No. 45515-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KUT SUEN LUI and MAY FAR LUI,

Plaintiffs/Respondents,

v.

ESSEX INSURANCE COMPANY,

Defendant/Appellant.

AMENDED BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondents are Kut Suen Lui and May Far Lui ("Luis" or "Insureds"), the Plaintiffs in the action pending in the Pierce County Superior Court. Appellant-Defendant Essex Insurance Company ("Essex") appeals the Superior Court's ruling that the Luis were entitled to summary judgment on the meaning of a "vacancy" clause in the Luis' insurance policy. CP 858–59. Essex also seeks review of the Superior Court's denial of summary judgment on the issues of estoppel and waiver. Brief of Appellant Essex Insurance Company ("Appellate Brief") at 21–28. As the Superior Court correctly found, the "vacancy" provision is ambiguous and the law is well settled that all ambiguities must be interpreted in favor of the insureds. CP 690–92. Further, the issues of estoppel and waiver are not ripe for review and are not before this Court. The Superior Court denied summary judgment on those issues due to the existence of factual issues which must be determined at trial. *Id.* For these reasons, the Luis respectfully request this Court affirm the Superior Court's ruling on the "vacancy" issue and remand the case for trial on the remaining issues pertaining to the Luis' bad faith claims.

II. STATEMENT OF THE CASE

A. Factual Background

The Luis owned a three-story building consisting of 51 individual living units and commercial tenant space. CP 36. The Luis purchased the property on or about April 16, 2004, for $1,200,000.00. CP 194. The Luis paid $400,000.00 toward the purchase price and mortgaged the balance. *Id.* At the time of the loss, the Luis had a commercial insurance policy with Essex covering both liability and property damage. CP 36. The policy, number BF46025006, was effective June 30, 2010, through June 30, 2011 (the "Policy"). *Id.*

On or about January 1, 2011, a water pipe in the ceiling of the second floor froze and burst. CP 36–37. Water spread throughout significant portions of the building, causing substantial damage. CP 37. At the time of the loss, the building was being prepared for new tenants. *Id.* The previous tenant, The Agape Foundation, Inc., were evicted on or about December 7, 2010, for failure to pay rent. CP 37, 96, 98. After the eviction, the Luis began preparing the property for the purpose of renting rooms to foreign students attending or planning to attend Tacoma Community College. CP 37.

Upon discovering the water loss, the Luis notified Essex through their agent. *Id.* Essex retained an adjuster to evaluate and adjust the loss, Thomas Johnson ("Johnson") of Cunningham Lindsey. CP 90. Johnson toured the building on January 5, 2011, with the Luis' representative to inspect and begin Essex's claim investigation. CP 91. At the time, Mr. Johnson knew the property was unoccupied. *Id.* During his investigation, Johnson contacted and retained ServiceMaster to provide mitigation services, on behalf of Essex. CP 67. The Luis submitted a partial claim for property damage and business income loss. CP 37. On February 8, 2011, Essex issued a reservation of rights letter claiming "portions of the damages to the property" may not be covered. CP 70–76. Essex highlighted certain exclusions but made no mention whatsoever of policy provisions relating to "vacancy." *Id.*

On March 2, 2011, Essex reiterated its position based on the policy exclusions and added a reservation relating to the Luis' business income or extra expense claims. CP 78–79. Again, Essex made no mention whatsoever of the policy's "vacancy" provisions. *Id.*

In the meantime, Essex's independent adjuster was preparing an estimate of repairs for only one floor although water damaged all of the floors. CP 38. Essex thereafter denied a portion of the Luis' property

claim due to the pollution and contaminant exclusion and the business income loss. *Id.* Nevertheless, on March 22, 2011, Essex accepted $124,942.75 of the Luis' claim as "undisputed" and paid the Luis $122,442.75. CP 67–68. Yet again, Essex expressed no reservation or coverage exception based on the policy's "vacancy" provisions. *Id.*

Subsequently, upon the Luis' submission of a partial claim for removal of ceiling tiles and carpet, Essex denied that portion of the property claim pursuant to the pollution and contaminant exclusion due to the presence of asbestos material even though removal of products and materials containing asbestos was made necessary by the water loss. CP 84.

On March 21, 2011, Essex reevaluated its coverage decision in part, and paid for removal of the carpeting left by its vendor ServiceMaster. CP 542–43. However, on March 31, 2011, Essex renewed its coverage denial for "costs associated with removal and/or abatement of asbestos." CP 545.

