No. 45515-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

KUT SUEN LUI and MAY FAR LUI, Plaintiffs-Respondents,

v.

ESSEX INSURANCE COMPANY, Defendant-Appellant.

BRIEF OF APPELLANT ESSEX INSURANCE COMPANY

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I. INTRODUCTION

Essex Insurance Company insured a commercial building owned by the Luis. The surplus-lines insurance policy includes a provision that, if the building became vacant, coverage is restricted. Specifically, the policy provides that "[e]ffective, at the inception of any vacancy or unoccupancy, the Causes of Loss provided by this policy are limited . . . ." The policy also provides that, if the building remains vacant for more than 60 consecutive days, ***all*** coverage is suspended.

In January 2011, the building was damaged when a sprinkler pipe broke. Essex paid almost $300,000 of the loss before discovering that the building was vacant when the loss occurred, and it has declined to pay more.

The facts are undisputed that the Luis' only tenant vacated the entire building in December 2010, one month before the loss. The Luis also have not disputed that the January 2011 pipe break is not within the limited covered causes of loss that remained available as soon as the

building became vacant. Accordingly, Essex determined the Luis' loss was not covered.

The Luis contend, however, that the policy provision is ambiguous, specifically asserting that the word "vacancy" can only mean 60 days of vacancy. That is, the Luis argue that coverage cannot be limited upon the inception of the vacancy, but only after 60 days. The Luis make this argument even though the policy expressly provides that a building is "vacant" "unless at least 31% of [the building's] total square footage is" used by the owner or a lessee to conduct customary operations. There is no dispute that the Luis' building was empty and unoccupied at the time of the sprinkler pipe break.

The trial court accepted the Luis' argument, erroneously holding that the policy was ambiguous and could be read to mean that a completely vacant and unoccupied building was not effectively vacant until more than 60 days after the vacancy occurred. (CP 773) This interpretation rewrites the policy, providing the Luis

coverage for a vacant building that is not provided by the language of the policy.

Also at issue, the Luis assert that Essex acted in bad faith by making the wrong coverage determination—i.e., by applying the literal terms of the vacancy provision. Although an insurer can act in bad faith by failing to conduct an adequate investigation even when there is no coverage for the loss under the terms of the policy, the Luis do not allege that here. Further, there is no genuine issue of material fact concerning the adequacy of Essex's investigation. Essex correctly denied coverage, and it did not act in bad faith as a matter of law.

Still, the Luis contend that even if there is no actual coverage by contract, they are nevertheless entitled to coverage by waiver or estoppel. Although the trial court did not rule on that issue, it expressed agreement in principle. The Luis' position on this issue of law is refuted by established case law. Coverage for a property insurance loss cannot be established by estoppel or waiver contrary to the terms of the policy. Indeed, Washington law is clear

there is no coverage by waiver or estoppel in the context of first-party property insurance coverage.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering the Order on Cross-Motions for Summary Judgment and the Order Denying Defendant Essex Insurance Co.'s Motion for Reconsideration, ruling that:

1. the Vacancy/Unoccupancy Provision is ambiguous and coverage is owed for a vacant building, and

2. the Luis cannot establish coverage by estoppel or waiver as a matter of law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Vacancy/Unoccupancy Provision (a) restricts coverage to certain causes of loss "at the inception of any vacancy or unoccupancy" and (b) suspends coverage entirely if the building is vacant "beyond a period of sixty consecutive days." The policy defines a building as "vacant" when usage falls below 31%. Did the trial court err when it found the policy ambiguous as to when the

vacancy begins such that coverage is restricted to select causes of loss?

2. The Luis admit the building was not under construction or renovation at the time of the sprinkler leak. Should the Construction/Renovation Exception apply such that the building should not be considered vacant?

3. Can Essex be found in bad faith when it reserved its rights under the policy throughout its investigation and, after paying nearly $300,000, correctly determined there is no coverage available under the policy?

