No. 91777-9

(Washington Court of Appeals No. 72835-1-I)

SUPREME COURT OF THE STATE OF WASHINGTON

KUT SUEN LUI and MAY FAR LUI,

Plaintiffs/Petitioners,

v.

ESSEX INSURANCE COMPANY,

Defendant/Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

STATEMENT OF AUTHORITIES

Page

CASES

RULES

I. IDENTITY OF MOVING PARTY

Kut Suen Lui and May Far Lui (the "Luis" or "Insureds"), Plaintiffs in the trial court and Respondents below, submit the following Petition for Review pursuant to RAP 13.4.

II. COURT OF APPEALS DECISION

The Luis respectfully request review of the decision of the Court of Appeals, Division I filed on April 6, 2015, together with the order denying the Luis' Motion for Reconsideration issued on May 5, 2015. A copy of the opinion of the Court of Appeals is attached to this motion as Appendix A and a copy of the Order Denying Motion for Reconsideration is attached to the motion as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

This Petition presents four issues of insurance policy interpretation:

1. Did the Court of Appeals err in finding that the vacancy provisions of the Luis' insurance policy eliminated coverage despite being fairly susceptible to more than one interpretation?

2. Did the Court of Appeals err in failing to give effect to the entire policy?

3. Did the Court of Appeals err in considering the Luis' alleged prior experience with the vacancy provisions and in applying a subjective standard?

4. Did the Court of Appeals err in failing to affirm the trial court's decision on the alternative grounds that the building was under renovation at the time of the loss, and thus not vacant?

IV. 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., was 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 discovery of 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 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]

[1] In its February 4, 2012 letter, Essex's counsel stated, "Even though there is no coverage for your client's loss, the insurance company will refrain from seeking 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.

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***
>
> . . . . .
>
> ***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.

On 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. 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, the Court of Appeals 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, attached as Appendix C, at 6–7. Specifically, the Court noted that resolution of the "vacancy" issue would significantly

[3] At the summary judgment hearing, 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.

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 did not request discretionary review on the issues of estoppel and waiver.

The Court of Appeals issued its decision on April 6, 2015, reversing the trial court's decision and finding that the Essex policy provided no coverage for the Luis' loss. The Luis moved for reconsideration on April 27, 2015. . The Court of Appeals denied the Luis' motion for reconsideration on May 5, 2015.

V. ARGUMENT

Supreme Court review of the Court of Appeals decision is warranted by RAP 13.4(b) for the following reasons:

1. Court of Appeals decision conflicts with established rules of insurance policy interpretation.

2. The interpretation of the vacancy provisions in this case involves an issue of substantial public interest that should be determined by the Supreme Court.

A. 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. The Court of Appeals Erred in Finding that the Vacancy Provisions of the Luis' Insurance Policy Eliminated Coverage Despite Being Fairly Susceptible to More than One Interpretation

a. *Insurance Policies Must be Construed Liberally to Provide Coverage Wherever Possible.*

The Court of Appeals misapplied well-established Washington law regarding the interpretation of insurance policies. The case law is clear:

> 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 has intended otherwise.

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)) (emphasis added). A policy provision is ambiguous when, on its fact, it is fairly susceptible to two different interpretations, both of which are reasonable. *Washington Restaurant Corp. v. General Ins. Co. of America*, 64 Wn.2d 150, 390 P.2d

970 (1964). As long as the insured's interpretation is not unreasonable, the Court *must* find in favor of the insured. *See Morgan v. Prudential Ins. Co.*, 86 Wn.2d 432, 545 P.2d 1193 (1976) (emphasis added). It is not necessary for the insured's interpretation to be *the most* reasonable interpretation—it must just be *a* reasonable interpretation. *See, e.g., Selective Logging Co. v. General Casualty Co.*, 49 Wn.2d 347, 301 P.2d 535 (1956) (emphasis added).

An insurance policy must be interpreted as it would be by the average person purchasing insurance. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 110 P.3d 733, 737 (2005). As discussed further below, this principle is particularly germane because the Court of Appeals applied a subjective standard in this case.

The loss in this case occurred after the tenant moved out of the Luis' building, but before sixty (60) days had passed. The Vacancy Endorsement is reasonably interpreted to suspend all coverage *after* sixty (60) days of vacancy absent permission from Essex and payment of an additional premium. With payment of the premium, Essex will provide coverage for certain enumerated Causes of Loss only. CP 278. This interpretation is reasonable and considers not only the language of the Change in Conditions Endorsement, but also the policy structure chosen

by Essex, i.e., the order in which the paragraphs of the Vacancy Endorsement are presented. The fact that the first paragraph of the Change in Conditions Endorsement describes the effect of vacancy after sixty (60) days affects the reading of the second paragraph. Had Essex flipped the order of the two paragraphs (placing the second paragraph first and the first paragraph second) an average policyholder might understand that a coverage consequence arises upon "any" vacancy as Essex urges and that additional consequences would follow after 60 days. However, as actually structured, the dominant concept reasonably expressed by the Endorsement as a whole is that no coverage consequence arises until 60 days has passed. This is exactly what is stated in the paragraph Essex presents first. It is not unreasonable for policyholders to read the second paragraph as merely qualifying the same post-60 day vacancy addressed in the first paragraph. If Essex intended a different interpretation it could and should have crafted the Vacancy Endorsement with greater clarity. Essex, not the Luis, is responsible for policy's ambiguity. Importantly, the trial court found the Luis' interpretation to be reasonable as did Essex itself until it later reversed its initial coverage position.