In response to the shifting coverage positions asserted by Essex, the Luis asked Essex to re-evaluate its decision on April 29, 2011. CP 61. On May 26, 2011, Essex (through its current counsel) stated: "I want to clarify that Essex does not deny coverage for the Luis' claim. The

sprinkler leak is a covered loss. The dispute we face is about the value of the loss as defined by the policy." CP 86; CP 551–52.

The Luis thereafter submitted a revised claim and Essex responded with a revised "cost estimate." CP 39. Based on this revised estimate on July 26, 2011, Essex advised the Luis they would pay another portion of the claim in the amount of $161,155.29 but continued to exclude repair costs for asbestos remediation and focused on a single floor of the building. CP 554–55. Essex, in its July 26, 2011 letter, stated its belief that its obligations under the policy were extinguished despite its knowledge that the Luis were obtaining an evaluation from its structural engineer and a cost to repair everything damaged by the burst pipe. *Id.*

In response, the Luis retained structural engineer Jim Perrault to evaluate the water loss and prepare an independent scope and cost of repair encompassing all areas of the building affected by the water loss. CP 629–33. Based upon Mr. Perrault's evaluation and estimate, the Luis again asked Essex to reconsider its scope and estimate of repair. *Id.* On February 14, 2012, Essex denied the Luis' request and threatened to seek the return of partial payments already made if the Luis sought declaratory relief.[1] CP 102–03. Instead, Essex rescinded its previous acceptance of

[1] In its February 14, 2012, letter, Essex's counsel stated, "Even though there is no coverage for your client's loss, the insurance company will refrain from seeking

coverage and, for the first time, asserted a policy endorsement pertaining to "vacancy" as grounds for denying coverage. *Id.* The vacancy endorsement states:

> ***Vacancy or Unoccupancy***
>
> *Coverage under this policy is suspended while a prescribed 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 unoccupancy.*
>
> *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*[2]

B. Other Policy Provisions

In addition to the "vacancy" endorsement, the Essex policy also includes the following provisions:

> ***BUILDING AND PERSONAL PROPERTY COVERAGE FORM***
>
> . . . . .
>
> ***E. Loss Conditions***
>
> . . . . .

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reimbursement from your client of the money the insurance company has previously paid. The insurance company will refrain from seeking reimbursement in good faith deference to your client's situation, but it does so without waiving any of the insurance company's rights or policy defenses should your clients choose to pursue this further." CP 102–03.

[2] See CP 22.

6. Vacancy Provisions
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:

(a) When this policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations (b) When this 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.*

(2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for ***more than 60 consecutive days*** *before that loss or damage occurs:*

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism;
(b) Sprinkler leakage, unless you have protected the system against freezing;
(c) Building glass breakage;
(d) ***Water damage****;*

(e) Theft; or
(f) Attempted theft.

CP 290 (emphasis added).

C. Procedural History

The Luis filed a motion for summary judgment requesting the trial court: (1) find that Essex waived its right to deny coverage based on its unqualified acceptance of coverage on May 26, 2011; (2) find that Essex is estopped from claiming exclusions in the Policy do not provide coverage for the Luis' loss after expressly accepting coverage; and (3) find that the "vacancy" provision is ambiguous and thus must be interpreted in favor of coverage. CP 35–59.

Essex filed a motion for summary judgment asking the Court to find that the Luis' loss was excluded from coverage on the basis of the "vacancy" provisions. CP 197–225.

At a hearing held August 30, 2013, the Superior Court denied Essex's motion and partially granted the Luis' motion. CP 688–89. The Court held that the "vacancy" provisions were in conflict and construing the resulting ambiguity in favor of the Luis. *Id.* The Superior Court denied the remainder of the Luis' motion regarding waiver, estoppel and bad faith finding there were genuine issues of material fact still to be

resolved.[3] CP 740. On October 11, 2013, upon Essex's motion, the trial court certified its August 30, 2013, order, pursuant to RAP 2.3(b)(4). CP 852–54.

On October 29, 2013, Essex filed a Request for Discretionary Review seeking review of the Superior Court's ruling on the "vacancy" provision of the Luis' insurance policy. CP 855–63. Essex did not seek review of the Superior Court's denial of summary judgment on the issues of waiver, estoppel or bad faith. *Id.* On December 16, 2013, this Court accepted review, finding that the interpretation of the "vacancy" provision is a "controlling question of law, as to which there is a substantial ground for difference of opinion." Ruling Granting Review, at 6–7. Specifically, the Court noted that resolution of the "vacancy" issue would significantly affect the scope of issues for trial: "If the Luis' loss was covered under the policy, the trial would be focused on damages and possibly the bad faith claim. If the Luis' loss is not covered under the policy, the trial would include the waiver and estoppel claims." *Id.* at 7.

