (“Evolution”) conducted an intrusive
12 investigation which involved making 12 openings and removing siding and WRB (and in some
13 instances sheathing) in order to observe the condition of the sheathing and framing at Westboro.
14 *Id.* ¶ 8. Evolution discovered hidden water damage at 11 out of 12 openings made. *Id.* Then, in
15 January 2020, the Association submitted claims to Country and other historical insurance carriers
16 for the hidden damage discovered during the intrusive inspection. Stein Dec. ¶ 2. In its tender the
17 Association asked Country to investigate for all hidden damage to sheathing and framing at
18 Westboro. *Id.* Ex. A.

19 In June 2020, an extensive joint intrusive investigation was held at the Westboro
20 Condominiums. Eggert Dec. ¶ 8. The Association’s expert Kris Eggert (“Eggert”) of Evolution
21 attended the investigation on behalf of the Association. Country’s expert Christopher Hasse
22 (“Hasse”) attended the intrusive inspection on behalf of Country. *Id.* Twenty-eight (28) openings
23 were made and documented as part of this joint intrusive investigation. *Id.* Hidden water damage
24 was observed at twenty-four (24) of twenty-eight (28) openings (86%). *Id.* In total, hidden water

25 ³ *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *22-36. See also *Sunwood Condo. Ass'n v. Travelers Cas.*
26 *Ins. Co. of Am.*, No. C16-1012-JCC, 2017 U.S. Dist. LEXIS 189892, at *8-13; *23-27 (W.D. Wash. Nov. 16, 2017)
27 where the Court following *Greenlake* and *Vision One* interpreted an all-risk policy similar to Country’s to cover the
concurrent combination of wind-driven rain and inadequate construction, and to cover resulting water damage from
wind-driven rain under an identical resulting loss clause to the inadequate construction exclusion.

1 damage was observed at thirty-five (35) of forty (40) openings (87.5%) made at the Westboro
2 Condominium.⁴ *Id.*

3 Country denied the Association's claim on December 14, 2020. Stein Dec. ¶ 4.

4 A. The Association's Expert's Findings.

5 According to the Association's expert Eggert, the intrusive investigation at Westboro
6 revealed water damage to sheathing and framing caused by wind-driven rain. Eggert Dec. ¶ 22.
7 Specifically, the hidden damage was caused by a combination of wind-driven rain and
8 inadequate construction.⁵ *Id.*

9 It is Eggert's opinion that wind-driven rain was the predominant and initiating cause of
10 the damage because the water that penetrated behind the siding and resulted in damage came
11 from rain that was driven against the exterior walls by the wind. *Id.* ¶¶ 23-24. According to
12 Eggert the fact that there were openings made during the intrusive inspection with inadequate
13 construction but no water damage to sheathing and framing, evidenced that inadequate
14 construction did not cause or initiate the damage at Westboro. Rather it was the storm events that
15 were the predominant cause (and initiated) the damage at Westboro. *Id.* ¶ 25.

16 It is Eggert's opinion that damage to sheathing and framing has been occurring
17 incrementally and progressively since shortly after initial construction with new damage
18 occurring each year. *Id.* ¶¶ 9-19. It is also Eggert's opinion that most of the water intrusion
19 occurred during weather events with rain and wind speeds of 11 mph at areas within 90° of the

20 _____
21 ⁴ The sheathing and framing which was damaged by wind-driven rain was well constructed and installed at
the time of construction. Eggert Dec. ¶ 4.

22 ⁵ Eggert determined that the inadequate construction was the following secondary causal factors found at
some locations of the building:

- 23 1) Lack of adequate flashing;
24 2) Lack of sealant joints or insufficient sealant joints at building penetrations and
openings;
25 3) Improper weather resistive barrier installation;
4) Missing/Omitted weather resistive barrier. Eggert Dec. ¶¶ 22-25.

26 Country also admitted that inadequate construction was a factor in the loss but that inadequate construction
did not initiate a sequence of events that led to water damage to sheathing and framing at Westboro. Stein Dec. Ex.
H-I.

1 wind direction; and that storm events with higher windspeeds and precipitation intensity would
 2 cause a proportionately higher level of hidden damage. Eggert Dec. ¶ 14. It is Eggert’s opinion
 3 that under this criteria for a wind-driven rain event, there “would have been approximately 62
 4 wind-driven rain events that on a more probable than not basis would cause damage to
 5 sheathing” during Country’s policy period. *Id.* ¶ 16. It is Eggert’s opinion that there would have
 6 been new incremental and progressive damage during Country’s policy period including at the
 7 35 openings where damage was discovered during the two intrusive inspections at Westboro
 8 which took place shortly after Country’s policy period ended. *Id.* ¶¶ 18-19.

9 According to Eggert, there were no storm events that lasted for a period of 14 days or
 10 more during Country’s policy period, and a small amount of water, i.e. moisture would not have
 11 caused the damage to the sheathing and framing at Westboro. *Id.* ¶¶ 20-21.

12 B. Country’s Expert’s Findings

13 Country’s expert Hasse agrees with Eggert that the damage at Westboro was incremental
 14 and progressive with new damage to sheathing and framing occurring during each year since
 15 after initial construction. Stein Dec. Ex. R-S. Like Eggert, it is Hasse’s opinion based on the
 16 results of the joint intrusive investigation that there would have been new damage from rainwater
 17 at several locations at the building during Country’s policy period. *Id.* Ex. R, U.⁶ Hasse agrees
 18 with Eggert that the damage to sheathing and framing could not have occurred without rain
 19 (Stein Dec. Ex. V⁷), that rain and inadequate construction had to occur at the same time for there
 20 to be damage (Stein Dec. Ex. N pg. 40:8-24), and that inadequate construction did not initiate
 21 wind-driven rain (Stein Dec. Ex. N pg. 40:3-7). Hasse also agrees with Eggert that rain would be
 22 driven onto the exterior walls at Westboro when there is more than 10 mph of rain (Stein Dec.
 23 Ex. T), and that damage would not have occurred at certain locations at Westboro absent wind-
 24

25 _____
 26 ⁶ Exhibit U is a compilation of testimony from Country’s expert Hasse where he admits that there was
 damage to sheathing and framing from rain during Country’s policy period at several locations at Westboro.

27 ⁷ Exhibit V is a compilation of testimony from Hasse where he admits that damage at several locations at
 Westboro could not have happened without wind-driven rain.

1 driven rain events meeting Eggert’s wind-driven rain criteria (Stein Dec. Ex. V at pg. 117:4-7;
2 118:24-119:1, 12-15; 122:15-123:1; 124: 25-125:7; 134:7-10; 135:17-19).

3 Hasse also agrees with Eggert that at Westboro small amounts of water would not have
4 caused the damage to sheathing and framing (Stein Dec. Ex. W)⁸; and that he could not identify a
5 single storm event during Country’s policy period that lasted for a period of 14 days or more
6 (Stein Dec. Ex O-Q).⁹ Hasse was not retained by Country as an expert to opine as to the cause of
7 damage with respect to the 12 openings made by Evolution at the December 2019 initial
8 intrusive inspection, and has expressed no opinions to contradict Eggert as to the cause of
9 damage at these 12 openings. *Id.* Ex Y.