C. The Court of Appeals Erred in Failing to Give Effect to the Entire Policy

a. *The Luis' Interpretation Provides a Reasonable Reading of the Endorsement Which Gives Effect to the Entire Policy.*

The Change in Conditions Endorsement is not the only provision which must be considered when determining whether coverage is suspended. Instead, the policy as a whole must be considered. *See Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869, 876, 784 P.2d 507 (1990) ("In construing the language of an insurance policy, the entire contract must be construed together so as to give force and effect to each clause."). "[I]f there is ambiguity arising because of the difference of language used in the endorsement and the body of the policy, or between two endorsements, the language of the contract is construed most strongly against the insurer." *Transcon. Ins. Co. v. Wash. Pub. Utils. Dist. Util. Sys.*, 111 Wn.2d 452, 462, 760 P.2d 337 (1988).

The Conditions of Loss, read with the Change in Conditions Endorsement, make it at least reasonably plausible that an insured property must be vacant for sixty (60) days before coverage is suspended. The Conditions of Loss states as follows:

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.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

CP 290. Under this provision, coverage for some Causes of Loss exists even after a building "has been vacant for more than 60 consecutive days," although Essex's payment obligation is reduced by fifteen percent (15%). *Id.*

Insurance endorsements may alter the insurance coverage provided to an insured. *Transcon.*, 111 Wn.2d at 462. However, the endorsement must expressly change the terms of the policy. "An endorsement attached to a policy . . . must be read with the policy and will not abrogate or nullify

any provisions of the policy unless it is so stated in the endorsement." *Id.* Here, the endorsement simply states that it "changes coverage under your policy." CP 278. It does not state or imply that it entirely replaces the vacancy provisions completely. The Luis' interpretation of the Change in Conditions Endorsement harmonizes the Endorsement and other provisions and structure of the policy. The Court of Appeals' ruling fails to do this.

Courts harmonize clauses that seem to conflict in order to give effect to all of the contract's provisions. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). The only way to harmonize the Change in Conditions Endorsement and the policy itself is by adopting the Luis' interpretation. Read together, these provisions reasonably indicate that vacancy only affects the policy after sixty (60) consecutive days.

c. *No Case Law Supports Such a Restrictive Reading of a Vacancy Exclusion.*

The vacancy provisions operate to exclude coverage and thus must be narrowly construed. "Exclusions from insurance coverage are contrary to the fundamental protective purpose of insurance, and [the court] 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)). The Court of Appeals cited no case law to support such a restrictive reading of a vacancy provision.

Heartland Capital Investments, Inc. v. Grange Mutual Casualty Company, No. 08-CV-2162, 2010 U.S. Dist. LEXIS 8691 (C.D. Illinois, Feb. 2, 2010), cited by the Court of Appeals in support of its decision denying coverage, had a policy which was nearly identical to the policy at issue in this case. However, in *Heartland*, the Court specifically found the exclusion to apply because the building had been vacant for **more than sixty (60) days**, as proscribed by the policy. *Id.* at *10 (emphasis added). Similar, in *Roas v. Scottsdale Insurance Company*, 678 N.W.2d 527 (Neb. 2004), another case cited by the Court of Appeals in support of its decision reversing the trial court decision, the Court excluded coverage because the property had been unoccupied for **more than sixty (60) days**. *Id.* at 926 (emphasis added). Finally, the Court of Appeals relied in *Brehm Lumber Company v. Svea Insurance Company*, 36 Wash. 520, 524, 79 P.24 (1905). There, the court found no coverage because the property had been vacant for **longer than thirty (30) days** as explicitly stated in the policy. *Id.* at 522 (emphasis added).

None of the above cases, nor any other case cited by the Court of Appeals, or by Essex, supports the Court of Appeals' decision to reverse the trial court's decision and find that no coverage existed when the property had been vacant significantly less than sixty days. The loss at issue occurred before the sixty (60) day period established by the Essex policy had expired. In each of the cases cited by the Court of Appeals, the policy clearly stated a time period after which coverage would be excluded. The courts in those cases found no coverage existed specifically because the stated time period had expired. These cases support the Luis' reading that the vacancy exclusion applies only after a designated amount of time—here, sixty (60) days—rather than the moment a tenant moves out.

This interpretation is not only reasonable but also significantly more practical than the reading proposed by Essex. Tenants in commercial properties come and go with some degree of regularity with nothing occurring between the tenancies beyond renovation or simple maintenance. Is coverage truly meant to be suspended for short, predictable periods between tenants? If so, does an insured need to re-apply for coverage when the new tenant arrives? Essex's proposed interpretation raises more questions than it answers. Clearly, a reasonable

grace period is intended to apply before a vacancy status arises. In this case that period is 60 days.

D. The Court of Appeals Erred in Considering the Luis' Alleged Prior Experience with the Vacancy Provisions and in Applying a Subjective Standard to a Legal Question of Insurance Policy Interpretation

In its opinion, the Court of Appeals stated:

> The record shows the Luis were aware of Essex's interpretation of the policy 2004, well before the incident at issue here. Essex partially suspended coverage in 2004 upon discovering the building was vacant. An insurance agent then explained to the Luis that coverage was restricted as soon as the building became vacant. Essex reinstated full coverage when a tenant moved into the property.