4. In the event the Court remands this case on the issue of bad faith, can the Luis recover policy proceeds as a remedy for alleged bad faith when the Washington Supreme Court has repeatedly ruled that an insured cannot create coverage by estoppel or waiver in a first-party property case?

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Insurance Policy

The Luis own an apartment building in Tacoma,

Washington. Essex issued an insurance policy for property coverage to the Luis in 2004 (the "policy"). (CP 264) The policy was registered and delivered as surplus line coverage pursuant to RCW 48.15.040, a type of coverage allowed by statute for higher risk properties when regular policies are not available.[1]

Attendant with the higher risk involved with the Luis' property, and consistent with the higher risk involved with any vacant property, the policy includes a Vacancy/Unoccupancy Provision that (1) restricts coverage to certain causes of loss "at the inception of any vacancy or unoccupancy," and (2) suspends coverage entirely if the building is vacant or unoccupied "beyond a period of sixty consecutive days." (CP 278) The policy specifically defines a building as "vacant" unless "at least 31% of its total square footage is" used by the owner or lessee to conduct customary operations. (CP 290)

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[1] *See Saunders v. Lloyd's of London*, 113 Wn.2d 330, 332 n.1, 779 P.2d 249 (1989).

2. The Vacancy

Shortly after the Luis' coverage began in 2004, Essex learned the building had been vacant when the policy was issued. (CP 428) Essex cancelled coverage. (CP 432) Coverage was reinstated when the Luis began renting the premises to the Agapé Foundation. (CP 232)

In 2010, Agapé fell behind on its rent payments to the Luis, and the Luis instituted an unlawful detainer action against Agapé. (CP 435) The Luis and Agapé entered into a stipulated order whereby Agapé was to move out of and completely vacate the premises no later than December 1, 2010. (CP 440) It is undisputed that Agapé moved out of the property on December 3, 2010, taking everything in the building when it left and leaving the building completely empty and unoccupied. (CP 324)

The Luis did not inform Essex that Agapé had moved out of the premises or that there was no new tenant to take Agapé's place. (CP 227)

3. The Sprinkler Leak

According to the Luis, a frozen sprinkler pipe broke

on January 1, 2011, causing water damage at the property. (CP 4) The Luis tendered the claim for loss to Essex, and Essex began its investigation into the claim subject to a full and continuing reservation of Essex's right to deny coverage or limit payment under the policy. (CP 528) Essex repeated its reservation in 14 letters throughout the course of its one-year coverage investigation. (CP 536-578) Essex paid to the Luis $293,598.05 for the loss while continuing its investigation. (CP 480)

Essex learned during its investigation that Agapé had vacated the premises; that no new tenant had taken Agapé's place; and that the building was not undergoing any construction or renovation during the period of vacancy and unoccupancy. (CP 324, 339, 355-58) Essex then denied any further payment to the Luis based on the Vacancy/Unoccupancy Provision. (CP 577) Essex did not demand the Luis return the nearly $300,000 already paid, but not owed. (CP 577) Despite the fact that Essex had never promised more money that it paid, the Luis still

demanded more money and filed this lawsuit alleging Essex improperly denied coverage and acted in bad faith. (CP 3)

4. Undisputed Facts

It is undisputed that:

- Agapé moved out of the building on December 3, 2010 (CP 324, 339, 355);
- the building was left completely empty and unoccupied (CP 358, 364);
- the Luis did not have a new tenant at the building at the time of the loss on January 1, 2011 (CP 323-24, 330-32, 339);
- the property was not under construction or renovation at the time of the sprinkler leak (CP 356-58, 364-66);
- the Luis did not request or obtain approval from Essex for continued coverage during the vacancy (CP 227); and
- the damage was caused by a sprinkler leak (CP 4).