10 **III. STATEMENT OF ISSUES**

- 11 **1.** Are weather conditions and wind-driven rain separate and distinct covered perils under
12 Country’s policy?
- 13 **2.** Has Country met its burden of establishing that its 14 day or more repeated seepage
14 exclusion could apply when it is undisputed that there were no storm events that occurred
15 for a period of 14 days or more during Country’s policy period, and that moisture i.e. a
16 small amount of water, did not cause damage to the sheathing and framing at Westboro?
- 17 **3.** Does Country’s policy cover the loss if the EPC is either wind-driven rain or the
18 combination of wind-driven rain and inadequate construction?
- 19 **4.** Given that Country’s policy has no inverse EPC language and contains a resulting loss
20 clause which provides coverage for damage from a “Covered Cause of Loss” that results
21 from inadequate construction, if inadequate construction is the EPC does Country’s
22 policy still otherwise cover the damage from wind-driven rain?
- 23
- 24

25 ⁸ Exhibit W is a compilation of testimony from Hasse where he admits that a small amount of water (i.e.
moisture) would not have caused the damage to sheathing and framing at Westboro.

26 ⁹ While the Association understands it is Hasse’s opinion that there is inadequate maintenance at Westboro
due to lack of sealant and chipped paint, it is Eggert’s opinion that sealant was not needed because trim was installed
27 on the top of the exterior cladding and did not butt up against the siding. Eggert Dec. ¶ 28. It is also Eggert’s opinion
and that any cracked paint did not lead to water damage to sheathing and framing. *Id.* ¶ 29.

1 5. Can Country meet its burden of establishing that inadequate construction is the EPC
2 given that it admits inadequate construction did not initiate a sequence of events that led
3 to damage at Westboro?

4 6. Is Country’s provision which states “We cover loss or damage commencing (1) During
5 the policy period...” satisfied given that it undisputed that new incremental and
6 progressive damage to sheathing and framing occurred during Country’s policy period;
7 and is Country jointly and severally liable for the incremental and progressive loss at
8 Westboro under Washington’s continuous trigger rule?

9
10 **IV. EVIDENCE RELIED UPON**

11 Plaintiff relies upon the Declaration of Daniel Stein and exhibits thereto; the Declaration of
12 Kristoffer Eggert, and exhibits thereto, and the records on file herein.

13 **V. ARGUMENT**

14 **A Country’s All-Risk Policy Provides Coverage for Damage to Sheathing, and Framing**
15 **Caused by Wind-Driven Rain or Weather Conditions.**

16 Insurance policies generally fall into two categories: “named-peril” and “all-risk.” While
17 “named peril” policies cover only the specific risks enumerated in the policy, “all-risk” policies,
18 such as the ones in this case, **“provide coverage for all risks unless the specific risk is**
19 **excluded.”** *Vision One*, 174 Wn.2d at 513 (emphasis added). Accordingly, “[a]ll-risk policies
20 generally allocate risk to the insurer, while specific peril policies place more risk on the insured.”
21 *Id.* at 514.

22 In *Sunbreaker*, the Court examined the policy language to determine whether wind-
23 driven rain was a separate and distinct covered peril under a similar Travelers’ all-risk policy.
24 *Sunbreaker*, 79 Wn. App. at 375-378. Specifically, Travelers argued that “weather conditions”
25 was not a distinct peril from excluded “dry rot” or “repeated seepage of water,” under its policy.
26 *Id.* at 376-78. The Sunbreaker Condominium Association countered that because the policy
27 mentioned “weather conditions,” but only excluded “weather conditions” when weather

1 conditions combined with certain other causes of loss that were not applicable, that “weather
 2 conditions” was a distinct (and covered) peril. *Id.* The Court agreed and held that “the weather
 3 conditions clause evinces the insurer’s intent to accept liability for loss or damage caused by
 4 wind-driven rain” *Id.* *Sunbreaker* concluded that the all-risk policy at issue treats wind-
 5 driven rain as a distinct, covered peril from defective construction, repeated seepage of water that
 6 occurs over a period of 14 days or more, and fungus. *Id.* at 378.

7 In its denial letter, Country improperly claims with no support that rain is a “general
 8 background condition” and therefore is not covered. Stein Dec. Ex. C pg. 19. Following
 9 *Sunbreaker*, Courts in this District have repeatedly rejected the argument that an all-risk policy
 10 excludes wind-driven rain absent a specific exclusion for weather or rain. *See Eagle Harbour*
 11 *Condo. Ass’n v. Allstate Ins. Co.*, No. C15-5312-RBL, 2017 U.S. Dist. LEXIS 54761, at *13
 12 (W.D. Wash. Apr. 10, 2017) (“many insurance policies exclude coverage for weather, including
 13 storm events, evidencing its characterization as a peril that must be explicitly excluded.”) *See*
 14 *also Sunwood*, 2017 U.S. Dist. LEXIS 189892, at *7 (“NSC’s policy contains no exclusion for
 15 rain, and NSC cannot create one with a fortuitousness argument.”); *Greenlake*, 2015 U.S. Dist.
 16 LEXIS 184729, at *23 (“Allstate’s all-risk policy does not exclude, and therefore covers, damage
 17 to exterior sheathing and framing caused by rain, weather conditions...”); *Babai v. Allstate Ins.*
 18 *Co.*, No. C12-1518 JCC, 2013 U.S. Dist. LEXIS 175336, at *10-11 (W.D. Wash. Dec. 13, 2013),
 19 (Court rejected the argument that rain should not be covered because it is “expected” it will rain
 20 in the Puget Sound on the basis that if this were true “there would be no reason for insurance
 21 policies ever to exclude normal weather conditions (or any expected conditions at all) from
 22 coverage. Yet policies do exclude weather conditions”).

23 Here, Country’s all-risk policy covers because it does not exclude damage from wind-
 24 driven rain. For example, Country’s policy only excludes weather conditions to the extent it
 25 causes:

- 26 (1) Landslide, mud slide or mud flow;
 27 (2) Mine subsidence; earth sinking, rising or shifting (other than sinkhole collapse);

- 1 (3) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or
their spray, all whether driven by wind or not;
- 2 (4) Water backing up from a sewer or drain; remodeling; or
- 3 (5) Water under the ground surface

4 Stein Dec. Ex. D pg. 116-17 ¶ 6.3.a.

5 Given that the loss at issue here does not involve landslide, mine subsidence, flood or
6 water under the ground, Country’s weather exclusion does not apply. Recognizing that its
7 ineffective weather conditions exclusion does not bar coverage, Country claimed in its coverage
8 determination that coverage for rain is barred by its separate “interior rain” limitation. Stein Dec
9 Ex. C pg. 7. The problem with Country’s argument is that same exact argument has been rejected
10 by multiple Courts in this District.

11 For example, in *Greenlake* this Court determined that a nearly identical “interior rain”
12 exclusion in Allstate’s policy did not bar coverage because exterior wall sheathing and framing is
13 not located on the “interior of the building,” which is “more properly [to] be understood as
14 damages to fixtures within the internal walls of the building.” *Greenlake*, 2015 U.S. Dist. LEXIS
15 184729, at *17; *See also Canyon Estates Condo. Ass’n v. Atain Specialty Ins. Co.*, No. 2:18-cv-
16 01761-RAJ, 2021 U.S. Dist. LEXIS 62077, at *9 (W.D. Wash. Mar. 31, 2021) [“interior rain”
17 exclusion does not apply and thus, “water intrusion damage to a building’ exterior is a distinct
18 peril that is covered”].

19 As in *Sunbreaker*, the fact the Country’s policy excludes weather and rain in certain
20 inapplicable circumstances but not when weather and rain cause damage to exterior wall
21 sheathing and framing evinces Country’s intent to provide coverage for such damage. *See*
22 *Sunbreaker*, 79 Wn. App. at 377-78.

23 B. Country’s Exclusion for Continuous or Repeated Seepage or Leakage of Water or
24 Presence or Condensation of Humidity, Moisture or Vapor that Occurs Over a Period of
25 14 Days or More is Inapplicable.