Opinion at 9, n.6. This observation fails to account for the fact that Essex did not initially even assert the Vacancy Endorsement as a basis for denying coverage. Moreover, it presumes the circumstances in 2004 were similar to those presented in the subject loss (they were not).

At the time Essex canceled the Luis' policy in 2004, the property had been vacant for longer than sixty (60) days. The Luis first obtained the insurance policy on June 30, 2004. CP 425. At the time, the Property was vacant. CP 322–23. On July 30, 2004, Essex had a survey done, which stated that the Property was vacant. CP 428. On September 24, 2004, Essex sent out a Notice of Cancellation because of the vacancy.

CP 432. By this time, the building had been vacant for the entire eighty-six (86) days the Luis had insured the Property. The Policy was actually cancelled on October 27, 2004, after one hundred and nineteen (119) days of vacancy. CP 433. Accordingly, the 2004 experience was fundamentally dissimilar to the subject loss which occurred during an interim gap between an outgoing tenant and a planned incoming tenant well within the 60 day threshold established by the Vacancy Endorsement.

Perhaps more importantly, the Court of Appeals applied the wrong legal standard. "Terms in an insurance policy 'must be given a fair, reasonable, and sensible construction as would be given by an average insurance purchaser.'" *Ainsworth v. Progressive Casualty Ins. Co.*, 180 Wn. App. 52, 62, 322 P.3d 6 (2014) (emphasis added; citing *Mid-Century Ins. Co. v. Henault*, 128 Wn.2d 207, 213, 905 P.2d 1244 (1995). The court must interpret the insurance contract "from the point of view of the average person." *Id.* (citing *Holden v. Farmers Ins. Co. of Wash.*, 169 Wn.2d 750, 756, 239 P.3d 344 (2010)).

Whatever the Luis previous experience may have been, it was not relevant to the Court of Appeals' construction of the Essex policy which is strictly a legal question. The Court of Appeals fundamentally erred in construing the policy based on what it presumed the Luis knew about the

vacancy provisions. Under settled Washington law, the Court of Appeals should have limited its focus to determining how an average purchaser of insurance would reasonably interpret the Vacancy Endorsement. The applicable standard is objective, not subjective. *See, e.g., State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139, 1142 (1984) ("We have said that we will interpret an insurance contract according to the way it would be understood by the average insurance purchaser.") Instead, the Court of Appeals applied a subjective standard which distorted its analysis and lead to a legally incorrect construction of the Vacancy Endorsement.

E. The Court of Appeals Erred in Not Affirming the Trial Court's Decision on the Alternative Grounds that the Property was Under Renovation and Thus Not Vacant

RAP 2.5 provides that "a party may present any ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). Appellate courts may "affirm the decision of the court below if there are alternative grounds presented by the pleadings and the record that support the court's order." *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 143, 231 P.3d 840 (2010); *see also Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

The Court of Appeals misapprehended the status of the Property at the time of the incident. The Luis' insurance policy creates an explicit exception to the definition of vacancy for unoccupied buildings under renovation: "Buildings under construction or renovation are not considered vacant." CP 290.

The record shows that the Property was under renovation at the time of the loss. The Luis were preparing to re-lease the Property to Tacoma Community College as a foreign student dormitory. CP 5 ("The Luis were in the process of renovating the building for the TCC students."); CP 37 ("After the eviction, the Luis took possession of the property and began preparing the property with the intent of renting rooms to foreign students attending or planning to attend Tacoma Community College."); CP 205 ("There were cosmetic things that needed to be taken care of, such as maybe, cleaning or removing the carpet, painting interior walls, just because Agape had occupied the building for quite some time.").

Because the Luis' building was in fact under renovation at the time of the loss, it was "not considered vacant" according to Essex's own chosen policy language. Put differently, if the building was under renovation when the loss occurred, the vacancy question never arises. The

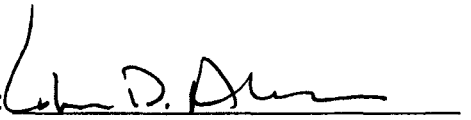
Court of Appeals should have affirmed the trial court's decision on the alternative grounds that the Property was not vacant because it was under renovation. This Court should reverse the Court of Appeals' opinion on these alternative grounds.

VI. CONCLUSION

The Luis respectfully request the Supreme Court to grant this petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted this 4th day of June, 2015.

KARR TUTTLE CAMPBELL

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies that on Thursday, June 04, 2015, 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 04, 2015, at Seattle, Washington.

Heather L. Hattrup

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KUT SUEN LUI and MAY FAR LUI, Respondents, v. ESSEX INSURANCE COMPANY, Appellant.	)	NO. 72835-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 6, 2015

LAU, J. — After a vacant building owned by Kut Suen and May Far Lui was damaged by a frozen water pipe, Essex Insurance Co. denied coverage for the property loss because the Luis' insurance policy excluded losses due to water damage when the building is vacant. On the parties' cross motions for summary judgment, the trial court granted the Luis' motion and denied Essex's motion.[1] It concluded that the policy's vacancy provisions are ambiguous and construed the policy in favor of the Luis. But because the plain language of the policy unambiguously denies coverage for water

[1] Essex does not appeal the trial court's denial of its motion for summary judgment.