B. Procedural History

Essex and the Luis each filed cross-motions for summary judgment requesting the trial court interpret coverage under the Vacancy/Unoccupancy Provision of the policy. (CP 35, 197) Essex further requested the trial court find Essex did not act in bad faith as a matter of law by denying the Luis further payment under the policy. (CP 223)

The trial court granted the Luis' motion for summary judgment and denied Essex's motion, finding the Vacancy/Unoccupancy Provision ambiguous. (CP 690) By order dated October 11, 2013, the trial court denied Essex's motion for reconsideration, but granted Essex's request to certify the matter to this Court. (CP 852) This Court granted certification under RAP 2.3(b)(4).

V. AUTHORITY

An order granting summary judgment is reviewed de novo, "with the reviewing court performing the same

inquiry as the trial court."[2]

A. The trial court erred when it found the Vacancy/Unoccupancy Provision ambiguous.

The trial court failed to follow principles of insurance policy interpretation that are well-settled under Washington law.[3] On review, this Court must construe the policy as a whole, giving each clause force and effect.[4] The Washington Supreme Court has repeatedly recognized that, "[m]ost importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists. We will hold that a clause is ambiguous ***only*** 'when, on its face, it is fairly susceptible to two different interpretations, ***both of which are reasonable.***'"[5] The trial court violated these principles when it found an ambiguity despite the

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[2] *Ski Acres, Inc. v. Kittitas Cnty.*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992) (citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987)).

[3] *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005) ("The criteria for interpreting insurance contracts in Washington are well settled.").

[4] *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002) (citing *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 797, 881 P.2d 1020 (1994)).

[5] *Quadrant Corp.*, 154 Wn.2d at 171 (citations omitted) (emphasis added).

Luis failure to offer a reasonable interpretation of the Vacancy/Unoccupancy Provision.

1. The plain language of the policy is clear.

The Vacancy/Unoccupancy Provision provides:

> Coverage under this policy is suspended while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days, unless permission for such vacancy or unoccupancy is granted hereon in writing and an additional premium is paid for such vacancy or occupancy.
>
> Effective, at the inception of any vacancy or unoccupancy, the Causes of Loss provided by this policy are limited to Fire, Lightning, Explosion, Windstorm or Hail, Smoke, Aircraft or Vehicles, Riot or Civil Commotion, unless prior approval has been obtained from the Company.

(CP 278)[6] The purpose of a vacancy provision is "to exclude those structures which present a higher insurance risk than exists for occupied buildings."[7] That is, when a building is vacant, there is higher risk of damage resulting from fire, trespass, and defects, such as leaks, that would

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[6] The "Vacancy or Unoccupancy" clause, found in the "Change in Conditions" Endorsement, amends the vacancy provision in the "Conditions" section of the policy. (CP 278, 290)

[7] *Heartland Capital Inv., Inc. v. Grange Mut. Cas. Co.*, No. 08-CV-2162, 2010 WL 432333, at *4 (C.D. Ill., Feb. 2, 2010).

go unnoticed and cause greater damage.[8] Washington courts agree that the concept of a vacancy provision "is a reasonable one, and, having been plainly and deliberately agreed upon by the parties, it should be enforced as any other contract provision."[9]

The first paragraph of the Vacancy/Unoccupancy Provision (the "Suspension Clause") suspends coverage entirely if the insured building is vacant or unoccupied for more than 60 consecutive days. That clause is not at issue here because the building had been vacant for fewer than 60 days at the time of the loss.

The second paragraph (the "Restriction Clause") restricts coverage when the building is vacant or unoccupied but has been vacant or unoccupied fewer than 60 consecutive days. In that situation—i.e., whenever the building is vacant or unoccupied—coverage is provided

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[8] *See, e.g., Rojas v. Scottsdale Ins. Co.*, 678 N.W.2d 527, 533 (Neb. 2004) ("[W]hen a building is not in use, it is more likely that potential fire hazards will go undiscovered and that a fire in a vacant or unoccupied building will burn for a longer period and cause greater damage before being detected.").

[9] *Brehm Lumber Co. v. Svea Ins. Co.*, 26 Wn. 520, 524, 79 P. 34 (1905).

only for specified causes of loss, none of which apply to the present loss.

