SUPREME COURT OF THE
STATE OF WASHINGTON

Case No. 91777-9

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

KUT SUEN LUI and MAY FAR LUI,

Plaintiffs/Petitioners,

v.

ESSEX INSURANCE COMPANY

Defendant/Respondent.

ANSWER TO PETITION FOR REVIEW

Submitted by:

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I. INTRODUCTION

The Luis have wrongly petitioned the Court for review of an interlocutory decision under RAP 13.4 (rather than the proper RAP 13.5). In so doing, the Luis have failed to address any considerations that would warrant the Court's discretionary review of an interlocutory decision. Because the Luis have failed to address the considerations of RAP 13.5(b), their petition should be denied.

Moreover, the Court of Appeals did not err in reversing the trial court's grant of partial summary judgment.

II. ISSUE PRESENTED FOR REVIEW

1. Petitioners (the "Luis") seek review of the Court of Appeal's interlocutory decision, which reverses the trial court's ruling on partial summary judgment and remands the case for further proceedings. Does the Court of Appeal's decision merit discretionary review under RAP 13.5(b)?

III. STATEMENT OF THE CASE

Factual Background

1. The Insurance Policy

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

Attendant with the higher risk involved with the Luis' property, and consistent with the higher risk involved with any vacant property, the policy includes a Vacancy/Unoccupancy Provision that (1) restricts coverage to certain causes of loss "at the inception of any vacancy or unoccupancy," and (2) suspends coverage entirely if the building is vacant or unoccupied "beyond a period of sixty consecutive days." (CP 278) The policy specifically

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

defines a building as "vacant" unless "at least 31% of its total square footage is" rented and used to conduct customary operations. (CP 290)

2. The Vacancy

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

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

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

3. The Sprinkler Leak

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

Essex learned during its investigation that Agapé had vacated the premises; that no new tenant had taken Agapé's place; and that the building was not undergoing any construction or renovation during the period of vacancy and unoccupancy. (CP 324, 339, 355-58) Essex then denied any further payment to the Luis based on the

Vacancy/Unoccupancy Provision. (CP 577) Essex did not demand the Luis return the nearly $300,000 windfall that Essex had paid. (CP 577) Despite the fact that Essex had never promised more money that it paid, the Luis still demanded more and filed this lawsuit alleging Essex improperly denied coverage and acted in bad faith. (CP 3)

4. Undisputed Facts

It is undisputed that:

- Agapé moved out of the building on December 3, 2010 (CP 324, 339, 355);
- the building was left completely empty and unoccupied (CP 358, 364);
- the Luis did not have a new tenant at the building at the time of the loss on January 1, 2011 (CP 323-24, 330-32, 339);
- the property was not under construction or renovation at the time of the sprinkler leak (CP 356-58, 364-66);

- the Luis did not request or obtain approval from Essex for continued coverage during the vacancy (CP 227); and
- the damage was caused by a sprinkler leak (CP 4).

Procedural History

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

The trial court granted the Luis' motion for summary judgment and denied Essex's motion, finding the Vacancy/Unoccupancy Provision ambiguous. The trail court declined to rule for either party on other issues, including bad faith. (CP 690) By order dated October 11, 2013, the trial court denied Essex's motion for reconsideration, but granted Essex's request to certify the matter to this Court. (CP 852) Division II granted

certification under RAP 2.3(b)(4) on December 16, 2103, and transferred the appeal to Division I on December 3, 2014.

By order dated April 6, 2015, the Appellate Court for Division I found that the Vacancy/Unoccupancy Provision unambiguously limits coverage upon the inception of any vacancy. In so doing, the Court of Appeals reversed the trial court's grant of partial summary judgment and remanded the case to the trial court to address unresolved issues that were not subject to the trial court's original certification order issued pursuant to RAP 2.3(b)(4). The Luis moved the Court of Appeals for reconsideration on April 27, 2015. The Court of Appeals denied the Luis' motion for reconsideration on May 5, 2015.

IV. ARGUMENT

A. The Luis failed to properly move for discretionary review of the Appellate Court's interlocutory decision.

The Luis petitioned this Court for review incorrectly under RAP 13.4(b). Even so, they did not address the considerations governing acceptance of review under that

RAP. By any measure, the Luis' reliance on RAP 13.4(b) as a vehicle for review is incorrect.

The matter before this Court is an interlocutory decision for which the considerations for review are set out in RAP 13.5. Under RAP 13.5(b), the Court should grant discretionary review of an interlocutory Court of Appeals decision if:

> (1) the Court of Appeals has committed an obvious error which would render further proceedings useless, or
>
> (2) the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act, or
>
> (3) the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 13.5 (b).

