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DIVISION II
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
NO. 34214-6-II

PAULA STONE and JOHN F. FANNING.,
wife and husband and the marital community composed thereof,

Plaintiffs-Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Respondent.

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. LEGAL ISSUES

1. Whether the trial court erred in dismissing the lawsuit because Appellants evidence, including the declarations submitted when moving for reconsideration, created a genuine issue of material fact regarding whether Appellants' actions or conduct breached the notice provisions of the insurance policy.

2. Whether the trial court erred in dismissing the lawsuit because Appellants evidence, including the declarations submitted when moving for reconsideration, created a genuine issue of material fact regarding whether Safeco was actually and substantially prejudiced by Appellants' actions or conduct.

3. Whether the trial court erred in dismissing the lawsuit because Appellants evidence, including the declarations submitted when moving for reconsideration, created a genuine issue of material fact regarding whether estoppel/waiver should be applied to Safeco's conduct.

B. STANDARD OF REVIEW

The appellate court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court and assuming facts most favorable to the nonmoving party. *Tornetta v. Allstate Insurance Co.*, 94.

Wn. App. 803, 808, 973 P.2d 8 (1999). To grant a summary judgment motion, the evidence, admissions and pleadings must show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. CR 56. All material allegations of the non-moving party must be taken as true. *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1400 (9th Cir. 1989).

In ruling on a motion for summary judgment, the Court must consider all of the material evidence and all inferences from the evidence most favorable to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992).

The burden is on Defendants, the moving party, “to demonstrate that there are no issues as to a material fact, and the moving party is held to a strict standard.” *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. *Atherton Condominium Ass’n v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). A material fact is one upon which the outcome of the case depends, in whole or in part. *Id.* The court should grant the motion only if, from all the evidence, reasonable persons could reach but

one conclusion. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

An insurer is not relieved of its duty to pay an insured's claim on the basis of the insured's breach of the insurance contract unless the insurer is actually and substantially prejudiced thereby. Whether the insured breached the insurance contract and whether defendant was prejudiced thereby are questions of fact. Prejudice is presumed only in extreme cases. *Pederson's Fryer Farms, Inc. v. Transamerica Insurance Co.*, 83 Wash.App. 432, 922 P.2d 126 (1998).

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

1. Water Incidents

There are three specific water incidents which give rise to Appellants' claims. First, an accidental water release caused damage to Appellants' bathroom in January 1996. Safeco adjusted the claim and paid for the repair of pipes under the bathroom sink. Safeco internally recorded but failed to disclose to Appellants its observation that there was (i) a "bad mildew odor;" and (ii) "water under the home directly under the bathrooms." Appellants did not find out this information until discovery was underway in this lawsuit. (CP 419, 425, 426.)

Second, an accidental water release in October 2001 caused damage to Appellants' hall bathroom. Appellants took reasonable steps personally to effect repair of a broken valve and were unaware that the broken valve had caused a substantial water intrusion until August 2002. (CP 419.) This was the incident which was the central focus of the summary judgment motion.

Third, in June 2002 there was an accidental water release with respect to the dishwasher in the kitchen. (CP 419.)

2. Notice to Safeco

In April 2002 Plaintiff linked a growing pattern of nagging health problems with visual observation of mold in the master bedroom bathroom at the home. Appellants reported the claim to Safeco in May 2002. (CP419.)

Safeco sent Mr. Hess to investigate the claim. The majority of Mr. Hess' work involves investigating automobile accident claims. He has no particular expertise in construction methods or investigating wall intrusion claims. (CP 474.) Mr. Hess did not observe any obvious water intrusion issues. (CP 476.) Mr. Hess did not advise Ms. Stone of any steps to take to clean up or otherwise mitigate the mold which he did observe. (CP 419.)

Approximately two weeks later, on May 27, 2002, Safeco issued a coverage decision denying the claim. (CP 419.) Safeco treated the claim

as purely a mold claim. Safeco conducted its investigation with the aim of denying or minimizing the claim. Safeco denied the claim without performing a reasonable investigation of the water intrusion issues which caused the mold to develop in the home or the full extent of damage to the home. Safeco did not engage an engineer, architect, industrial hygienist or other qualified consultant to investigate the full extent of physical damage at the home and to provide a reasonable repair plan. (CP 419.) Safeco did not advise Appellants of the risks associated with water intrusion or mold growth or make a good faith effort to minimize the risk of further damage from these conditions. (CP 419.)