APPENDIX A

damage at the inception of any vacancy, we reverse and remand for further proceedings.

FACTS

The main facts are undisputed. Kut Suen and May Far Lui owned a three-story building containing tenant space. On or about January 1, 2011, a water pipe froze and burst, causing substantial damage to the building. No tenant occupied the building at the time. The previous tenant, The Agape Foundation Inc., was evicted around December 7, 2010, for failure to pay rent. Upon discovering the damage, the Luis notified Essex Insurance Co., their insurance provider. Essex investigated the Luis' insurance claim and ultimately paid the Luis $293,578.05 for property damage. When Essex learned that the building was vacant during the time of the loss, it denied coverage of their insurance claim. In a letter to the Luis' attorney, Essex explained that the vacancy endorsement in the Luis' insurance policy prevented coverage for water damage occurring when the building is vacant. Essex stated that although it would refrain from seeking reimbursement for the almost $300,000 already paid, it would no longer provide any coverage for the loss:

> This letter explains the reasons why Essex must deny your clients' claim based on the investigation to date.
>
> First, the policy contains a Change of Conditions Endorsement, which I copy here at Appendix A. This Endorsement was specifically endorsed to the policy over the past few years. As you will see, the Endorsement states:
>
> > Effective at the inception of any vacancy or unoccupancy, the Causes of Loss provided by this policy are limited to Fire, Lightening, Explosion, Windstorm or Hail, Smoke, Aircraft or Vehicles, Riot or Civil Commotion, unless prior approval has been obtained from the Company.

> In this situation, the subject building was vacant and unoccupied at the time of the loss. The insurance company was never notified of the vacancy until after the loss, and hence never approved coverage beyond the named perils listed in the Endorsement. The cause of the January 1, 2011 loss was not one of the perils named in the Change of Conditions Endorsement. Therefore, the insurance company cannot provide coverage for the claimed loss.

The Luis sued Essex[2] for the remainder of the total claimed amount.[3] Both the Luis and Essex filed cross motions for summary judgment. The Luis argued that the policy's vacancy provisions did not restrict insurance coverage until after 60 consecutive days of vacancy occurred. The Luis also claimed that (1) Essex waived its right to deny coverage, (2) Essex was estopped from claiming the vacancy provision in the policy restricted coverage, and (3) Essex denied coverage in bad faith. Essex argued in its motion for summary judgment that the policy's vacancy provisions trigger at the inception of any vacancy and, therefore, unambiguously deny coverage for the Luis' claim.

The trial court denied Essex's motion for summary judgment and granted partial summary judgment in favor of the Luis, concluding that the vacancy endorsement is ambiguous and construing the endorsement in favor of the Luis. The trial court declined to grant summary judgment on the Luis' remaining claims of waiver, estoppel, and bad faith due to genuine issues of material fact: "I'm not making a determination on estoppel or waiver, and I'm not granting the plaintiff's motion for bad faith. I believe there are issues of fact that govern all those latter issues." Report of Proceedings

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[2] The Luis initially included Avila & Sorenson Inc., as a defendant but later dismissed it from the case. Avila is not part of this appeal.

[3] The Luis' insurance claim totaled $758,863.31—$465,285.26 more than what Essex had already paid at the time the Luis filed the lawsuit.

(Aug. 30, 2015) at 25. The trial court's ruling addressed the sole issue of whether the vacancy endorsement denied the Luis' insurance coverage.

Essex moved for reconsideration. Alternatively, Essex requested that the trial court certify its ruling for interlocutory appeal under RAP 2.3(b)(4). The trial court denied Essex's reconsideration motion but granted the motion to certify. Under RAP 2.3(b)(4), the trial court certified its prior ruling that the vacancy provision did not suspend coverage of the Luis' insurance claim. Therefore, the sole issue in this interlocutory appeal is the interpretation of the vacancy provision:

> The Court finds that its legal interpretation of the insurance policy language is a novel controlling question of law about which there are grounds for disagreement. There are no material issues of fact on which the Court's interpretation depends. . . . [A]ppellate review will determine whether Plaintiff's remaining claims should proceed to trial.

Accordingly, the Luis' remaining claims of waiver, estoppel, and bad faith are not properly before us.

ANALYSIS

Standard of Review

This court reviews an order granting summary judgment de novo, performing the same inquiry as the trial court. Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Granting summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); see Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Interpretation of an insurance contract is a question of law reviewed de novo. Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

The Vacancy Endorsement

The parties dispute whether the vacancy endorsement in the insurance contract requires an insured building to be vacant for 60 days[4] before coverage is limited. The vacancy endorsement provides:

VACANCY OR UNOCCUPANCY

> 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 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.

(Boldface omitted.) The policy provides a specific definition for "vacancy" in the building and personal property coverage form:

> 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 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.

[4] The parties agree that the damage occurred before the building had been vacant for 60 days.

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.