Because the insured building was vacant at the time of the loss, Essex determined that the Restriction Clause applied and, therefore, the Luis were not entitled to coverage for their loss. The trial court disagreed.

The trial court found the Vacancy/Unoccupancy Provision ambiguous based on the Luis' argument that the property is not deemed "vacant" until 60 days after the property is empty. (CP 690, 773-74) At the hearing on summary judgment, counsel for the Luis argued:

> [T]he way we read the 60-day insurance provision is that vacancy doesn't occur until after the 60th day. Any inception of vacancy, if you read our 60-day argument correctly, means that vacancy doesn't begin until the 61st day. So inception of vacancy isn't until the 61st day.

(CP 757) That is to say, according to the Luis, the building does not become "vacant" until 60 days after it becomes vacant or unoccupied. The trial court accepted the Luis' interpretation, finding the policy was ambiguous as to when the "inception" of the vacancy occurred under the

Restriction Clause—i.e., whether (1) when the property became vacant or (2) 60 days later.

Vacancy, however, is specifically defined in the policy:

> **6. Vacancy**
>
> **a. Description Of Terms**
>
> (1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in **(1)(a)** and **(1)(b)** below:
>
> . . .
>
> (b) When the policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:
>
> (i) Rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or
>
> (ii) Used by the building owner to conduct customary operations.

(CP 290) The plain language of the policy provides that the property is deemed "vacant" immediately upon the

happening of a specified condition—usage of the building drops below 31%. The policy definition does not require that the condition persist for 60 days before the property is deemed "vacant." In ruling as it did, the trial court erroneously rewrote the policy definition to include a 60-day waiting period.

Vacancy provisions, like the one in the Essex policy, are common in property policies and are interpreted according to their plain language.[10] No other court in the country has imposed the 60-day waiting period into the policy definition of "vacancy" as did the trial court here.

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[10] *See, e.g., Heartland Capital Inv.*, 2010 WL 432333, at *4 ("Reading the insurance policy as a whole, the court finds the policy's definition and concept of vacancy to be clear and unambiguous."); *Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Philadephia Indem. Ins. Co.*, 462 Fed. Appx. 70, 72 (2nd Cir. 2012) (finding an identical definition of "vacancy" to be unambiguous to allow the insurer to exclude a loss under a vacancy provision); *Saiz v. Charter Oak Fire Ins. Co.*, 299 Fed. Appx. 836, 840 (10th Cir. 2008) ("Because we conclude that, at the time of the loss, the business could not have been utilizing more than 31% of the premises for customary operations, the district court properly held that, based on the uncontroverted evidence, the building was vacant under the policy terms."); *Hollis v. Travelers Indem. Co. of Conn.*, No. 08-2350-STA, 2010 WL 1050991, at *9 (W.D. Tenn. March 19, 2010) ("Because at the time the leak began in August 2006, the building was less than 31% occupied, and therefore, under the clear language of the policy, the building was vacant, any water damaged resulting from the leak is excludable.")

Rather, other courts read the "vacancy" definition according to its plain language and have found that the definition is "clear and unambiguous."[11] In *Heartland Capital Investments, Inc. v. Grange Mutual Casualty Co.*, a federal district court in Illinois found an identical definition of "vacancy" to mean what it says—that "[a] structure will be considered vacant unless 31% of its square footage is used by the building owner or lessee to conduct its customary operations."[12] In that case, as in this case, both parties agreed that less than 31% of the square footage was in use.[13] The property was, therefore, vacant upon the happening of that condition.[14] The policy's vacancy provision in that case required the insurer to wait 60 days after the inception of the vacancy before it could restrict coverage to select causes of loss.[15] Significantly, the insurer in *Heartland* was not required to wait 60 days before it could deem the property "vacant" and then an

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[11] *Heartland Capital Inv.*, 2010 WL 432333, at *4.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at *2.