26 Country also claims in its denial letter that there is no coverage under its policy under the
27 exclusion for damage caused by “continuous or repeated seepage or leakage of water, or the

1 presence or condensation of humidity, moisture or vapor, that occurs **over a period of 14 days**
2 **or more.**” Stein Dec. Ex C. pg. 14.

3 Country’s argument that intermittent rainstorms triggers the seepage exclusion was
4 directly rejected by *Sunbreaker* which determined that:

5 **[T]he seepage exclusion relates to a long term event (“a period of 14 days or**
6 **more”) which is not commonsensically associated with a weather condition;**
7 the expert testimony in this case focuses on two particular storms, each of which
8 lasted less than 14 days. **The policy’s structure and language both support a**
9 **characterization of wind-driven rain as a peril which is distinct from**
10 **“continuous or repeated seepage . . . that occurs over a period of 14 days or**
11 **more.”**

12 *Sunbreaker*, 79 Wn. App. at 378. (emphasis added).

13 In *Eagle Harbour*, Judge Leighton similarly rejected the argument that that a 14 day or
14 more seepage exclusion bars coverage for wind-driven rain:

15 **Under [insurer’s] policy, “repeated seepage of water” does not necessarily**
16 **include decades of storm events.** The repeated seepage provision excludes
17 coverage for “[c]ontinuous or repeated seepage or leakage of water that occurs
18 over a period of 14 days or more.” The policy also excludes coverage for losses
19 sustained because of weather, so long as the weather event works with an act of
20 ordinance or law, earth movement, governmental action, a nuclear hazard, power
21 failure, war and military action, or overflowing ground water. **But, as an all-risk**
22 **policy strictly construed for coverage, it covers all other weather events.**
23 **Rain, not acting with the listed exclusions, is therefore covered, so long as it**
24 **does not leak into the property for over 14 days in duration.**

25 *Eagle Harbour*, 2017 U.S. Dist. LEXIS 54761, at *11-12 (emphasis added).

26 In *Canyon Estate*, 2021 U.S. Dist. LEXIS 62077, at *10, the Court examined the exact
27 same¹⁰ seepage exclusion as in Country’s policy and determined that it did not swallow coverage
for wind-driven rain:

10 The Courts in *Sunbreaker* and *Eagle Harbour* examined substantially similar seepage exclusion as in
Country’s policy. While Country may attempt to point out that its seepage exclusion contains the following
additional language “presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days
or more”, this is a distinction without a difference as the Court in *Canyon Estates* examined the exact same seepage
exclusion and determined that it did not exclude damage from rainwater intrusion. See *Canyon Estates Condo. Ass’n*
v. Atain Specialty Ins. Co., No. 18-cv-1761-RAJ, 2020 U.S. Dist. LEXIS 11604, at *10 (W.D. Wash. Jan. 21, 2020),
which made clear that the full language contained in the seepage exclusion analyzed in *Canyon Estates* read

1 The Court concedes that these excluded perils could feasibly include “water
2 intrusion” damage. For example, damage caused by “rust” or the “**presence . . . of**
3 **moisture**” could conceivably encompass water intrusion damage to a building’s
4 exterior. The issue turns on whether the Court construes the exclusion broadly (in
5 favor of the insurer) or narrowly (against the insurer). Washington law is resolute:
6 exclusions must be construed narrowly against Indian Harbor...

7 Thus the Court determined that “damage resulting from penetration by water
8 through the buildings’ exteriors’ is a distinct peril not expressly excluded” by the policy’s
9 seepage exclusion. *Id.*

10 Here, in line with the case law discussed above, wind-driven rain is a separate and
11 distinct peril under Country’s policy language from its 14 day or more seepage exclusion.
12 While Country will no doubt attempt to argue otherwise in its Opposition, Country is
13 bound by the admissions of its FRCP 30b6 witness who agrees that wind-driven rain is a
14 separate and distinct peril from its seepage exclusion:

15 Q. So under the policy, are wind-driven rain and repeated
16 seepage or leakage of water separate and distinct perils?

17 A. **I guess -- yeah, I guess they’re separate and distinct.** Wind-driven rain
18 could be a -- from a singular event, or it could be from
19 something that’s occurred for longer than 14 days.

20 Stein Decl. Ex. E (emphasis added).

21 While in the cases discussed above whether the seepage exclusion applies was left as an
22 issue of fact for the jury, the Court should rule not only that wind-driven rain is a separate and
23 distinct covered peril, but that Country’s 14 day or more seepage exclusion does not apply
24 outright as both the Association’s expert and Country’s expert agree that there were no wind-
25 driven rain events during Country’s policy period that lasted for a period of 14 days or more.

26 Eggert Dec. ¶ 20; Stein Dec. Ex O.

27 In attempt to avoid this result, Country will likely argue that its seepage exclusion still

28 “[c]ontinuous or repeated seepage or leakage of water, or the presence of condensation of humidity, moisture or
29 vapor, that occurs over a period of 14 days or more.”)

1 may apply because it excludes “. . . the presence or condensation of humidity, **moisture** or
2 vapor, that occurs over a period of 14 days or more.” However, “moisture” is an undefined term
3 in Country’s policy. As such, in interpreting Country’s exclusion the Court should look to the
4 dictionary definition of moisture. *See Kut Suen Lui v. Essex Ins. Co.*, 185 Wn.2d 703, 713, 375
5 P.3d 596 (2016). According to the Merriam-Webster Online Dictionary, moisture is defined as:
6 “[L]iquid diffused or condensed in relatively small quantity.”¹¹

7 Here, both the Association’s expert and Country’s expert agree that a small amount of
8 water did not cause damage to sheathing and framing at Westboro. Eggert Dec. ¶ 21; Stein Dec.
9 Ex. W. Thus it is undisputed that the presence of moisture did not cause damage to sheathing
10 and framing. Furthermore, there is no evidence that there were moisture events causing damage
11 at Westboro that lasted 14 days or more. According to Eggert:

12 Based upon the type of construction, as well as what we observed during the
13 intrusive investigations at Westboro, it would be wrong to assume that the
14 damage at Westboro was caused by continuous moisture exposure that occurs
over a period of 14 days or more.

15 Eggert Dec. ¶ 21.

16 Country’s expert similarly admitted there was not damage at specific openings
17 observed during the joint intrusive investigation caused by moisture that occurred over a
18 period of 14 days or more during Country’s policy period. Stein Dec. Ex. P. For
19 example, Country’s expert testified that:

20 **Q. Do you have any evidence that there was moisture behind the siding**
21 **at this particular location between August of 2018 and August of 2019**
22 **for a period of 14 days or more that resulted in damage?**

23 **A. No**

24 *Id.* (emphasis added).

25 While Country’s expert later attempted to backtrack from his admission and claim
26

27 ¹¹ “Moisture.” Merriam-Webster Online Dictionary. <https://www.merriam-webster.com/dictionary/moisture>

1 retroactively that all damage really was from moisture that occurred over a period of 14
 2 continuous days or more, he ultimately conceded at deposition that he “can’t prove” that
 3 there was moisture behind the siding for any 14-day period during Country’s policy
 4 period; and could not identify a single 14 day period where there was moisture behind the
 5 siding. Ex. Q.

6 Country bears the burden of proving that its seepage exclusion unambiguously
 7 bars coverage. *Pleasant v. Regence BlueShield*, 181 Wn. App. 252, 262, 325 P.3d 237
 8 (2014) (“The insurer bears the burden of establishing an exclusion to coverage.”) Given
 9 that Country’s expert agrees with the Association’s expert that there was no evidence of
 10 wind-driven rain storm events that occurred for a period of 14 days or more during
 11 Country’s policy period (Stein Dec. Ex O), that damage was not caused by a small
 12 amount of water (i.e. moisture)¹² (Stein Dec. Ex. W), and admits that he otherwise cannot
 13 prove there was damage from the presence of moisture during any 14 day period during
 14 Country’s policy period (Stein Dec. Ex. P-Q), Country cannot meet its burden of
 15 establishing its seepage exclusion.