(2) With respect to Covered Causes of Loss other than those listed in b.(1)(a) through b.(1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

(Boldface omitted.) Essex argues these provisions are unambiguous. It contends the vacancy provisions mean that, absent written permission and additional premium, the instant a building becomes "vacant" (i.e., "at the inception of any vacancy . . . ."), it is covered only for the limited causes of loss listed in the second paragraph of the vacancy endorsement (fire, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion). After 60 days of vacancy, coverage is suspended altogether. The Luis respond that the policy is ambiguous and could reasonably be read to mean that "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." Br. of Resp't at 12. Because the vacancy endorsement's plain language unambiguously restricts coverage at the beginning of any vacancy, we reverse the trial court's grant of summary judgment in the Luis' favor.

The Vacancy Endorsement is Unambiguous

Insurance policies are construed as contracts. Findlay v. United Pac. Ins. Co., 129 Wn.2d 368, 378, 917 P.2d 116 (1996). Washington courts follow the objective manifestation theory of contracts, looking for the parties' intent as objectively manifested rather than their unexpressed subjective intent. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Therefore, courts consider only what the parties wrote, giving words their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates contrary intent. Hearst, 154 Wn.2d at 504. "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy." RCW 48.18.520. An insurance policy is construed as a whole, with the policy being given a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 124 Wn.2d 618, 627, 881 P.2d 201 (1994) (quoting Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 65, 882 P.2d 703, 891 P.2d 718 (1994)). Courts harmonize clauses that seem to conflict in order to give effect to all the contract's provisions. Nishikawa v. U.S. Eagle High, LLC, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). Insurance limitations must be clear and unequivocal. Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 694, 186 P.3d 1188 (2008).

We will find a clause ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., 134 Wn.2d 413, 428, 951 P.2d 250 (1998). We construe

ambiguity in favor of coverage. Key Tronic, 124 Wn.2d at 630. But we cannot "create ambiguity where none exists." Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). We will not find a contract provision ambiguous simply because it is complex or confusing. McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 734, 837 P.2d 1000 (1992). Therefore, our task is to determine whether each party's proposed interpretation is reasonable. If both are reasonable, then we must construe the policy in favor of the Luis.

Essex proposes the only reasonable interpretation of the policy. Under Essex's interpretation, the policy alters coverage in two ways, absent written permission to the contrary. First, it restricts coverage to specified causes of loss whenever usage of the insured building drops below 31 percent, i.e., when it becomes "vacant."[5] Second, after 60 consecutive days of vacancy, coverage is suspended altogether.

The plain language of the policy supports this interpretation. The vacancy section of the building and personal property coverage form states that the insured building "is vacant unless 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." Therefore, when less than 31 percent of the building is in use, it is "vacant." According to the

[5] In its reply brief, Essex argues that "vacancy" and "unoccupancy" have different meanings. Resp't's Reply Br. at 6. Some persuasive authority supports this argument. See, e.g., Rojas v. Scottsdale Ins. Co., 678 N.W.2d 527, 532 (Neb. 2004) ("The terms 'vacant' and 'unoccupied' . . . are not synonymous."). However, the difference between these terms, if any, is irrelevant. The parties here do not dispute whether the building was either vacant or unoccupied or not, they dispute whether the building needed to be vacant or unoccupied for 60 days before the policy restricted coverage.

second paragraph of the vacancy endorsement, "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." Finally, under the first paragraph of the vacancy endorsement, the policy provides no coverage after 60 days of vacancy, absent written permission: "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 . . . ."[6]

Insurers use vacancy provisions like this one to reflect the increased risk posed by vacant buildings. See, e.g., Heartland Capital Invs., Inc. v. Grange Mut. Cas. Co., 2010 WL 432333 (C.D. Ill. 2010). Vacant buildings are more susceptible to insurance risks such as fire, trespass, leaks, and other defects that often cause greater damage because they go unnoticed. Rojas v. Scottsdale Ins. Co., 678 N.W.2d 527, 533 (Neb. 2004). Washington courts have recognized that vacancy provisions are reasonable and should be enforced as any other contract provision. Brehm Lumber Co. v. Svea Ins. Co., 36 Wash. 520, 524, 79 P. 34 (1905).

Nevertheless, the Luis argue that the vacancy endorsement is ambiguous. The Luis contend that the vacancy condition in the endorsement is not triggered until the building has been vacant for 60 days. At the inception of this condition, absent written permission to the contrary, coverage is suspended. But with written permission and an

[6] The record shows the Luis were aware of Essex's interpretation of the policy in 2004, well before the incident at issue here. Essex partially suspended coverage in 2004 upon discovering the building was vacant. An insurance agent then explained to the Luis that coverage was restricted as soon as the building became vacant. Essex reinstated full coverage when a tenant moved into the property.

additional premium, Essex provides coverage for the enumerated causes of loss in the second paragraph of the endorsement.

The Luis' interpretation is unreasonable because it contravenes the plain language in the vacancy endorsement. Specifically, it overlooks the plain meaning of the phrase "inception at any vacancy." "Inception" means "'an act, process, or instance of beginning.'" Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 139, 26 P.3d 910 (2001) (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1141 (1981)). And if the policy defines "vacancy" as whenever the building's usage drops below 31 percent of its total square footage,[7] the "inception" or beginning of vacancy would be the instant that condition occurs. Indeed, as Essex notes, this definition of "vacant" is common in insurance policies. Accordingly, many courts have found that an insured building becomes "vacant" when its usage dropped below 31 percent of the total square feet. See, e.g., Heartland, 2010 WL 432333.