In the coverage letter Safeco invited and encouraged Appellants to present additional facts or analysis supporting the claim. Safeco asserted that they “stand ready to review any additional facts or analysis you (Ms. Stone) wish to provide.” (CP 428-430.) It was the policy within Safeco to provide the insured the option of getting back a hold of them should she find additional damages or another cause that Safeco had not addressed and the letter was implementing this policy. (CP 471.)

3. Investigations at the Home

On or about August 5, 2002, Energy Options Northwest, at the request of Appellants, inspected the home to determine the causes and extent of reported water damage and mold contamination. (CP 420, 432-437.) Their investigation uncovered an array of obvious water intrusion problems with the home, including evidence of sudden, accidental water damage in the bathrooms and kitchen. (CP 420-421, 432-437.) This investigation is also the source of Appellants' knowledge regarding the scope and severity of the water problems which occurred on October 2001 and June 2002. (CP 419.)

Energy Options Northwest also uncovered water intrusion at the exterior siding on the south side of the home and water leaks at plumbing stack penetrations through the roof. (CP 432-437.) Energy Options Northwest discovered that all the drywall on the walls and ceilings in both bathrooms were damaged by water or mold and removed the drywall. (CP 432-437.) The remaining framing materials, which up to this time were hidden from view, showed clear signs of water staining and heavy mold growth in the wall cavity behind the tub faucet. (CP 432-437.) Energy Options Northwest further discovered that the underlayment and sub-floor below the kitchen cabinet, as well as an area of wall behind it, were wet and moldy. (CP 432-427.) This material was also removed.

In the course of its investigation Energy Options Northwest conducted environmental sampling and found evidence of growth of certain molds that grow indoors in damp environments, including *Stachybotrys Charatum*, *Penicillium*, *Chaetomium*, *Cladosporium*, *Aspergillus* and others that produce very toxic poisons. (CP 433.) Energy Options Northwest worked to remediate the damage, removing contaminated materials and replacing portions of walls and floor underlayments and cleaning surfaces of moldy studs exposed. (CP 434.)

On or about August 9, 2002, American Management Associates, LLC, at the request of Plaintiffs, also conducted an additional investigation and found more mold contamination in bathroom walls, kitchen decking and master bedroom sheet rock. (CP 421, 439-448.)

On September 27, 2002, Plaintiff's counsel wrote an extensive letter to Safeco forwarding them the results of the investigations and requesting Safeco to re-evaluate its coverage position, withdraw its denial letter and accept the claim. (CP 421, 450-452.)

On October 3, 2002, Safeco agreed to investigate the information presented in the Energy Options Report and to determine the applicability of coverage under Appellants' insurance policy. (CP 472, 473, 495-596.)

4. Ms. Stone's Health Problems

On or about July 25, 2002 Ms. Stone consulted with Dr. John H. McAnulty, MD of Oregon Health and Science University. Plaintiff was advised at that time to move out of her house until the mold could be eliminated from the home. (CP 453.)

Ms. Stone has developed extensive and serious personal injuries from hyper-sensitivity to mold. Ms. Stone has been physiologically impacted by significant exposure to mycotoxin producing molds including *Stachybotrys Chartarum*, *Aspergillus*, *Penicillium*, *Chaetomium* and others. Among other medical conditions brought on by this exposure she suffers from Toxic Encephalopathy and at times life threatening allergic reactions brought on by Immune System Dysfunction as well as Asthma and Reactive Airway Disease. (CP 320, 324, Appendix C, CP 421-422.) Ms. Stone experiences both anaphylactic and allergic reactions to many things including food, medication and even the environment around her. (CP 324.) These injuries are permanent and provide many restrictions and limitations on Ms. Stone's day-to-day living. (CP 324.)

On or about March 17, 2004 the City of Vancouver issued a Notice and Order to Vacate, Repair or Demolish the Stone residence and classified it as a dangerous building. (CP 421, 460-468.) Harriet Amman, Senior Toxicologist for the Washington State Department of Health,

determined that the house, more than likely, cannot be restored to a condition that would allow Appellants to return and live at the home. (CP 468.)

B. PROCEEDINGS

On October 17, 2002 Paula Stone and John Fanning filed this lawsuit against Safeco Insurance Company. (CP 3.) On November 21, 2002 Safeco file its answer and affirmative defenses. (CP 6.)

On April 10, 2003 Appellants filed the First Amended Complaint which pleaded facts about each of the three water incidents involved in this lawsuit. (CP 11.)

On August 1, 2003 Appellants filed the jury demand. (CP 17.)

On July 1, 2003, Respondent's counsel took the deposition of Ms. Stone. At the time of the deposition, Ms. Stone was quarantined to her home. Ms. Stone was taking Benadryl and had concerns that it would inhibit her ability to give accurate and complete answers to questions. (CP 181.)