Notably, the Court's denial of discretionary review does not affect the right of a party to obtain later review of the Court of Appeals' decision or issues pertaining to that decision. RAP 13.5(d).

Published case law interpreting the considerations of RAP 13.5(b) is scarce. Similar considerations govern under RAP 2.3(b)(1)-(3).[2] In interpreting those provisions Washington courts have found that although obvious or probable error by the trial court may warrant discretionary review, courts do not favor interlocutory review. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 21 P.3d 1157 (2001), review granted 145 Wn.2d 1001, 35 P.3d 381, remanded 146 Wn.2d 370, 46 P.3d 789, certiorari denied 124 S.Ct. 1147, 540 U.S. 1149, 157 L.Ed.2d 1043, rehearing denied 124 S.Ct. 1708, 541 U.S. 957, 158 L.Ed.2d 394.

Interlocutory review is available in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest. When seeking interlocutory review, counsel is urged to argue with specificity: (1) the criteria they are relying on, (2) why the challenged ruling was sufficiently erroneous to meet the

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[2] Notably, discretionary review of the trial court's decision here was based exclusively on RAP 2.3(b)(4).

applicable rule criterion, and (3) how that error established the relevant harm threshold." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 232 P.3d 591 (2010).

The Luis' petition altogether fails to address these factors. For that reason alone, the Luis petition should be denied. Moreover, the Luis seek review of an order that reverses the trial court's grant of partial summary judgment and remands the case to the trial court for further proceeding. Under *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999), it would be highly unusual for this Court to grant a review under these circumstances.

B. No review should be granted under the considerations of RAP 13.5(b).

1. The Appellate Court did not commit obvious error that would render further proceedings useless.

RAP 13.5(b)(1) requires that the Court find that (1) the Court of Appeals committed "obvious error" and (2) that the error renders further proceedings "useless."

Here, the Appellate Court did not err. The Vacancy/Unoccupancy Provision provides:

Coverage under this policy is suspended while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days, unless permission for such vacancy or unoccupancy is granted hereon in writing and an additional premium is paid for such vacancy or occupancy.

Effective, at the inception of any vacancy or unoccupancy, the Causes of Loss provided by this policy are limited to Fire, Lightning, Explosion, Windstorm or Hail, Smoke, Aircraft or Vehicles, Riot or Civil Commotion, unless prior approval has been obtained from the Company.

(CP 278)[3]

Vacancy is specifically defined in the policy as:

6. Vacancy

a. Description Of Terms

(1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in **(1)(a)** and **(1)(b)** below:

. . .

(b) When the policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant

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

> 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.

The plain language of the policy provides that the property is deemed "vacant" immediately upon the happening of a specified condition—usage of the building dropping below 31%. Thus, the first paragraph of the Vacancy/Unoccupancy Provision (the "Suspension Clause") suspends coverage entirely if the insured building is vacant or unoccupied for more than 60 consecutive days. The second paragraph (the "Restriction Clause") restricts coverage when the building is vacant or unoccupied, but has been vacant or unoccupied fewer than 60 consecutive days. In that situation—i.e., whenever the building is vacant or unoccupied—coverage is provided only for specified causes of loss, none of which apply to the present loss.

It is undisputed that the building was vacant at the time of the loss and not under construction or renovation. The Court of Appeals determined that the policy unambiguously restricted the Luis' coverage to the specified causes of loss enumerated in the Restriction Clause. The sprinkler leak was not among those enumerated specified causes; there was no coverage.

The Court of Appeals "construed [the policy] according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by [the] . . . endorsement . . . attached to and made part of the policy" as required by RCW 48.18.520 and, further, gave the policy a "fair, reasonable, and sensible construction as would be given 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).

The Court of Appeals relied on Washington precedent and cases in other jurisdiction that have found that vacancy provisions are reasonable, should be enforced as other

contract provisions, and they reflect the increased risk posed by a vacant building. *See Heartland Capital Invs., Inc. v. Grange,* 2010 WL 432333 (C.D. Ill. 2010); *Rojas v. Scottsdale Ins. Co.,* 678 N.W.2d 527, 533 (Neb. 2004); *Brehm Lumber Co. v. Svea Ins. Co.*, 36 Wn. 520, 524, 79 P.34 (1905).