Essex never requested discretionary review over the issues of estoppel and waiver.

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[3] At the hearing on the cross motions for summary judgment, Judge Serko stated, "I'm not making a determination on estoppel or waiver, and I'm not granting the plaintiff's [sic] motion for bad faith. I believe there are issues of fact that govern all those latter issues." CP 740.

III. APPELLANT'S ASSIGNMENT OF ERROR

The sole issue before this Court is:

Whether the trial court correctly held that the "vacancy" provision is ambiguous and interpreted it in favor of the Luis where there is more than one reasonable interpretation of the vacancy provision?

IV. ARGUMENT

A. Summary Judgment Standard of Review

An appellate court reviews an order entering summary judgment de novo, applying the standard of CR 56, and viewing the facts submitted in the light most favorable to the nonmoving party. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

B. Trial Court Correctly Held that the "Vacancy" Provision was Ambiguous and Must Be Interpreted in Favor of the Insureds

The Superior Court's interpretation of the vacancy provisions in Essex's policy is grounded in settled principles of insurance policy interpretation that have been well-developed by Washington's appellate courts. In particular, there can be no doubt under Washington law that where ambiguities exist in an insurance policy, the ambiguities are to be resolved in favor of coverage:

> When a provision of a policy of insurance is capable of two meanings, or is fairly susceptible of two constructions, the meaning and construction most favorable to the insured **must** be employed, even though the insurer may have intended otherwise. This rule applies with added force in the case of exceptions and limitations to a policy's coverage.

Greer v. Northwestern Nat'l Ins. Co., 109 Wn.2d 191, 201, 743 P.2d 1244 (1987) (citing *Shotwell v. Transamerica Title Ins. Co.*, 91 Wn.2d 161, 167-68, 588 P.2d 208 (1978)). An insurance policy is a contract and is to be construed according to the general rules applicable to all contracts. *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984); *Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976). But the plain meaning of an insurance policy language is not measured by the understanding of a hypothetical layperson; rather, it is measured by the understanding of an average person engaged in the insured's specific course of business. *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990).

Here, the vacancy provisions are ambiguous at best. Essex argues that the Vacancy Endorsement (See pg. 6) operates in two ways: First, all coverage is meant to be suspended when the covered building "is vacant or unoccupied beyond a period of sixty consecutive days" unless permission is granted to, and an additional premium is paid by, the insured; and

second, immediately upon the inception of a vacancy or unoccupancy, coverage under the policy is limited to certain Causes of Loss and those Causes of Loss do not include water damage of the kind sustained by the Luis. Brief at 13.

The Superior Court correctly rejected the interpretation offered by Essex. CP 691. Instead, the Vacancy Endorsement is more reasonably interpreted to suspend all coverage after sixty days of vacancy or unoccupancy absent permission from Essex and payment of an additional premium. Put differently, the "vacancy" condition does not occur until the building has been vacant or unoccupied for sixty days; upon inception of this vacancy condition, i.e., the post-sixty day period, and with payment of an additional premium, Essex provides coverage but the coverage is limited to certain enumerated Causes of Loss. *Id.* This interpretation gives effect to all provisions of the Endorsement and properly resolves ambiguities in the word "inception" and elsewhere in favor of the Insureds. This interpretation is reasonable and correctly applied by the Superior Court. There is no dispute that the loss in this case occurred before sixty days had passed from the eviction of the Luis' tenant. Accordingly, the Vacancy Endorsement did not suspend or limit any Cause of Loss and the trial court was correct to hold that the Vacancy

Endorsement did not exclude water damage or other coverage available to the Luis.

Essex's position that coverage for water damage was excluded the day the Luis' tenant left the premises is patently unreasonable and is contrary to the "fundamental protective purpose of insurance." *State Farm Fire & Cas. Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007). In support of its contention that the inception of "any" vacancy should be read to literally apply on the first day of a vacancy, Essex directs the Court to certain provisions in the policy's "Conditions of Loss." In particular, Essex argues these provisions establish that a "vacancy" is deemed to arise immediately "unless at least 31% of [the building's] total square footage is rented." Brief at 6. According to Essex, because the Luis' building was not leased at all (i.e., less than 31% was rented) at the time of the loss, there was no coverage for water damage.