The parties attended mediation on December 22, 2003. The mediation was held at Ms. Stone's residence because she was still quarantined due to her poor health.

On February 6, 2004 Respondent filed the Motion for Summary Judgment. (CP 18.)

On February 19, 2004 Plaintiff filed a motion for abatement of the trial proceedings due to Ms. Stone's poor medical condition. (CP 319.)

On February 20, 2004 the Court issued an order confirming a trial date of March 22, 2004. (CP 330.) Thereafter, the Court issued an order of abatement and the trial date was stricken. (CP 330.)

On June 13, 2004 Appellants' counsel withdrew from the case

On January 7, 2005, The Law Offices of Daniel S. McMonagle filed an appearance on behalf of Appellants. (CP 368-371.)

On June 22, 2005 Appellants filed Plaintiff's Opposition to Defendant's Motion for Summary Judgment. (CP 387.)

On September 2, 2005, oral argument was held on the motion. (CP 583.) On September 28, 2005, the court issued its decision granting Defendant's Motion for Summary Judgment. (Appendix A.) The trial court determined that the undisputed material facts were that Appellants were aware of the water intrusion in October of 2001: "While they may not have known of the consequences of the leak, the fact that water had leaked into the wall was acknowledged." Appendix A. The court ruled that Appellants' failure to notify or take immediate remediation action exposed Safeco to a substantial increase in damages and therefore, Safeco was substantially prejudiced by the lack of notice. (Appendix A.)

On October 13, 2005, the court issued the Summary Judgment Order. (CP 608.) Judgment was entered on November 23, 2005 dismissing Appellants' claims.

On December 5, 2005, Appellants filed the Motion for Reconsideration (CP 620.), including the declarations of John Fanning and Paula Stone, which clarified and strengthened the facts regarding Appellants' actions, conduct and knowledge of water intrusion at the time of the October 2001 water incident.

On December 21, 2004 Appellants filed the Notice of Appeal. (CP 647.)

On January 9, 2006, after reviewing and considering the new declarations, the court issued an order denying the motion for reconsideration and forwarded it to the Court of Appeals. (Appendix B, CP 652-653.) The court again relied solely upon deposition testimony of Paula Stone and ruled that the new information set forth in the declarations amounted to self-impeachment

III. ARGUMENT

A. SUMMARY OF ARGUMENT

This lawsuit arises out of a claim for water damage at the Stone residence. In a nutshell, Appellants allege that Safeco improperly denied

coverage for their water damage claim and failed to adequately investigate the claim.

It is undisputed that there are multiple water intrusion problems at the residence which have created a wet environment in which toxic mold has flourished in the wall cavities and beneath the floors. It is undisputed that Ms. Stone has suffered severe personal injuries by exposure to toxic mold at the home. It is undisputed that the home has been classified as a dangerous building. It is undisputed that Safeco denied coverage without hiring any constructional professionals or industrial hygienists to investigate the claim. It is undisputed that the resulting mold contamination would ordinarily be covered under the insurance policy.

Safeco's only real defense is that the homeowners failed to provide timely notice of the claim and that Safeco was somehow prejudiced thereby.

Appellants' first-party property insurance policy provides coverage on an "all risk" basis. The nature of this property insurance policy is that the insurer is liable for an open ended risk that may escalate over time. This is the reason that it is Safeco's policy to provide the insured the option of getting back a hold of them should she find additional damages or another cause that Safeco had not addressed. Ultimately, the question is whether the average person purchasing insurance would believe that he or

she assumed the risk of mold growing behind the bathroom walls and underneath the kitchen floor when he or she repaired a bathtub valve or cleaned up a flooded floor from a dishwasher hose that burst.

A jury should determine whether the ten month time period which it took for the facts to become fully uncovered was reasonable under the circumstances of this claim. A jury should determine whether Safeco was actually and substantially prejudiced by Appellants' actions.

A jury should determine whether Safeco's actions reflected in the stream of correspondence from May 2002 through September 2002 contemporaneously indicated that they would consider the claim or whether it served as an estoppel/waiver of any objections they may have had to timely notice.