The Court of Appeals rejected the Luis' argument that the Vacancy/Unoccupancy Provision is ambiguous. The Court of Appeals properly found that the Luis' interpretation of the provision was unreasonable and contradicted the policy's plain meaning. In finding the Luis' interpretation unreasonable, the Court of Appeals cited to Washington precedent for the meaning of "inception." *Panorama Vil. Condo Owners Ass'n Bd of Dirs. v. Allstate Ins. Co.,* 144 Wn.2d 130, 139, 26 P.3d 910 (2001). Moreover, in accordance with Washington precedent, the Court of Appeals also interpreted the policy in a fashion gives effect to all the policy's provisions and enforces the clear and unambiguous language of the policy. *Snohomish County Pub. Transp. Benefit Area Corp. v.*

FirstGroup Am., Inc., 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

The Luis do not identify how the Court of Appeals committed obvious error. The Court of Appeals interpreted the policy pursuant to established Washington precedent. The Luis offer no precedent that contradicts the Court of Appeals' interpretation.

Even if the Court of Appeals committed obvious error, the Luis must establish that the decision renders further proceedings useless. It cannot do so. Further proceedings are pending, i.e. the trial court has not addressed issues such as bad faith and waiver. The Court of Appeals' decision does not render those further proceedings useless.

Nothing prohibits the Luis from requesting review of the Court of Appeals' decision after a final decision. In fact, RAP 13.5(d) ensures the Luis' concerns can be heard after final resolution of this matter.

2. The Appellate Court did not commit probable error that alters the status quo or substantially limits the freedom of a party.

The Court of Appeals' decision was neither an obvious nor probable error. But even if one considers the probable error standard further, the Luis cannot prevail. Probable error must alter the status quo or substantially limit the freedom of a party. Our Appellate Courts recognize that, "[r]ead literally, nearly every trial court decision alters the status quo or limits a party's freedom to act to some degree and, at least arguably, substantially." *State v. Howland*, 180 Wn. App. 196, 206-208, 321 P.3d 303, 308 - 309 (2014).[4] The *Howland* court instructs litigants to remember the rule was first intended to "apply 'primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right.'" *Id.* (quoting Geoffrey Crooks, Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure, 61

[4] *State v. Howland* involved construction of RAP 2.3(b) which applies the same standards for discretionary review as RAP 13.5(b).

Wash. L. Rev., 1541, 1545–46. (1986)). Thus, discretionary review of a interlocutory decision should "be accepted only when a trial court's order has, as with an injunction, an immediate effect outside the courtroom." *Id.* "But where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2). Errors such as these are properly reviewed at the conclusion of the case where they may be considered in the context of the entire hearing or trial." *Id.*

Here, the Court of Appeals' order has no immediate effect outside of the courtroom. No reason exists for this Court to undertake discretionary review at this time.

3. The Court of Appeals has not departed from the accepted and usual course of judicial proceedings.

Procedurally, the Court of Appeals heard the trial court's certification under RAP 2.3(b)(4). By so certifying, the trial court recognized there were substantial grounds for a difference of opinion between the parties, and immediate

review would materially advance the ultimate termination of the litigation. The Court of Appeals granted discretionary review on this basis and rendered its decision. The Court of Appeals acted well within its power in denying the Luis' motion for reconsideration. Because the Court of Appeals has not departed from the accepted and usual course of judicial proceedings, the Luis' petition fails to meet the requirements of RAP 13.5(b)(3) and therefore discretionary review cannot be granted on this basis.

V. CONCLUSION

The Luis' failure to submit a motion to this Court for review under RAP 13.5(b), and failure to address the considerations set out therein, is fatal to their petition for discretionary review. Beyond the Luis' procedural failure to address the necessary considerations of RAP 13.5(b), this case does not qualify under the substantive factors necessary for discretionary review before this Court. Thus, Essex respectfully requests that the Court deny the Luis' petition.

DATED: July 9, 2015

BULLIVANT HOUSER BAILEY PC

By _____
Michael McCormack, WSBA #15006

Attorneys for Essex Insurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of July, 2015, I caused the foregoing to be served to the following persons in the manner indicated below:

J. Dino Vasquez Jacque E. St. Romain Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle, WA 98104	☒ ☐ ☐	via hand delivery. via first class mail. via email.

I declare under penalty of perjury under the laws of the state of Washington this 10th day of July, 2015, at Seattle, Washington.

Michael McCormack

15614275.1

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Attached is Respondent Essex Insurance Company's Answer to Petition for Review.

Case name: Lui v. Essex Insurance Company

Case number: 91777-9

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