The Luis claim "inception" refers to the 60-day requirement in the first paragraph of the endorsement—i.e., vacancy coverage restrictions "incept" on day 61. But this

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[7] The Luis argue that this definition of vacancy applies only at the moment the policy is issued. They cite section E.6.a.(b), which provides: "When this policy is issued to the owner or general lessee of a building . . . [s]uch building is vacant unless at least 31% of its total square footage is: (i) Rented . . . or (ii) Used by the building owner . . . ." The Luis argue that for a building to be "vacant," less than 31 percent of the building must be in use "when the policy is issued . . . ." But placing this temporal requirement on the vacancy provision nearly eliminates the various coverage provisions related to vacancy in both the policy and the endorsement. The "when" phrase can be more reasonably read to distinguish between when the policy is issued to an owner and when the policy is issued to a tenant. Indeed, the policy provides a separate definition for vacancy "when [it] is issued to a tenant," rather than an owner. Otherwise, as long as a building was not "vacant" at the moment the policy was issued, it would never be vacant regardless of its usage.

ignores the plain language of the second paragraph, which unambiguously states that coverage is limited "at the inception of any vacancy . . . ." (Emphasis added.) The second paragraph places no limit on the vacancy condition restricting coverage—"any" vacancy limits the available causes of loss. Therefore, as explained above, when the insured building satisfies the policy's definition for vacancy, that qualifies as "any vacancy" under the terms of the endorsement, and the inception of that vacancy limits the available causes of loss. Ultimately, the Luis' proposed interpretation improperly integrates the two paragraphs in the endorsement. They apply the 60-day requirement in the first paragraph to the second paragraph despite the fact that the plain language of the endorsement indicates there are separate consequences for (1) the beginning of a vacancy and (2) a vacancy lasting longer than 60 days.

Further, the Luis' interpretation of the endorsement arguably renders the second paragraph superfluous. The first paragraph completely suspends coverage after 60 days of vacancy, while the second paragraph limits the available causes of loss. The second paragraph serves no purpose if it applies only after 60 days of vacancy. No reason exists to limit the available causes of loss after 60 days if, under the first paragraph, no coverage is available at all. "An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used." Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc., 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

The Luis contend that Essex's interpretation of the vacancy endorsement conflicts with other provisions in the policy. Specifically, the Luis point to the vacancy

provisions in section E.6.(b) of the building and personal property coverage form. They claim their interpretation harmonizes the endorsement's provisions with section E.6.(b). But regardless of any conflict between these two sections, the endorsement controls over other policy provisions. Transcon. Ins. Co. v. Wash. Pub. Utils. Dist. Util. Sys., 111 Wn.2d 452, 462, 760 P.2d 337 (1988). The Washington Supreme Court has held that an endorsement controls when it expressly states that it changes the policy:

> An endorsement attached to a policy, which expressly provides that it is subject to the terms, limitations and conditions of the policy, must be read with the policy and will not abrogate or nullify any provision of the policy unless it is so stated in the endorsement. However, if there is ambiguity arising because of the difference of language used in the endorsement and the body of the policy, or between endorsements, the language of the contract is construed most strongly against the insurer.

Transcon., 111 Wn.2d at 462 (emphasis added). Indeed, it is a well-settled principle that endorsements alter and modify the other provisions in an insurance policy. See, e.g., 3 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION §§ 21.01[1], 21.02[2][a] (Jeffrey E. Thomas & Francis J. Mootz III eds. (2010) ("Endorsements are also often issued to modify or remove the effect of existing terms or exclusions contained in the policy form. In these instances, such an endorsement will supersede the term or exclusion in question.").

Here, the endorsement expressly states that it alters the policy. The endorsement is entitled "CHANGE IN CONDITIONS ENDORSEMENT" and states "Please read carefully as this changes coverage under your policy." (Emphasis added.) The end of the endorsement provides: "Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations

of the above mentioned Policy, other than as above stated."[8] (Emphasis added.) Therefore, in accordance with the plain language of the endorsement, we read the endorsement as superseding the policy, specifically section E.6.b. of the building and personal property coverage form. See Transcon., 111 Wn.2d at 462 ("As endorsements are later in time, they generally control over inconsistent terms or conditions in a policy."). The Luis fail to cite any authority compelling us to harmonize the endorsement with the policy's other provisions under the circumstances here.

Finally, the Luis cite policy considerations to support their interpretation of the insurance contract. For instance, they argue that Essex's interpretation restricts coverage the instant a building becomes "vacant" and is therefore 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). Further, they argue that courts view coverage exclusions with strict skepticism:

> The courts liberally construe insurance policies to provide coverage wherever possible. . . . Any remaining ambiguity must be given a meaning and construction most favorable to the insured. Coverage exclusions "are contrary to the fundamental protective purpose of insurance and will not be extended beyond their clear and unequivocal meaning. Exclusions should also be strictly construed against the insurer."

Bordeaux, 145 Wn. App. at 694 (footnotes omitted). But the Luis fail to explain why these considerations should supersede the plain language of the vacancy endorsement.

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[8] At oral argument, the Luis argued that this provision indicates that the endorsement is not intended to alter the rest of the policy. But that provision states only that the endorsement does not change the policy other than as provided in the endorsement. In other words, the endorsement cannot be read to alter any provisions beyond its plain, unambiguous scope. When provisions in the policy conflict with the plain language in the endorsement, however, we must read the endorsement as controlling. Transcon., 111 Wn.2d at 462.