B. LEGAL ANALYSIS

1. Safeco Admits the Insurance Policy Covers the Claim

Under Washington law mold damage which is an ensuing loss or resulting damage from a covered loss is clearly covered under the insurance policy. This is made possible because Washington recognizes the efficient proximate cause doctrine. In *Safeco Ins. Co. of America v. Hirschmann*, 112 Wn.2d 621, 773 P.2d 413 (1989), the Washington Supreme Court, relying upon its prior decisions, expressly held that “when an insured risk sets into operation a chain of causation in which the last

step may be an excluded risk, the (anti-concurrent clause) exclusion will not defeat recovery.” *Hirschmann* at 417. Several recent decisions apply the “efficient proximate cause” analysis to mold claims in order to grant coverage. *Bowers v. Farmers Insurance Exchange*, 99 Wn. App 41, 991 P.2d 734 (2000); *Thomas and Karen DePhelps v. Safeco Insurance Company*, 116 Wn. App. 441, 65 P.3d 1234 (2003).

Appellants’ counsel took the deposition of the three claims representatives that handled Appellants’ claim. Each of them admitted that the mold damage that resulted from water releases of the type asserted by Appellants would be covered under a reasonable interpretation of the insurance policy.

With respect to assertion that “On or about October 25, 2001, a valve broke in the Fanning’s bathtub and ran down behind the inside of the wall between the bathtub and the master bath shower” Mr. Halladin, Safeco’s Claim Supervisor, agreed:

a. the valve breaking has the potential to be a sudden loss that would be a covered event. (CP 473, 497.)

b. the fact that mold, if it developed, was caused or developed from a covered loss would make that a possibility of a covered event. (CP 473, 498.)

c. If the mold develops spores and disperses through the house and ruined furniture or ruined clothes that that could also be a covered event. (CP 473, 499.)

d. If you had to vacate the home as a result of the mold spores spewing through the house, that has a potential for being a covered event as well: the loss of use of the home. (CP 473, 499-500.)

e. If the home had to be demolished because mold had infested the home, the value of the home itself could potentially be a covered event as well. (CP 474, 500.)

Mr. Peters, Safeco's Claim Adjuster and author of the coverage letter, testified that there would be coverage for mold when it was an ensuing loss or resulting from a covered loss. Mr. Peters provided the following example:

“What that means is that if, for instance, a washing machine hose bursts while the homeowner was out of town for a day, and they came back and there was water everywhere and mold grew specifically related to that washing machine line burst, then there would be coverage for the cleanup of the water and the mold and that kind of thing.” (CP 477, 548.)

Mr. Peters used the following examples to illustrate the type of damage due to water leaks that would be covered under the Safeco insurance policy:

“Based on my understanding of this policy, what would be considered sudden or direct accidental water losses, which would include losses such as a sudden break of a water line, for instance, the water line to the washing machine, toilet supply lines sometimes go; for instance if somebody left a bathtub running and forgot about it and it overflowed, overflow of the toilet is also not an uncommon loss, something that happens suddenly and accidentally and causes damage.” (CP 477, 549.)

Mr. Peters testified as follows:

“If a water pipe breaks, and the release of water occurs, and they contact their insurance company, and they follow the conditions of the policy and assist us in investigating the claim, allow us to inspect the damage, and we inspect the damage, there’s water damage and resulting mold growth related directly to that water damage, then it’s in most cases probably going to be covered.” (CP 478, 550.)

Mr. Hess, Safeco’s field representative, worked on two prior mold claims where there was coverage. The first was a roof leak around an attic vent. Mold was discovered growing on the underside of the roof sheathing and on some of the trusses and the insurance company paid for the remediation of the mold. (CP 474, 475, 527, 528.) The second was a water pipe that burst in a townhome. There was mold that was on the studs behind the drywall. The mold developed where water seeped into a couple of walls. (CP 474, 475, 526.)

Clearly the fact patterns of each of the incidents described by Safeco’s claims adjusters are identical to the three water incidents which

occurred at Appellants' residence. There are certainly material issues of fact regarding coverage for each of the various water damage claims that precluded summary judgment.

2. Material Issues of Fact Surrounding October Incident

The Court's Opinion provides:

“The undisputed material facts are that the plaintiffs were aware of the water intrusion in October of 2001. While they may not have known of the consequences of the leak, the fact that water had leaked into the wall was acknowledged.” (Appendix A.)

The court reached this conclusion based upon excerpts from Ms. Stone's deposition. In the opposition papers to the summary judgment, Appellants submitted a Declaration of Ms. Stone which stated that her husband took reasonable steps to repair the broken valve and that she was unaware that the broken pipe had caused a substantial water intrusion until the walls were opened by Energy Options Northwest in August 2002. (CP 419.)

After the court issued the opinion granting summary judgment counsel sat down with Ms. Stone to explain the court's decision. At that time Ms. Stone advised that the deposition testimony cited by Safeco's counsel was misleading because it appeared to summarize what she observed at the time of the incident. (CP 628-629.) In reality, she was

testifying based upon the facts which she knew at the time of the incident, combined with the facts that she subsequently learned when the walls in the bathroom were opened up by Energy Options Northwest, in August 2002. (CP 629.) Ms. Stone further advised that she was very ill and heavily medicated at the time of her deposition. (CP 181.)