The Conditions of Loss, read fairly, do not help Essex for several reasons: First, the 31% limitation on its face only applies "[w]hen this policy is issued to the owner..." as stated in the introductory clause. The 31% limitation applies "when," meaning at the moment, the policy is issued presumably because the insurer does not want to insure a build that is uninhabited from inception. However, nothing in the policy suggests

that the 31% threshold must be maintained throughout the period of coverage. CP 290. Second, section a(2) of this same provision states: "Buildings under construction or renovation are not considered vacant." *Id.* Clearly, "vacancy" is an elastic concept according to Essex's own policy language. There is no dispute that the Luis were preparing, at least tentatively, to re-lease the property to Tacoma Community College for use as a foreign student dormitory. Even if preparations included nothing more than re-painting, re-furnishing, and general maintenance, the preparations reasonably constitute "renovation," a term that is not defined in the policy. *Id.* Third, under section b(2) of the same provision, coverage exists for some Causes of Loss even after a building "has been vacant for more than 60 consecutive days," although Essex's payment obligation is reduced by 15%. *Id.* This confirmation by Essex of *some* coverage for *some* Causes of Loss is difficult to reconcile with Essex's position that *all* coverage is suspended under the Endorsement after 60 days of vacancy absent permission and payment of an additional premium.

Essex's policy is structurally-ambiguous with respect to the effect of a "vacancy" on the coverages purchased by the Luis and the trial court was right to interpret the ambiguities in their favor.

a. *Essex's Interpretation is Contrary to Washington State Case Law.*

It is also significant that the "vacancy"-related provisions all operate as exclusions to coverage and thus must be narrowly construed. Essex's argument that the policy should be read as excluding this type of loss even if the property is empty for a single day prior to a sprinkler leak is an expansive reading of the policy exception which is contrary to Washington State case law: "Exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance, and we will not extend them beyond their clear and unequivocal meaning. In the same vein, we construe exclusions against the insurer." *State Farm Fire & Cas. Co. v. Ham & Rye, LLC*, 142 Wn. App. 6, 13, 174 P.3d 1175 (2007) (citing *Stuart v. Am. States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998)).

b. *Essex Has Failed to Provide Any Support for its Position.*

Essex provides no support for its position that this policy should be interpreted in any way other than the way in which it was interpreted by the Superior Court. Instead, Essex erroneously relies on a number of cases which show that the "vacancy" exception only applies after a specific time period has passed. For example, Essex relies on *Brehm Lumber Company*

v. Svea Insurance Company, 36 Wn. 520, 79 P, 34 (1905). In *Brehm Lumber*, the policy provided the following clear and unambiguous exclusion: "Warranted by the assured . . . that if such property be idle or shut down for more than thirty days at any one time, notice must be given this company and permission to so remain idle for such time must be indorsed hereon or this policy shall immediately cease and determine." *Id.* at 522. There, the Court properly upheld the denial of coverage because the property has been vacant for **longer than thirty days**. The Luis have no quarrel with *Brehm Lumber.* If the Luis' property been vacant for more than 60 days, it may be more instructive (though still problematic because Essex asserted the issue so late). *Brehm Lumber*, in any event, provides Essex no support because here the loss occurred before the specified period expired.

The cases cited by Essex from other jurisdictions are distinguishable. For example, Essex relies on the unpublished Illinois decision *Heartland Capital Investments, Inc. v. Grange Mutual Casualty Co.*, No. 08-CV-2162, 2010 U.S. Dist. LEXIS 8691 (C.D. Illinois, Feb. 2, 2010). Essex alleges that the policy in *Heartland* contains an "identical definition of 'vacancy'". Brief at 17. There, the Court found a loss excluded specifically because the building had been vacant for **more than**

sixty days, as prescribed by the policy. *Id.* at *10. Yet, somehow, Essex is arguing for a different outcome here. It is undisputed that the Luis' property was not empty for more than thirty days. Therefore, the trial court here properly found that the Luis' property was not vacant.

The other cases cited by Essex are similarly problematic.[4] Essex makes broad statements in its Brief for which Essex has no support. Specifically, Essex states "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." Brief at 16. However, the contrary is actually true – a simple review of all of the cases cited by Essex shows that in fact no court has removed the waiting period which is written into the policy very clearly, as in this case.