additional 60 days before it could restrict coverage under the vacancy provision.[16]

The Luis and the trial court have read the Suspension Clause and the Restriction Clause together such that the 60-day requirement in the Suspension Clause is carried over to the Restriction Clause. The language of the Restriction Clause does not include the 60-day requirement. Instead, the Clause states that it is effective "at the inception of any vacancy[.]" (CP 278) "Inception" is defined by the Washington Supreme Court as "an act, process, or instance of beginning."[17] If the definition of "vacant" is interpreted according to its plain language and without the 60-day waiting period imposed by the Luis and the trial court, the Restriction Clause must be read to limit the covered causes of loss once usage of the building drops below 31%. The trial court erred when it created an ambiguity where none

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[16] *Id.* at *4.
[17] *Panorama Village Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 139, 26 P.3d 910 (2001) (citing *Webster's Third New Int'l Dictionary* 1141 (1981)).

exists.[18] The Vacancy/Unoccupancy Provision should be enforced as written to preclude coverage in this case.

2. The Construction Exception does not apply.

In response to Essex's motion for discretionary review, the Luis argued for the first time that the building was not "vacant" because the Construction/Renovation Exception to "vacancy" applies. That exception, found in the definition of "vacancy," reads:

> Buildings under construction or renovation are not considered vacant.

(CP 290) The Luis' argument represents an about-face from their position in the trial court and is contrary to the undisputed evidence. The Luis conceded in sworn testimony below that the building was ***not*** under construction or renovation when the sprinkler leak occurred. (CP 356-58, 364-66) Cindy Lui testified that, when Agapé moved out, the only work to be done was "general cleanup that is expected." (CP 357) She testified that none of the cleanup had begun at the time the sprinkler

[18] *Quadrant Corp.*, 154 Wn.2d at ("Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists.").

leak happened (CP 366), and the Luis confirmed the building was empty—i.e., vacant and unoccupied (CP 324). At the hearing on summary judgment, counsel for the Luis represented to Judge Serko that "there is [*sic*] no other issues of fact with respect to the vacancy. It occurred when it occurred." (CP 768)

Yet, on appeal, the Luis argue the building was not vacant because it was under renovation.[19] According to the Luis, they "were preparing, at least tentatively, to re-lease the property to Tacoma Community College[.]" The Luis, however, had not signed a contract with the college and had not begun any work on the building. (CP 323, 339, 358, 364-66)

Other courts agree that simply ***planning*** to renovate does not constitute "construction or renovation."[20] The Construction/Renovation Exception exists in recognition of

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[19] Luis's Response to Essex's Motion for Discretionary Review at 13. The Luis argued the building was under "renovation," but did not contend the building was under "construction" to fall within the Construction/Renovation Exception.

[20] *Suder-Benore Co., Ltd. v. Motorists Mut. Ins. Co.*, 995 N.E.2d 1279, 1285 (Ohio 2013) (citing *Belich v. Westfield Ins. Co.*, No. 99–L–163, 2001 WL 20751, at *3 (Ohio Ct. App. Dec. 29, 2000)).

the fact that, if a construction project results in the continuous and substantial presence of workers on the property, then the risk of increased damage due to unoccupancy no longer exists and enforcement of the vacancy exclusion is not warranted.[21] The Luis concede there were no workers at the building at the time of the sprinkler leak, and they cannot point to any evidence that the building was under "construction or renovation." (CP 324, 332, 364-66) The Luis' alleged plan to renovate for a prospective tenant is insufficient to trigger the Construction/Renovation Exception.

B. The trial court erred when it left open the possibility for the Luis to create coverage by estoppel or waiver as a remedy for alleged bad faith.