If the plain language of the endorsement is unambiguous, we adopt that meaning. Quadrant, 154 Wn.2d at 171 ("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.").

Alternatively, the Luis argue that even if the vacancy endorsement excludes their claimed loss, the endorsement does not apply because the building was being renovated and therefore was not "vacant." Under the policy's vacancy definition, "Buildings under construction or renovation are not considered vacant." The Luis claim that the building was under renovation because they were preparing for a new tenant. The record shows that the Luis failed to raise this issue below, and we therefore decline to address it on appeal. "As a general rule, appellate courts will not consider issues raised for the first time on appeal." State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a).

We also decline to address the Luis' remaining claims for bad faith, waiver, and estoppel. As discussed above, these remaining issues are not properly before us. Both parties agree that the trial court never ruled on these issues. Further, the trial court explicitly stated it was not granting summary judgment on these issues because of remaining issues of fact. The only issue properly before us in this appeal is the coverage question.

CONCLUSION

Because the plain language of the vacancy endorsement unambiguously limits coverage to only those enumerated causes of loss upon the inception of any vacancy,

we reverse the trial court's ruling construing the endorsement in favor of the Luis. We reverse the trial court's grant of partial summary judgment and remand for further proceedings.

Ann, J.

WE CONCUR:

Trickey, J

Spearman, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

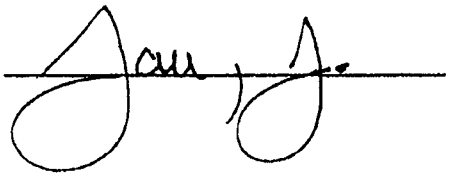
KUT SUEN LUI and MAY FAR LUI, Respondents, v. ESSEX INSURANCE COMPANY, Appellant.	)	NO. 72835-1-I DIVISION ONE ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

The respondents have filed a motion for reconsideration, and the panel has determined that the motion should be denied; therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated this 5th day of May, 2015.

For the panel:



APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KUT SUEN LUI and MAY FAR LUI, Respondents, v. ESSEX INSURANCE COMPANY, Petitioner.	No. 45515-3-II RULING GRANTING REVIEW

Essex Insurance Company seeks discretionary review of the trial court's order on cross-motions for summary judgment and its subsequent order denying reconsideration. Concluding that Essex has demonstrated review is appropriate under RAP 2.3(b)(4), this court grants review.

In 2010, Essex issued a commercial insurance policy to Kut Suen Lui and May Far Lui (the Luis) for an apartment building the Luis owned in Tacoma, Washington. The insurance policy was effective from June 30, 2010 to June 30, 2011. At the time Essex issued the policy, the Luis were renting the building to the Agapé Foundation. However, in early December 2010, Agapé moved out of the building, leaving it completely empty and unoccupied.

APPENDIX C

On or about January 1, 2011, while the building remained empty, a frozen water pipe burst in the building, causing significant water damage. The Luis filed a claim for loss with Essex, which paid portions of the claim after initially determining that the burst water pipe was a covered loss under the policy.[1] Essex later changed its position as to coverage and told the Luis by letter dated February 14, 2012, that it must deny the entire claim because it had learned that the building was vacant and unoccupied at the time of the loss.

Essex relied upon the Change of Conditions Endorsement (Endorsement) contained in the policy, which addressed Essex's obligations when the building was vacant and unoccupied. The Endorsement provided:

> 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 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, Rot or Civil Commotion, unless prior approval has been obtained from the Company.

Mot. for Disc. Rev., App. 3 at 15 (ESSEX00117). Essex told the Luis that, based on the second paragraph of the Endorsement, coverage only extended to the enumerated perils because Essex was not notified of the vacancy until after the loss occurred and never approved coverage for loss caused by water damage.

[1] Essex refused to cover certain portions of the damage under pollution and contaminant exclusions in the policy.

Essex denied any further payment on the claim and the Luis filed a lawsuit against Essex on September 4, 2012, alleging that it wrongfully denied coverage and acted in bad faith in handling the claim. Thereafter, Essex and the Luis filed cross-motions for summary judgment on the issue of whether water damage was a covered cause of loss under the insurance contract.[2] The Luis argued that, according to the original policy and the Endorsement, the building must be vacant for 60 days before Essex could deny coverage for water damage.[3] They also argued that, at best, the vacancy provision was ambiguous and thus must be interpreted in favor of coverage. Essex argued that the vacancy provision in the Endorsement was unambiguous, as it provided that: (1) immediately upon vacancy or unoccupancy of the building, only the enumerated perils in paragraph two of the Endorsement were covered causes of loss; and (2) after 60 days of vacancy or unoccupancy of the building, all coverage was suspended, including loss caused by the enumerated perils.[4]

On August 30, 2013, the trial court concluded that the vacancy provision in the Endorsement contained conflicting language and thus should be resolved in favor of the Luis. It found that the "inception" language in the vacancy provision of the Endorsement

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[2] The Luis also asked the trial court to find that: (1) Essex waived its right to deny coverage based on its unqualified acceptance of coverage on May 26, 2011; and (2) Essex was estopped from claiming that exclusions in the policy did not provide coverage after expressly accepting coverage.