16 C. Country’s Policy Covers Wind-Driven Rain Under the EPC Rule.

17 In Washington, the EPC rule is a rule of policy interpretation that operates only in favor
 18 of coverage. *Vision One*, 174 Wn.2d at 520. “The efficient proximate cause rule applies only
 19 when two or more perils combine in sequence to cause a loss and a *covered peril* is the
 20 **predominant or efficient** cause of the loss.” *Id.* at 519 (emphasis added). “The rule effectively
 21 imposes liability on an insurer for a loss efficiently caused by a covered peril, even though other,
 22 excluded perils contributed to the loss.” *Sunbreaker*, 79 Wn. App. at 375.

23
 24 ¹² Country’s expert report states that there was damage from condensation only at openings 2, 3, and 25 of the
 25 28 openings at the joint intrusive investigation. Stein Dec. ¶ 3. Country’s expert testified that at areas where there
 26 was condensation there also would have been damage from precipitation, i.e. rain and that he was unable to
 27 apportion the damage caused by precipitation and rain. Stein Dec. Ex X. Thus Country, is not able to meet its
 burden of showing damage at these 3 of 40 openings was solely caused by the presence of condensation that
 occurred over a period of 14 days or more. It is the Association’s understanding that Country has not asserted that
 vapor is a cause of damage at Westboro. Stein Dec. ¶ 3.

1 In other words, no matter what a policy’s causation language says, “where an insured risk
2 itself sets into operation a chain of causation in which the last step may have been an excepted
3 risk, the excepted risk will not defeat recovery.” *Villella v. Public Employees Mut. Ins. Co.*, 106
4 Wn.2d 806, 813–14, 725 P.2d 957 (1986); *see also Safeco Ins. Co. v. Hirschmann*, 112 Wn.2d
5 621, 627, 773 P.2d 413, 415 (1989) (efficient proximate cause rule “may not be circumvented”
6 by policy language).

7 In *Sunbreaker*, after determining that wind-driven rain was a covered and distinct peril,
8 the Court determined that there were “four distinct causes that may have contributed
9 to Sunbreaker’s loss: defective construction, wind-driven rain, repeated seepage, and fungus,”
10 and “[b]ecause the policy excludes three of these causes, while wind-driven rain is a covered
11 peril, the efficient proximate cause rule applies.” *Sunbreaker*, 79 Wn. App. at 378. The Court
12 ultimately determined that if wind-driven rain was the EPC there was coverage for the loss.

13 In accord with *Sunbreaker*, multiple courts have determined that in a loss involving wind-
14 driven rain and inadequate construction that there is coverage if wind-driven rain is the EPC. *See*
15 *Eagle Harbour*, 2017 U.S. Dist. LEXIS 54761, at *15-16 (coverage if wind-driven rain is EPC
16 where “the Association’s loss would not have occurred without the use of stucco, construction
17 defects, and Pacific Northwest weather”); *see also Sunwood*, 2017 U.S. Dist. LEXIS 189892, at
18 *25-26 (coverage if wind-driven rain or combination of wind-driven rain and inadequate
19 construction is the EPC); *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *27 (universe of EPCs is
20 wind-driven rain, inadequate construction or a combination of wind-driven rain and inadequate
21 construction).

22 Here, the Association’s expert Eggert has opined that the damage is caused by the
23 combination of wind-driven rain and inadequate construction with wind-driven rain being the
24 predominant and initiating cause of the damage. Eggert Dec. ¶¶ 22-25. Country agrees that
25 inadequate construction did not initiate a sequence of events that led to water intrusion at
26 Westboro (Stein Dec. Ex. H-I, N), that inadequate construction did not initiate or cause the wind-
27

1 driven rain events that caused the damage (Stein Dec. Ex. H-I, N), and that the loss could not
 2 have happened without rain (Stein Dec. Ex. V). Thus, the undisputed evidence supports that
 3 wind-driven rain is the EPC.

4 D. Because Country’s Inadequate Construction Exclusion Does Not Contain Inverse
 5 Efficient Proximate Cause Language, It Does Not Exclude Otherwise-Covered Losses
 6 that Result from a Causal Chain Set into Motion by Inadequate Construction.

7 Country’s policy is structured so that it contains three paragraphs of exclusions. Stein
 8 Dec. Ex. D pg. 54-59. Country’s policy contains an endorsement which modifies the policy
 9 language. Paragraph 2 of the endorsement adds “initiates a sequence of events”¹³ lead-in
 10 language preceding the exclusions in paragraphs 1-2 of Country’s policy. *Id.* at 114. Paragraph 6
 11 of the endorsement then specifically modifies paragraph 3 of Country’s exclusions (which
 12 contains the inadequate construction exclusion) to state “we will not pay for loss or damage
 13 caused by or resulting from...” inadequate construction.¹⁴ *Id.* at 115-16.

14 Country’s FRCP 30b6 witness testified that he agrees that the endorsement modifies the
 15 policy so that “caused by or resulting from” lead-in language precedes the inadequate
 16 construction exclusion:

17 Q. Okay. So my question is: How do you reconcile these two paragraphs? So,
 18 for example, according to paragraph, the exclusion is replaced, exclusion B.3 is
 19 replaced and should be read "We will not pay for loss or damage caused by or
 20 resulting from any of the following." And then "negligent work" would be listed
 21 under that. However, paragraph 2 states the causation language that, "We will not
 22 pay for loss or damage caused by any of the excluded events described below, and

23 ¹³ In full part such language states:
 24 “We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be
 25 considered to have been caused by an excluded event if the occurrence of that event:
 26 **a.** Directly and solely results in loss or damage; or
 27 **b.** Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final
 event in that sequence...” Stein Dec. Ex. D pg. 114 ¶ 2.

28 ¹⁴ In full part the policy states:
 29 “**6. Paragraph B.3. Exclusions** is replaced by the following: **3.** We will not pay for loss or damage caused by or
 30 resulting from any of the following, **a.** through **c.** But if an excluded cause of loss that is listed in **a.** through **c.**
 31 results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss...
 32 **c. Negligent Work**
 33 Faulty, inadequate or defective: **(1)** Planning, zoning, development, surveying, siting; **(2)** Design, specifications,
 34 workmanship, repair, construction, renovation, remodeling, grading, compaction; **(3)** Materials used in repair,
 35 construction, renovation or remodeling; or **(4)** Maintenance; of part or all of any property on or off the described
 36 premises. But if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss
 37 or damage.” Stein Dec. Ex D. Pg. 114-116 ¶ 6.3.c.

1 loss or damage will be considered to have been caused by an excluded event if the
occurrence of the

2 event --" sorry "-- of that event: "Directly and solely results in loss or damage; or
3 "Initiates a sequence of events that results in loss or damage, regardless of the
nature of any intermediate or final event in that sequence." So my question is how
4 can those two paragraphs be reconciled or which one prevails?

5 **A. I think under paragraph 6 it's applicable only to those three subsections
6 for weather conditions, acts or decisions -- I'm sorry. Weather decisions.
Weather conditions, acts or decisions, and negligent work. Otherwise, it goes
under paragraph 2 for all other exclusions....**

7 ****

8 So your answer is that paragraph 2 applies to exclusions other than those
contained in –

9 **A. Correct. In paragraph 6.**

10 **Q. Yes. Which replaces Paragraph B.3 in the policy; correct?**

11 **A. Correct.** ¹⁵

12 Stein Dec. Ex. G.

13 The reason this is significant is that Country’s position is that inadequate construction is
14 the EPC of the loss. However, as the Washington Supreme Court explained in *Vision One*, the
15 common law “EPC rule” does not operate in reverse—if an *excluded* peril initiates a chain of
16 causation that includes covered perils, then the resulting loss is excluded only if the policy
expressly says so:

17 [T]he efficient proximate cause rule operates as an interpretive tool to establish
18 coverage when a *covered* peril “sets other causes into motion which, in an
unbroken sequence, produce the result for which recovery is sought.”