The Luis argued below that, even if Essex's coverage determination is correct, the Luis will seek to prove coverage by estoppel or waiver as a remedy for alleged bad faith. The trial judge did not decide the Luis' claims for estoppel, waiver, or bad faith, but erroneously commented

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[21] *TRB Invs. Inc. v. Fireman's Fund Ins. Co.*, 50 Cal. Rptr. 3d 597, 604 (2006).

that "there are issues of fact that govern all those latter issues." (CP 774) Because Essex reserved its rights under the policy and then correctly determined coverage, the question of bad faith should be decided as a matter of law. Even if a question of fact remains, the Luis cannot create coverage by estoppel or waiver as a matter of law.

1. Essex did not act in bad faith as a matter of law.

An insurer can be liable for bad faith only when it acts in a manner that is "unreasonable, frivolous, or unfounded."[22] In *Wright v. Safeco Insurance Co. of America*, the Washington Court of Appeals found that Safeco did not act in bad faith as a matter of law when it properly relied on the policy language to deny coverage.[23] Essex, here, properly relied on the Vacancy/Unoccupancy Provision to refuse to pay any additional policy proceeds. (CP 577) Essex did not act in bad faith as a matter of law.

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[22] *Wright v. Safeco Ins. Co. of Am.*, 124 Wn. App. 263, 279, 109 P.3d 1 (2004) (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998)).
[23] *Id.*

The Luis have asserted that they should be permitted to pursue a bad faith claim regardless of coverage. Under Washington law, an insured may sue its first-party property insurer for a bad faith breach of the duty to investigate, even if the insurer was ultimately correct in determining coverage did not exist.[24] The Luis, however, do not allege that Essex breached the duty to investigate. It is undisputed that Essex conducted an investigation over the course of one year during which Essex hired experts to determine the cause of the loss, incurred clean-up expenses, and took the examinations under oath of the Luis and other witnesses. (CP 528-78) Essex even paid the Luis nearly $300,000 for the loss. (CP 480)

Absent coverage under the policy, the Luis' sole allegation of bad faith is that Essex accepted coverage by letter dated May 26, 2011, and then informed the Luis in a letter dated February 14, 2012, that Essex would not pay any additional amounts for the loss. (CP 45-46, 57-58) At the time of the May 26 letter, Essex had paid $293,598.05

[24] *Coventry Assocs. v. Am. States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998).

and, in that letter, Essex reserved its right to refuse to pay any additional amount given the ongoing investigation. (CP 480, 577) Essex had, in fact, repeated its reservation in 14 letters throughout the course of its one-year investigation. (CP 536-578) Essex cannot be held in bad faith for reserving its right to deny additional payments pending its investigation, and then, in fact, denying additional payments based on that investigation.[25]

2. Coverage by estoppel or waiver is not a remedy for bad faith in this first-party property case.

The Luis are not entitled to coverage by estoppel or waiver as a remedy. The Washington Supreme Court has repeatedly ruled that first-party property coverage, such as the Luis are claiming here, cannot be established by

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[25] *Cf. Alaska Nat'l Ins. Co. v. Bryan*, 125 Wn. App. 24, 38-39, 104 P.3d 1 (2004) ("The purpose of a reservation of rights letter is not to change the contractual relationship of the parties, but rather it is to identify the insurer's position regarding coverage and serves to protect the parties by providing a conditional defense to the insured and protecting the insurer from a bad faith claim if coverage is due. Here, Alaska National clearly reserved its right to challenge coverage, and its reservation of rights letters did not alter its contractual obligations toward Bryan. Thus, Alaska National is not estopped from denying coverage based on contractual obligations.").

estoppel or waiver as a matter of law.[26] "The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel."[27]

The Washington Supreme court explained the difference between coverage by estoppel in the first-party property, as opposed to the third-party liability, context in *Coventry Associates v. American States Insurance Co.*[28] In the third-party liability context (where the insurer is asked to defend an insured in a lawsuit by another injured party), "coverage by estoppel is an appropriate remedy [for an insurer's bad faith conduct] because the insurer contributes to the insured's loss by failing to fulfill its obligations in some way."[29] However, "[c]overage by estoppel in the first party [property] context is not the appropriate remedy

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[26] *Coventry Assocs.*, 136 Wn.2d at 284-85.
[27] *Carew, Shaw & Bernasconi v. Gen. Cas. Co. of Am.*, 189 Wn. 329, 336, 65 P.2d 689 (1937).
[28] *Coventry*, 136 Wn.2d at 284-85.
[29] *Id.* at 284.

because . . . the loss in the first party situation has been incurred before the insurance company is aware a claim exists."[30] The damage to the Luis' property existed before the claim was made, and the conduct about which the Luis complain did not contribute to their loss. The Luis cannot create coverage by estoppel or waiver as a matter of law in this first-party property case.