[3] The Building and Personal Coverage Form provided that Essex would not pay for loss caused by water damage if the building had been vacant for more than 60 days.

[4] Essex did not address the conflict between the Endorsement and the Building and Personal Coverage Form or which provision prevailed.

did not automatically suspend coverage for water damage. Mot. for Disc. Rev., App. 8 at 24 (Report of Proceedings (RP) Aug. 30, 2013). Therefore, it denied Essex's motion for summary judgment and granted the Luis' motion for summary judgment on this narrow issue.[5] The court denied Essex's motion for reconsideration but certified the issue for immediate appellate review under RAP 2.3(b)(4). The trial court found that immediate review of the matter would materially advance the ultimate termination of the litigation because the legal interpretation of the insurance contract was a fundamental issue in the case, upon which other issues between the Luis and Essex depended. It also found that appellate review would reduce the risk of a needless trial and the potential for future appeals, thereby preserving judicial resources and promoting judicial economy. Essex moved for discretionary review.

ANALYSIS

This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

[5] The trial court did not rule on the value of the Luis' claim, whether estoppel or waiver applied, or if Essex acted in bad faith, stating that such issues were issues of fact.

RAP 2.3(b). Essex seeks discretionary review under RAP 2.3(b)(4).

Essex argues that discretionary review is warranted because interpretation of the vacancy provision involves a controlling question of law, as to which there is substantial ground for a difference of opinion. It asserts that the vacancy provision in the Endorsement is clear and unambiguous, with the second paragraph limiting coverage to the enumerated causes of loss immediately upon the building becoming "vacant" as defined in the policy, i.e., usage of the building drops below 31 percent, not after the building has been vacant for 60 days.[6] Mot. for Disc. Rev. at 11. Based on this interpretation of the contract, the Luis' claim for loss would not be covered under the policy because the building was vacant when the loss occurred and because water damage is not one of the enumerated perils. Thus, Essex argues that the Luis are not entitled to any additional policy proceeds and cannot succeed on their claim that Essex acted in bad faith, making a trial useless.

The Luis argue that the vacancy provision in the Endorsement is ambiguous at best, which must be resolved in favor of coverage. They assert that coverage is not limited to the enumerated causes of loss until the building has been vacant or unoccupied for 60 days, thus making water damage a covered cause of loss under the policy. The Luis also argue that review of the trial court's decision would not materially

[6] Essex cites to a number of non-Washington cases and argues that no other court in the United States has read a 60-day waiting period into the definition of "vacancy," as the trial court did here. Mot. for Disc. Rev. at 12. However, the trial court did not re-define when the building was considered "vacant." It merely determined that the limitations on coverage became effective after the building had been vacant for 60 days.

advance the ultimate termination of the litigation because their other claims involving estoppel, waiver, and bad faith must be resolved at trial.

The determination of whether a contract contains an ambiguity is a question of law that this court reviews de novo. *Syrovy v. Alpine Res., Inc.*, 122 Wn.2d 544, 551 n.7, 859 P.2d 51 (1993). A contract is considered ambiguous when it is "[c]apable of being understood in either of two or more possible senses." *Ladum v. Util. Cartage, Inc.*, 68 Wn.2d 109, 116, 411 P.2d 868 (1966) (quoting Webster's New International Dictionary (2d ed.)). If two or more reasonable meanings exist, then Washington follows an objective manifestation test looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998). The parties' objective intent is a question of fact that this court reviews for substantial evidence. *Kenney v. Read*, 100 Wn. App. 467, 475, 997 P.2d 455, 4 P.3d 861 (2000). However, if no objective manifestation of intent can be discerned from the facts presented, then the ambiguity is interpreted against the drafter. *Wash. Prof'l Real Estate LLC v. Young*, 163 Wn. App. 800, 260 P.3d 991 (2011), *review denied*, 173 Wn.2d 1017 (2012).

Given the parties' differing positions as to whether the vacancy provision in the Endorsement is ambiguous, this court concludes that the trial court's order on cross-motions for summary judgment involves a controlling question of law, as to which there is a substantial ground for a difference of opinion. Immediate review of the trial court's order may materially advance the ultimate termination of the litigation, as it would significantly change the scope of the 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 was not covered under the policy, the trial would include the waiver and estoppel claims. Accordingly, it is hereby

ORDERED that Essex's motion for discretionary review is granted.

DATED this 16th day of December, 2013.

Eric B Schmidt
Eric B. Schmidt
Court Commissioner

cc: Michael McCormack
Janis C. Puracal
J. Dino Vasquez
Jacque E. St. Romain
Thomas D. Adams
Hon. Susan K. Serko

OFFICE RECEPTIONIST, CLERK

To: Heather Hattrup
Subject: RE: Petition for Review for Filing

Rec'd 6/4/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Heather Hattrup [mailto:hhattrup@karrtuttle.com]
Sent: Thursday, June 04, 2015 1:42 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Petition for Review for Filing

Attached for filing please find a Petition for Review.

Kut Suen Lui and May Far Lui v. Essex Insurance Company
Court of Appeals No. 72835-1-I

Heather Hattrup filing on behalf of
J. Dino Vasquez, WSBA #25533
Thomas D. Adams, WSBA #18470
Jacque E. St. Romain, WSBA #44167