19 The opposite proposition, however, is not a rule of law. When an
excluded peril sets in motion a causal chain that includes covered perils, the
efficient proximate cause rule does *not* mandate exclusion of the loss. . . .

20

21 We have left open the possibility that an insurer may draft policy
language to deny coverage when an excluded peril initiates an unbroken causal

22 ¹⁵ The Association expects that Country will attempt to argue that the Court should disregard the
23 binding testimony of its FRCP 30b6 witness by claiming that the witness went back and forth before
24 reaching his final conclusion that the initiates a sequence of events language does not apply to the
inadequate construction exclusion. However, the fact that Country’s FRCP 30b6 witness thought
25 reconciling paragraph 2 and 6 of the endorsement was confusing, shows that at a minimum the
endorsement is ambiguous and therefore it must be construed in the Association’s favor, i.e. in the same
26 way Country’s FRCP30b6 witness admitted it should be applied. *Kaplan v. N.W. Mut. Life Ins. Co.*, 115
27 Wn. App. 791, 804-05, 65 P.3d 16 (2003). (“When an ambiguity in the policy exists, a meaning and
construction most favorable to the insured must be applied, even though the insurer may have intended
another meaning.”)

1 chain. But a policy provision is not the same as a controlling rule of insurance
2 contract interpretation. . . .

3 *Vision One*, 174 Wn.2d at 519-20.

4 In other words, if an excluded peril initiates a sequence of events that includes covered
5 perils, the common law will not deem the resulting loss to be excluded.

6 In *Vision One*, the Court gave initiates a sequence of events language as an example of
7 policy language that “may” permit inverse efficient proximate cause analysis, allowing an
8 insurer to deny coverage if an excluded peril is the EPC. *Id.* at 521. However, the policy at issue
9 effectively lacked a so-called inverse efficient proximate cause provision—because the insurer
10 had not cited the initiates a sequence of events provision in its denial letter. *Id.* Thus, because
11 the policy did not expressly “deny coverage when an excluded peril initiates an unbroken causal
12 chain,” and because the common law does not operate to exclude coverage in that situation, the
13 court held that there is coverage for otherwise-covered losses resulting from excluded faulty
14 design. *See Vision One*, 174 Wn.2d at 519-21.

15 In line with *Vision One*, in *Greenlake*, this Court explained that if an insurer intends to
16 exclude a loss when an excluded peril sets in motion a causal chain that includes covered perils,
17 then the insurer must expressly state that in the policy—*i.e.*, it must “include an inverse EPC-rule
18 provision”:

19 [T]he EPC rule operates only in favor of coverage. “When an *excluded peril*
20 sets in motion a causal chain that includes covered perils, the efficient
21 proximate cause rule does *not* mandate exclusion of the loss.”
22 ***Accordingly, should an insurer wish to exclude otherwise-covered losses that result from a causal chain set into motion by an excluded peril (i.e., include an inverse EPC-rule provision) the insurer must include specific language in the policy to this effect. . . .***

23 *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *28-29 (emphasis added).

24 Following *Vision One*, two additional trial Courts have determined in wind-driven rain
25 cases that in the absence of inverse EPC language there is coverage even if inadequate
26 construction is the EPC. *See West Beach Condo. V. Commonwealth Ins.*, No. 17-2-12136-3 SEA

1 (Dec. 22, 2017) (“Because none of these policies have ‘inverse efficient proximate cause’
 2 provisions losses resulting from excluded and non-excluded perils may be covered even if the
 3 efficient proximate cause of the damage occurred outside the policy period if it set in motion a
 4 causal chain that includes covered perils.”); *Canterbury Shores Apartment Owners Ass’n v.*
 5 *Lexington Ins. Co.*, King Cty. Cause No. 18- 2-20954-4 SEA (March 15, 2019) (In absence of
 6 EPC provision, policy covers damage resulting from excluded and covered perils).¹⁶

7 Here, Country’s policy has no inverse EPC language as it only excludes loss or damage
 8 “caused by or resulting from” inadequate construction. Stein Dec. Ex. D. pg. 114-116; Ex. G.
 9 Such language is a “far cry” from an inverse EPC clause. *See Greenlake*, 2015 U.S. Dist. LEXIS
 10 184729, at *30. Because the policy lacks inverse EPC language, it provides coverage even if
 11 inadequate construction initiated a causal chain which involves otherwise-covered wind-driven
 12 rain.

13 E. Assuming Initiates a Sequence of Events Language Somehow Applies, Country Still
 14 Cannot Establish its Inadequate Construction Exclusion.

15 Even if Country’s endorsement applied initiates a sequence of event lead-in language¹⁷ to
 16 the inadequate construction exclusion, to establish its exclusion Country must show that
 17 inadequate construction “initiates a sequence of events” resulting in damage. Country is not able
 18 to meet this burden as its FRCP 30b6 representative admitted that inadequate construction did
 19 not initiate a sequence¹⁸ of events that resulted in water damage at Westboro:

20 ¹⁶ See Stein Exs. Z and AA for copies of the *West Beach* and *Canterbury Shores* decisions.

21 ¹⁷ Even if Country’s endorsement somehow applied initiates a sequence of events language as the lead-in
 22 language to the inadequate construction exclusion, there would still be coverage as a matter of law if wind-driven
 23 rain is the EPC, or if damage to sheathing and framing is caused by the combination of wind-driven rain and
 24 inadequate construction. *Vision One*, 174 Wn.2d 501 at 521-22; *Sunwood*, 2017 U.S. Dist. LEXIS 189892, at *25-
 25 *26.

26 ¹⁸ Undefined terms in a policy are interpreted in accord with the understanding of the average purchaser of
 27 insurance, and the terms are to be given their plain, ordinary, and popular meaning, which may be determined by
 reference to dictionary definitions. *Lui.*, 185 Wn.2d 703 at 713. A common definition of the undefined term
 “sequence” is “a continuous or connected series.” <https://www.merriam-webster.com/dictionary/sequence>.
 Country’s FRCP 30b6 witness further admitted that inadequate construction did not initiate a “sequence”, i.e. a
 continuous or connected series:

Is it Country Mutual's position that the wind-driven rain events were a continuous or connected
 series? ...

THE WITNESS: No, I don't think so. Stein Dec. Ex. J.

1
2 Q. Is it Country Mutual’s position that faulty construction initiated a sequence of
events that resulted in water damage at the Westboro Condominiums?

3 A. **No...**

4 Stein Dec. Ex. H (emphasis added).

5 Country’s expert similar admitted that inadequate construction does not initiate rain:

6 Q. Does inadequate construction initiate rain? ...

7 A. **That’s an odd question, but I don’t think inadequate construction
initiates rain.** I think rain existed, you know, before the building was built.

8 Stein Dec. Ex. N pg. 40:3-7 (emphasis added).

9 Given that Country cannot meet its burden of establishing that inadequate construction
10 initiated a sequence of events¹⁹ even if such language applied, the Court should find coverage for
11 wind-driven rain damage to the sheathing and framing as a matter of law.

12 F. Country’s Policy Provides Coverage for Damage Caused by the Combination
13 of Wind-Driven Rain and Inadequate Construction.