C. The Issues of Estoppel and Waiver are Not Ripe for Appeal

Essex also, for the first time, seeks review of the trial court's denial of summary judgment on the issues of estoppel and waiver. Brief at 21. Essex asks this court to find, as a matter of law that no coverage exists by

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[4] *See, e.g., Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Philadelphia Indem. Ins. Co.*, 462 Fed. Appx. 70, 72 (2d Cir. 2012) (policy excludes coverage if the "building where loss or damage occurs has been vacant for **more than 60 consecutive days** before that loss or damage" (emphasis added)); *Saiz v. Charter Oak Fire Ins. Co.*, 299 Fed. Appx. 836, 839 (policy excludes coverage "if the building where loss or damage occurs has been 'vacant' for **more than 60 consecutive days** before the loss or damage occurs" (emphasis added)); *Hollis v. Travelers Indem. Co.*, No. 08-2350-STA, 2010 U.S. Dist. LEXIS 26395 (W.D. Tenn. March 19, 2010) (policy excludes

estoppel or waiver. Brief at 22. However, as Essex itself notes, the trial court denied summary judgment on these issues, finding that "there are issues of fact that govern all those later issues." Brief at 21–22, CP 774.

Denial of summary judgment is not an appealable order. *Quellos Grp., LLC v. Fed. Ins. Co.*, 177 Wn. App. 620, 633 n.5, 312 P.3d 734 (2013) (citing RAP 2.2(a); *In re Estate of Jones*, 170 Wn. App. 594, 605, 287 P.3d 610 (2012)). "An order denying summary judgment is essentially interlocutory. It does not end proceedings, but rather permits them to proceed." *In re Estate of Jones*, 170 Wn. App. at 605. "The trial court's denial of summary judgment is not a proper subject for a notice of discretionary review under RAP 2.3(b)." *Roth v. Bell*, 24 Wn. App. 92, 104, 600 P.2d 602 (1979).

The issue of whether coverage exists by estoppel and/or waiver has been reserved for trial because factual issues exist. Therefore, these issues are not properly appealable. The only issue properly before this Court is whether the "vacancy" provision is ambiguous.

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coverage "[i]f the building where loss or damage occurs has been 'vacant' for **more than 60 consecutive days** before the loss or damage occurs" (emphasis added)).

a. *Should this Court Consider the Issue of Estoppel, Essex Should be Estopped From Denying Coverage After Unequivocally Accepting Coverage.*

Equitable estoppel arises "when a person's statements or conduct are inconsistent with a claim afterward asserted and another has reasonably relied on the statements or conduct and would be injured by a contradiction or repudiation of them." *Estate of Hall v. HAPO Fed. Credit Union*, 73 Wn. App. 359, 362, 869 P.2d 116 (1994). An insurance company can be estopped from denying coverage by its conduct, its knowledge or by statute. *Id.* at 363 (citing *Carew, Shaw & Bernasconi v. General Cas. Co. of Am.*, 189 Wn. 329, 336, 65 P.2d 689 (1937)). In *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), the Court found that an insurance company could not forfeit the insurance policy for late payments where it had routinely accepted late payments by the insureds. An insurer may be estopped from denying coverage based on its prior course of conduct. *Id.* at 336.

Similarly, where an insurer "denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer's failure to initially raise the other grounds." *Bosko v. Pitts*, 75 Wn.2d 856, 865,

454 P.2d 229 (1969). An insurer is charged with the knowledge which it would have obtained had it pursued a reasonably diligent inquiry. *Id.* Estoppel "arise[s] by operation of law, and rests upon acts, statements or conduct on the part of the insurer or its agents which lead or induce the insured, in justifiable reliance thereupon, to act or forbear to act on his prejudice." *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1419 (W.D. Wash. 1990). Estoppel focuses on the insured's justifiable reliance on the insurer's conduct or words. *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 340, 779 P.2d 249 (1989).

Here, Essex should be estopped from denying coverage based on its prior actions. In May of 2011, Essex's counsel wrote to the Luis' counsel stating: "I want to clarify that Essex does not deny coverage for the Luis' claim. The sprinkler leak is a covered loss. The dispute we face is about the value of the loss as defined by the insurance policy." CP 86. The Luis justifiably relied on this representation by Essex, believing that their claims would be paid. Because Essex admitted coverage, the Luis continued to pay the mortgage on the insured property for as long as they could afford it. They paid the mortgage from January 2011 to March 2011, for a total of $72,907.25, reasonably and justifiably believing that Essex would be paying for their water damage claim so that they could

rent the premises to Tacoma Community College students. CP 48. Moreover, the Luis continued to pay expenses such as the alarm costs, utilities and other operating expenses. *Id.* They also relied on Essex's assurance of coverage to hire a property management consultant for advice on rental of the commercial property and incurred expenses marketing the property. *Id.* In reliance of Essex's acceptance of coverage, the Luis spent in excess of $161,581.33. *Id.*