Moreover, Essex did not waive, and specifically reserved, its right to rely on newly discovered information to deny the Luis' claim or refuse to pay additional amounts. Essex told the Luis in 14 separate letters that it was continuing its investigation without waiving any of its rights under the policy. (CP 528-78) In the May 26 letter about which the Luis complain, Essex wrote:

> In closing, Essex continues to reserve its rights under the insurance policy and as provided by law, including but not limited to the right to appraise the value of coverage loss. Essex does not waive any of its rights, and no estoppel of Essex's rights should be inferred.

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[30] *Id.*

(CP 577-78) Washington law specifically permits—and, in fact, requires—an insurance company to investigate the loss and determine coverage based upon the facts revealed.[31]

Moreover, RCW 48.18.470 provides that "[i]nvestigating any loss or claim under any policy . . ." "shall [not] be deemed to constitute a waiver of any provision of a policy or of any defense thereunder[.]" Even if Essex had not clearly reserved its rights, by letter, to continue its investigation without waiving any of its rights to deny coverage (which indeed it did), the legislature has provided that any insurer does ***not*** waive its defenses by conducting an investigation.[32]

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[31] *Coventry*, 136 Wn.2d at 281.

[32] *See Chong v. Safeco Ins. Co. of Am.*, No C05-0974RSM, 2006 WL 1169788, at *4 (W.D. Wash. Apr. 27, 2006) ("Although plaintiffs present numerous letters from [the insurer] in support of their argument, wherein [the insurer] states that it is continuing to investigate plaintiffs' claim, those same letters also include explicit language that [the insurer] "reserves all of its rights and defenses, and no waiver nor estoppel is intended nor should it be inferred." Defendant's language is directly supported by Washington statute which provides that "[n]one of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer thereunder: . . . (c) Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim.") (citing RCW 48.18.470); *Reed v. Allstate Ins. Co.*, No. C11-0866JLR, 2012 WL 527422 (W.D. Wash. Feb. 16, 2012) ("[U]nder Washington statutory law,

Essex cannot be estopped from refusing to pay additional amounts based upon its investigation—an investigation that revealed the property was vacant and not under construction or renovation at the time of the sprinkler leak.

VI. CONCLUSION

Essex respectfully requests that this Court reverse the trial court's ruling on summary judgment and hold there is no coverage under the policy. Essex further requests this Court hold that Essex did not act in bad faith as a matter of law by reserving its rights during the investigation and then refusing to pay additional amounts based on that investigation.

In the event the Court disagrees and remands this case for further proceedings on the bad faith claim, Essex requests the Court instruct the trial court that the Luis cannot create coverage by estoppel or waiver as a matter of law.

Allstate's investigation of the claim does not constitute waiver of any defense, which would include a contractual suit limitation period.") (citing RCW 48.18.470).

DATED this 28th day of April, 2014.

BULLIVANT HOUSER BAILEY PC

By _____
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Michael McCormack, WSBA #15006

Attorney for Defendant-Appellant Essex Insurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that on this 28th day of April, 2014, I caused the foregoing to be served to the following persons in the manner indicated below:

J. Dino Vasquez
Jacque E. St. Romain
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104

☒ via hand delivery.
☐ via first class mail.
☐ via email.

I declare under penalty of perjury under the laws of the state of Washington this 28th day of April, 2014, at Seattle, Washington.

Tracy Horan

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