14 As noted by this Court in *Greenlake*, while there is coverage if wind-driven rain is the
15 EPC, the Court need not pick whether wind-driven rain or inadequate construction was the EPC,
16 but could instead “find that the damage was caused by a combination of rain and inadequate
17 construction” which would permit coverage. *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *27.
18 Here, pursuant to *Greenlake* and *Vision One*, there is coverage for damage caused by the
19 combination of wind-driven rain and inadequate construction as Country fails to include anti-
20 concurrent causation language in its inadequate construction exclusion, i.e. language excluding
the concurrent combination of wind-driven rain and inadequate construction.

21 In *Vision One*, the loss at issue (collapse of a portion of an elevated concrete slab) was
22 caused by marginal shoring design (excluded) and problems with shoring installation (covered).
23 *Vision One*, 174 Wn.2d at 506-10. The expert report noted that while “[t]he marginal shoring
24 design **alone** may not have caused the shoring to collapse,” the “[marginal shoring design] in
25

26 ¹⁹ Country gave the example of initiates a sequence of events language applying where an inadequately
27 constructed electrical system initiates a fire. However, Country stated such initiates a sequence of events language
would not apply here because “wind-driven rain is a covered cause of loss, but it wasn’t initiated by faulty
workmanship or faulty electrical work or maintenance or anything like that.” Stein Dec. Ex. I.

1 **combination** with various shoring installation problems ... on a more likely than not basis,
2 caused the shoring to collapse.” *Id.* at 506.

3 The trial court found coverage to the extent that the loss **was caused** by the combination
4 of faulty design and faulty workmanship. *Id.* at 510–11 (emphasis added). The Court of Appeals
5 reversed, holding that a jury must determine whether the EPC of the loss was the excluded or
6 covered peril because if the excluded peril (faulty design) was the EPC, then the loss would be
7 excluded. *Id.* at 511. The Supreme Court reversed the Court of Appeals and held that there was
8 coverage as a matter of law because: (1) the insurer was estopped from relying on the “initiates a
9 sequence of events” language in its policy and as such could not engage in an inverse EPC
10 analysis allowing it to exclude the loss if the excluded peril (faulty workmanship) was the EPC;
11 and (2) even if the insurer’s initiates a sequence of events language applied, such language was
12 not anti-concurrent causation language and thus did not exclude loss caused by the combination
13 of covered and excluded perils. *Id.* at 521-22.

14 With respect to its ruling on concurrent causation, *Vision One* explained that:

15 Even if we allowed Philadelphia to belatedly rely on the “sequence of events”
16 causation clause in its policy, nothing in the record supports its application
17 here. . . . The record does not show the defective design of the shoring initiated
18 a causal chain of events. To the contrary, the engineering reports Philadelphia
19 relied upon indicated that **both inadequate design and poor installation**
20 **caused the shoring to fail. To the extent defective design and faulty**
21 **workmanship combined to cause the loss, they acted as concurrent causes;**
22 **there is no indication the faulty design caused the faulty workmanship. In**
23 **short, the trial court’s ruling on causation was correct,** and there is no issue
24 of fact for the jury meriting remand. We therefore reverse the Court of
25 Appeals.

26 *Id.* (emphasis added).

27 Other cases confirm that coverage exists when a loss is caused by a combination of
covered and excluded perils. In *Zhaoyun Xia v. ProBuilders Specialty Ins. Co.*, 188 Wn.2d 171,
183, 400 P.3d 1234 (2017), the Court described the decision in *Vision One* as “holding that
coverage existed where faulty workmanship, a covered peril, combined with an excluded peril as

1 the efficient proximate cause of the loss.” Similarly, in *Greenlake*, 2015 U.S. Dist. LEXIS
2 184729, at *27 (emphasis added) this Court ruled that:

3 “[T]he universe of EPCs of the damage for which there is evidence is constrained
4 to wind-driven rain or inadequate construction. However, the jury need not
5 necessarily find that the EPC was “either” one or the other, **but could instead**
6 **find that the damage was caused by a combination of rain and inadequate**
7 **construction (which would permit coverage...)”**

8 In making this ruling, this Court noted that *Vision One* stood for the proposition
9 that:

10 “[I]f an excluded peril and a covered peril **both contributed** to the property
11 damage, then the policy would cover the loss.” 174 Wn.2d at 509. The court also
12 held that, “[t]o the extent defective design [covered] and faulty workmanship
13 [excluded] **combined to cause the loss**, they acted as concurrent causes.”

14 *Id.* at *30-31 (emphasis added).

15 This Court found it significant that Allstate’s policy contained the following
16 “concurrent peril exclusion” in the irrelevant exclusions preceding paragraph 1 of the
17 policy:

18 [T]he Policy ‘do[es] not cover any loss or damage caused directly or indirectly by
19 any of the following. Such loss is excluded regardless of any other cause or event
20 contributing **concurrently** or in any sequence to the loss.”

21 *Id.* at *18, 31-32 (emphasis added).

22 This Court ruled that such “concurrent peril exclusion” language demonstrated the
23 insurer was “aware of the ‘concurrent perils’ doctrine and chose to only exclude certain
24 concurrent perils from coverage.” *Id.*

25 In *Sunwood* the Court also recognized that *Vision One* ruled that: “[u]nless precluded by
26 policy language, the [EPC] rule leads to coverage where a covered peril combines with an
27 excluded peril as the concurrent EPC of the loss.” *Sunwood*, 2017 U.S. Dist. LEXIS 189892, at
*10-11. The Court then examined coverage under National Surety and Travelers’ different policy
language. Relying on *Vision One* and *Greenlake*, the *Sunwood* Court examined similar lead-in
language preceding National Surety’s inadequate construction exclusion as here and determined

1 that “the plain language of NSC’s policy supports coverage of concurrent proximate causes”
 2 especially because the policy contained concurrent perils exclusion language as to “to other
 3 perils” but not the inadequate construction exclusion. *Id.* at *11.

4 Travelers’ policy contained “initiates a sequence of events” language preceding its
 5 inadequate construction exclusion. The *Sunwood* Court determined pursuant to *Vision One*, that
 6 Travelers initiates a sequence of events language is not “concurrent peril exclusion language”;
 7 and thus under Traveler’s policy “the Association’s loss would be covered if caused by
 8 concurrent perils of rain and inadequate construction.” *Id.* at *25-26.

9 Here, Country’s “caused by or resulting from” language preceding Country’s inadequate
 10 construction exclusion is not anti-concurrent causation language and does not exclude damage
 11 caused by the combination of wind-driven rain and inadequate construction. As in *Sunwood* and
 12 *Greenlake*, paragraph 1 of Country’s policy initially contained “concurrent peril exclusion”
 13 language which excluded loss or damage “regardless of any other cause or event that **contributes**
 14 **concurrently.**”²⁰ This shows Country knew how to exclude concurrent causes and effectively
 15 wrote the anti-concurrent causation language out of its policy by endorsement, confirming
 16 Country’s intent to cover such damage. *See Boeing v. Aetna*, 113 Wn.2d 869, 887 (1990) (“The
 17 industry knows how to protect itself and it knows how to write exclusions and conditions.”)

18 As discussed above, Country may argue that it really has “initiates a sequence of events”
 19 language preceding its inadequate construction exclusion. Even if this were true, pursuant to
 20 *Vision One* and *Sunwood*, such initiates a sequence of events language is still not anti-concurrent
 21 causation language and therefore damage caused by the combination of wind-driven rain and
 22 inadequate construction is covered. Country’s FRCP 30b6 witness admits²¹ that unlike anti-

23 ²⁰ Country’s terrorism exclusion also has anti-concurrent causation language. Stein Dec. Ex. D pg. 134 ¶
 24 B.1.a.