By January of 2012, the Luis still had not received all of the funds owing from Essex for their insurance claim. *Id.* They had not been able to afford the mortgage payments for the property since March of 2011 and they were no longer able to afford ongoing expenses and the property management consultant. *Id.* The property remained uninhabitable because of the water damage since the repair work could not be completed because of Essex's failure to pay the entire claim. *Id.* The property was foreclosed on in August of 2012, causing the Luis to lose over $400,000 in equity. *Id.* The Luis would not have incurred ongoing expenses, marketing expenses and other property-related expenses but for Essex's initial acceptance of coverage. *Id.* Essex should be estopped from now denying coverage.

b. *Should this Court Consider the Issue of Waiver, the Court Should Find Essex Waived its Right to Deny Coverage.*

Essex waived its right to deny coverage after explicitly admitting the loss was covered. "Waiver, either express or implied, has been defined as the voluntary and intentional relinquishment or abandonment of a known right." *Buchanan v. Switz. Gen. Ins. Co.*, 76 Wn.2d 100, 108, 455 P.2d 344 (1969). Waiver is a unilateral action that "arises out of either action or nonaction on the part of the insurer or its duly authorized agents and rests upon circumstances indicating or inferring that the relinquishment of the right was voluntarily intended by the insurer with full knowledge of all of the facts pertaining thereto." *Id.* Waiver requires that the party making the waiver had full knowledge of the facts. *Fuller v. Fireman's Fund Am. Life Ins. Co.*, 10 Wn. App. 824, 826, 520 P.2d 642 (1974). The focus for waiver, unlike estoppel, is on the conduct of the insurer, not the insured." *Saunders v. Lloyd's of London*, 113 Wn.2d at 340.

Generally, waiver claims implicate factual issues. *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 742 F. Supp. 1400, 1419 (W.D. Wash. 1990). However, "[a]n express waiver is governed by its own terms, and hence is not the subject of much dispute." *Reynolds v. Travelers' Ins. Co.*,

176 Wn. 36, 45, 28 P.2d 310 (1934). Here, there can be no clearer or more express instance of waiver than where the attorney representing the insurer specifically states, in writing, the insurer does not deny coverage, affirms the claim "is a covered loss" and states the only dispute is the amount of damages owed to the insureds. CP 86. There can be no clearer statement. Such a clear statement waives any right the insurer believes it has to later deny the claim. This statement expressly waived Essex's right to claim the loss was not covered either because of an exclusion, exception or any other policy provisions and seek a return of all its prior claim payments.[5] Accordingly, this Court should find, as a matter of law, Essex waived its right to deny coverage after unequivocally accepting coverage.

V. CONCLUSION

This Court should affirm the trial court's finding that Essex's policy provisions regarding "vacancy" were ambiguous and must be interpreted in favor of the insureds as this ruling is in accord with Washington's well-established principles of policy interpretation and conforms with case law from other jurisdictions. Further, this Court should find that the trial court's denial of summary judgment on the issue

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[5] Essex has argued that it made this statement because it lacked knowledge that the property was vacant. However, Essex confirmed knowledge of the vacancy in its March 2, 2011, letter, long before it decided to deny coverage on the basis of vacancy. CP 666 ("We understand the premises were vacant as of November 2010 . . . .").

of whether coverage exists by estoppel and/or waiver is not appealable. However, in the alternative, if this Court decides to review the issues of estoppel and/or waiver, then it should find that coverage exists by estoppel and waiver because Essex unequivocally accepted coverage and the Luis justifiably relied on that acceptance to their detriment.

Respectfully submitted this 28th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on Thursday, June 05, 2014, I caused to be served the foregoing document to:

Michael McCormack Bullivant Houser Bailey PC 1700 Seventh Ave., Ste. 1810 Seattle, WA 98101 206-292-8930 Michael.mccormack@bullivant.com ***Counsel for Defendant Essex Insurance Company***	☐ via hand delivery via ABC Legal Messengers. ☒ via first class mail, postage prepaid. ☒ via email.

I declare under penalty of perjury under the laws of the state of Washington on Thursday, June 05, 2014, at Seattle, Washington.

Heather L. White