25 ²¹ Country’s FRCP 30b6 witness testified that Country was aware of the concurrent causation doctrine,
 26 understood there were various Washington cases that applied concurrent causation, and recognized there was
 possibly coverage for the Association’s claim under concurrent causation, but testified that Country did not adopt
 coverage for the combination of wind-driven rain and inadequate construction because Country believed ignoring
 concurrent causation gave Country a better chance of not paying the Association’s claim:

27 Q. And you ultimately concluded that it [concurrent causation] didn't apply to the association's
 claim?

1 concurrent causation language in paragraph 1 of its policy, Country's initiates a sequence of
 2 events language does not exclude concurrent perils. Stein Dec. Ex. K pg. 87:13-88:7.

3 Given that (1) the Association's expert Eggert has determined that the water damage at
 4 Westboro is caused by the combination of wind-driven rain and inadequate construction (Eggert
 5 Decl. ¶ 22-25); (2) Country's expert admits that inadequate construction and rainwater had *to*
 6 *occur at the same time* for there to be damage (Stein Dec. Ex. N pg. 40:18-24); and (3) Country
 7 admits that like in *Vision One*, inadequate construction did not cause or initiate the covered peril,
 8 wind-driven rain, and did not initiate a sequence of events that led to water damage (Stein Dec.
 9 H-I), it should be undisputed that the water damage at Westboro occurred due to the combination
 10 of wind-driven rain and inadequate construction, and that Country's all-risk policy does not
 11 exclude and therefore covers such damage.

12 G. Country's Policy Has Resulting Loss Coverage for Water Damage from Wind-
 13 Driven Rain.

14 Not only does Country's inadequate construction exclusion contain no anti-concurrent or
 15 inverse EPC provision as discussed above, but it explicitly contains a resulting loss clause
 16 covering damage from a "Covered Cause of Loss" that results from inadequate construction,
 17 making it clear that there is coverage for damage to sheathing and framing caused by wind-
 18 driven rain even if inadequate construction is the EPC. (Stein Dec. pg. 115-16 at ¶ 6.3.c.).
 19 As discussed above, in *Vision One*, the first floor of the building collapsed shortly after concrete
 20 was poured. *Vision One*, 174 Wn.2d at 501, 506. The causes of the collapse were faulty
 21 workmanship and faulty design, both excluded under the policy. *Id.* at 506-07. The faulty
 22 workmanship exclusion had a resulting loss clause under which the insured sought coverage for
 23 the resulting collapse. *Id.* at 507. The resulting loss clause, which preserved coverage for damage
 24 if "a Covered Cause of Loss results," is nearly identical to the resulting loss clause that is part of
 25 Country's inadequate construction exclusion. *Id.* The trial court in *Vision One* found that this
 26

27 **A. Not that it didn't apply, but in our estimation, we have a better chance of prevailing on
 efficient proximate cause....** Stein Dec. Ex K, L (emphasis added).

1 resulting loss clause preserved coverage for the resulting collapse. *Id.* at 507, 509.

2 The Court of Appeals reversed, holding that for there to be coverage under the resulting
3 loss clause, there must be a causal break, i.e. a “a secondary covered peril,” that proximately
4 caused the ensuing loss. *Id.* at 505. The Court of Appeals explained its ruling as follows:

5 There was no independent covered peril (such as fire) that caused a covered
6 resulting loss. The collapse resulted directly from the initial excluded peril of
7 faulty workmanship, and loss resulting directly from the initial excluded peril
8 remains uncovered. *Vision One*, 158 Wn. App. 91, at 107-08 (2010).

9 The Washington Supreme Court rejected the Court of Appeals’ requirement that there
10 must be a secondary covered peril to trigger coverage under the resulting loss clause and
11 criticized the Court of Appeals’ analysis for failing “to consider that collapse is a covered peril
12 under the policy.” *Vision One*, 174 Wn.2d 501, 518. Thus, the Supreme Court held that “Under
13 the ensuing loss clause, damages resulting from faulty workmanship are covered if they are
14 caused by an otherwise covered event.” *Id.* at 517.

15 In *Greenlake*, this Court found it significant that in addition to not containing inverse
16 EPC language (like Country’s policy here) that the policy “in fact contains an ensuing loss clause
17 preserving coverage for damage not otherwise excluded.” *Greenlake*, 2015 U.S. Dist. LEXIS
18 184729, at *29. With respect to resulting loss coverage the Court explained that:

19 "[A] resulting or ensuing loss clause operates to carve out an exception to the
20 policy exclusion . . . [f]or example, a policy could exclude losses 'caused directly
21 or indirectly' by the peril of 'defective construction,' but then an ensuing loss
22 provision might narrow the blanket exclusion by providing that 'any ensuing loss
23 not excluded is covered.'" *Vision One*, 276 P.3d at 307 (internal citations
24 omitted). "In this way, ensuing loss clauses limit the scope of what is otherwise
25 excluded under the policy. Such clauses ensure 'that if one of the specified
26 uncovered events takes place, any ensuing loss which is otherwise covered by the
27 policy will remain covered. The uncovered event itself, however, is never
covered.'" *Id.* at * 13-14.

28 Thus, this Court in *Greenlake* ultimately determined under a resulting loss clause to
29 inadequate construction that “because water damage is not excluded, an ensuing loss of water
30 damage that is caused by inadequate construction is covered by the Policy.” *Id.* at * 26. This
31 Court determined that to avoid coverage, “the jury would also have to find that the damage in

1 this case was solely an excluded loss, such as deterioration, rot, and mold, and not a combination
2 of an excluded loss and a covered loss such as ‘water damage.’” *Id.* at *30 n.11.

3 Consistent with this Court’s ruling in *Greenlake*, the Court in *Sunwood* examined a
4 National Surety policy with identical “caused by or resulting” language preceding the inadequate
5 construction exclusion and a nearly identical resulting loss clause as in Country’s policy. The
6 Court determined that:

7 NSC’s ensuing loss provision states ‘if loss or damage from a covered cause of
8 loss results, NSC will pay for the resulting damage.’ By these terms, if an
9 excluded peril (e.g. inadequate construction) brings about a covered *peril* (e.g.
rain intrusion, repeated water seepage, or water damage), any resulting damage is
covered.

10 *Sunwood*, 2017 U.S. Dist. LEXIS 189892, at *11-12²² (internal citations omitted).

11 Here, the damage to sheathing is covered water damage caused by wind-driven rain.
12 Eggert Dec. ¶ 27. Thus, the policy by its plain language covers the water damage to sheathing
13 and framing under the resulting loss clause even if inadequate construction is somehow the
14 EPC.²³

15 H. Because New Damage from Wind-Driven Rain Commenced During Country’s
16 Policy Period, the Commencing Condition is Satisfied and Country is Liable for
the Entire Incremental and Progressive Loss at Westboro.

17 Country’s policies provide that Country insures “loss or damage commencing during the
18 policy period...” Stein Dec. Ex. C pg. 18. In *Eagle Harbour* the Court examined an identical
19 commencing condition in the context of a claim for long-term damage from wind-driven rain and
20 determined that:

21 “Commencing” is an ambiguous term. It means when damage begins, not when
22 it is discovered, but it is still unclear whether damage commences at “the first
occurrence of the type of loss claimed” or at “each occurrence of the loss in a

23 ²² The *Sunwood* Court also determined that under Travelers’ policy, which contained “initiates a sequence of
24 events” language, coverage exists under the resulting loss clause to inadequate construction for a “covered ensuing
loss [water damage] even if the EPC is excluded.” *Sunwood*, 2017 U.S. Dist. LEXIS 189892, at *12, 26.

25 This is consistent with *Vision One*, which found coverage under the resulting loss clause even if the initiates a
sequence of events language applied. *Vision One*, 174 Wn.2d at 501, 505.

26 ²³ Country FRCP 306 testified that if inadequate construction results in water damage: “it could potentially be
27 covered there because it potentially led to a covered cause of loss, that being potentially wind-driven rain.” Stein Ex.
F. Thus, Country agrees that if inadequate construction led to water damage caused by a Covered Cause of Loss
such as wind-driven rain there should be coverage under the plain language of its resulting loss clause.

1 series of multiple losses.” Because an insured could reasonably read the term
2 either way, it must be construed against the insurer. The exclusion therefore
3 does not apply outright.

4 *Eagle Harbour*, 2017 U.S. Dist. LEXIS 54761, at *18–19 (internal citations omitted).

5 Thus, the *Eagle Harbour* determined that if the Association could show new damage
6 from wind-driven rain during the policy period, the commencing condition was satisfied. *Id.*

7 Subsequently, in *Sunwood*, the Court similarly determined that:

8 Because the term is undefined in the policy and “susceptible of two
9 different but reasonable interpretations,” it is ambiguous and must be construed
10 against the insurer. The Association rightly observes that NSC could have
11 defined “commencing” in its policy if it intended to limit the term as it does
12 here. But NSC is correct that the Association’s proposed definition relies on
13 cases that find loss “commenced” upon each “identifiable instance of new
14 damage or loss.” The Association must identify instances of new damage
15 during NSC’s policy period to trigger coverage.

16 *Sunwood*, 2017 U.S. Dist. LEXIS 189892, at *14–15.

17 In its Order denying NSC’s Motion for Reconsideration, the Court clarified that it:

18 [D]id not, as NSC suggests, hold that the Association must “identify the time
19 and location of the new damage” or “areas of damage [specific] to a particular
20 policy period” to satisfy NSC’s commencing condition. Rather, the Court
21 determined that the Association must “identify instances of new damage”
22 during the policy period. **Plaintiff’s expert opined that instances of new
23 damage occurred during each rain event meeting specific parameters,
24 which occurred in the years NSC provided coverage. The Court concluded
25 that from this evidence, a reasonable juror could find new damage
26 commenced during NSC’s coverage.** *Sunwood Condo. Ass’n v. Nat’l Sur.
27 Corp.*, No. C16-1012-JCC, 2018 U.S. Dist. LEXIS 1084, at *4–5 (W.D. Wash.
Jan. 3, 2018) (emphasis added).

28 With respect to a loss of incremental hidden damage from ongoing water intrusion,
29 Washington has adopted a continuous trigger of coverage. As a result, each insurer is jointly and
30 severally liable for all incremental damage so long as the insured can establish that some
31 damage, however minute²⁴, occurred during the policy period. *See Cadet Mfg. Co. v. Am. Ins.*
32 *Co.*, No. C04-5411 FDB, 2006 U.S. Dist. LEXIS 51241, at *18 (W.D. Wash. July 26, 2006);

33 ²⁴ *See Gull. v. Granite*, 18 Wn. App. 2d 842, 891 (2021) [approving following jury instruction “...When
34 property damage first occurred and over what period of time property damage continued can be determined without
35 reference to any specific quantity of property damage. Any damage, however minute, is sufficient”].

1 *American Nat'l Fire v. B&L Trucking*, 134 Wn.2d 413, 425, 951 P.2d 250 (1998); *Villella*, 106
 2 Wn.2d 806, 813-14 (applying the continuous trigger to first-party policy); See *Greenlake*, 2015
 3 U.S. Dist. LEXIS 184729, *35 (“...*Villella* and the federal cases discussed above all point to the
 4 application of *Gruol* in a first-party insurance context....” and thus damage that occurred “before,
 5 during, and after the policy period, is covered.”)

6 The Courts in *Sunwood* and *Eagle Harbour* recognized that as long as there was some
 7 new incremental and progressive damage during the policy period, the commencing condition is
 8 satisfied, and the insurer is liable for the entire incremental and progressive loss from wind-
 9 driven rain. *Sunwood*, 2017 U.S. Dist. LEXIS 189892, at *17 (finding that if the jury concluded
 10 that a progressive loss occurred during the policy period of an insurer with commencing
 11 condition, the insurer is jointly and severally liable for the continuing damage); *Eagle Harbour*,
 12 2017 U.S. Dist. LEXIS 54761, at *18–20 (“If a jury concludes a progressive loss occurred during
 13 a Defendant’s policy period, the Defendant is jointly and severally liable for the Association’s
 14 continuing damage” with respect to insurers with commencing condition); see also *Parkridge v.*
 15 *W. Am. Ins. Co.*, 2002 U.S. Dist. LEXIS 29675, at *12 (W.D. Wash. June 7, 2002) (continuous
 16 trigger rule applied to find insurer with commencing condition jointly and severally liable).

17 In *Greenlake*, this Court noted that when there was no dispute amongst the experts,
 18 incremental and progressive damage is deemed to occur during the policy period as a matter of
 19 law. *Greenlake*, 2015 U.S. Dist. LEXIS 184729, at *35 n.13 (“the relevant question is whether
 20 damage occurred during the policy period, not ‘where’ it occurred.”) Here, it is undisputed that
 21 damage at Westboro was incremental and progressive since shortly after initial construction and
 22 that there was new incremental and progressive damage from rainwater to sheathing and framing
 23 during Country’s policy period.²⁵ Eggert ¶¶ 9-19; Stein Dec. Ex. R-S, U, M. Thus, it should be

24 ²⁵ While *Sunwood*, 2018 U.S. Dist. LEXIS 1084, at *4-5 is clear that the Association is not required to
 25 “identify the time and location of the new damage” or “areas of damage [specific] to a particular policy period” to
 26 satisfy the commencing condition, here it is also undisputed by the experts that there would have been new
 27 incremental and progressive damage from rainwater during Country’s policy period at several locations. Eggert Dec.
 ¶¶ 16, 18-19; Stein Dec. S, U. As in *Sunwood*, the Association’s expert is also able to show “instances of new
 damage occurred during each rain event meeting specific parameters” as Eggert has opined that there were storm
 events that caused damage during Country’s policy period. Eggert Dec. ¶¶ 16, 18.

1 determined as a matter of law that there was new incremental and progressive damage to
2 sheathing and framing during Country's policy period satisfying Country's commencing
3 condition, and that under the continuous trigger, Country is jointly and severally liable for the
4 entire incremental and progressive loss at Westboro.

5 **VI. CONCLUSION**

6 As demonstrated above, wind-driven rain and weather conditions are covered causes
7 under Country's all-risk policy. Pursuant to *Vision One*, *Greenlake*, and *Sunwood*, coverage for
8 loss or damage caused by a combination of wind-driven rain and inadequate construction is
9 mandated under the concurrent cause doctrine because Country's policy does not exclude such
10 damage. Additionally, because Country's inadequate construction exclusion contains no inverse
11 EPC provision and otherwise contains a resulting loss clause, Country cannot argue that
12 coverage is excluded if inadequate construction is the EPC in a loss otherwise involving covered
13 wind-driven rain. Alternatively, given that Country admits that inadequate construction did not
14 initiate a sequence of events that led to water damage at Westboro or cause the wind-driven rain
15 events that caused damage, Country cannot establish that inadequate construction is the EPC.
16 Therefore, there is coverage as a matter of law for the wind-driven rain damage at issue.

17 Finally, because Country and its expert admits there was new incremental and
18 progressive damage from rainwater during its policy period, Country's commencing condition is
19 satisfied, and Country is jointly and severally liable for the entire incremental loss at Westboro.

20 DATED this 8th day of August, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, a copy of the foregoing *Document* and this *Certificate of Service* were served on counsel below as noted:

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

SIGNED this 8th day of August, 2022, at Tukwila, Washington.

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