To clarify this issue, and in order to ensure that substantial justice was done, Appellants submitted additional declarations of Paula Stone and John Fanning which specifically addressed their knowledge of what occurred with respect to the October, 2001 water incident. (CP 628, 631. The Court should note that while Mr. Fanning's deposition was scheduled, once the case was abated counsel never took the deposition.) This testimony emphasized that on the day of the incident, Mr. Fanning and Ms. Stone could not observe any water gushing behind the wall. (CP 629, 633.) All they could observe was water gushing into the bathtub and down the outside of the tile wall. (CP 629, 632.) Mr. Fanning's declaration establishes that both at the time the incident occurred and at the time that he made the repairs to the hot water valve, he had no reason to believe that any water had discharged behind the tile wall or inside the tile wall. It was not possible to look inside or behind the wall. (CP 633.)

In August, 2002, Energy Options Northwest took apart the bathroom walls. Mr. Fanning was surprised to find that a lot of water had

penetrated behind the tile wall enclosure. (CP 633.) In addition, the wall space between the hallway bathroom wall and the master bedroom bathroom wall was open so that any water that penetrated behind the wall migrated into the master bedroom bathroom as well. (CP 634.) Significant amounts of mold were visibly present once the walls were opened up. (CP 634.)

Viewed in the light most favorable to Appellants, a jury could accept this testimony presented live, in lieu of the testimony in the deposition transcript, as a more accurate portrayal of events.

3. Appellants' Actions Were Reasonable

The manner in which the facts and claims developed in this case are identical to the pattern of facts set forth in *Thomas and Karen DePhelps v. Safeco Insurance Company*, 116 Wn. App. 441, 65 P.3d 1234 (2003). The DePhelps owned a home in eastern Washington. In late March 1997, heavy accumulations of snow and ice shifted and slid. This loosened part of the metal roof. Mr. DePhelps fixed it himself. He then realized the damage was more extensive than he had originally estimated. So in December 1997, he reported the damage to his insurance carrier, Safeco, and submitted a claim. Mr. DePhelps submitted a contractor's estimate of \$40,000 to repair the roof. Meanwhile the roof still leaked. Temporary repairs were made and paid for by Safeco, but they were

defective and additional water damage resulted from this defective temporary repair. In December 1999, the home and its contents were found to be contaminated by toxic mold caused by water leaks resulting from the defective repairs. In January 2000, the DePhelps moved out of the house and submitted more claims for mold damage and loss of use. Ultimately, the claims for mold damage and loss of use were determined to be covered under the policy and paid by Safeco.

The *DePhelps* case shows exactly how Safeco interprets its property insurance policy. The nature of this property insurance policy is that the insurer is liable for an open ended risk that may escalate over time. Mr. DePhelps discovered the roof problem in March 1997 and tried to fix it himself. Nine months later he discovered that the damage was more extensive than he had thought and reported the claim to Safeco. Temporary repairs were made and two years later Mr. DePhelps discovered the home was infested with mold. Safeco stepped up and insured the claim, including all of the mold damage and loss of use.

When the evidence is viewed in the light most favorable to Appellants, it is clear that: an accidental water release caused damage to Appellants' hall bathroom in October, 2001. Appellants' took reasonable steps personally to effect repair of a broken valve. Appellants were unaware that the broken pipe had caused a substantial water intrusion.

Appellants discovered mold on the master bedroom bathroom ceiling in May 2002 and notified Safeco. (CP 418-421.) Safeco sent a representative to visit the home. He didn't see anything that alerted him to extensive water damage. He didn't advise Appellants to remediate the home. He didn't advise Appellants to perform any additional investigation. After Safeco issued its coverage denial, Appellants hired Energy Options Northwest to investigate the claim. In August 2002 Energy Options Northwest opened the walls and discovered extensive mold. Appellants immediately had Energy Options Northwest remediate the mold from the home. Appellant retained an attorney and the attorney provided written notice to Safeco. All of this took place over a ten month period of time. Taken from the viewpoint of an average person purchasing insurance, without expertise in construction or insurance matters, there are certainly material issues of fact regarding whether Appellants' actions and conduct were reasonable that precluded summary judgment.

4. Safeco Actual and Substantial Prejudice

An insurer is not relieved of its duty to pay an insured's claim on the basis of the insured's breach of the insurance contract unless the insurer is actually and substantially prejudiced thereby. The burden of proving that an insurer has been prejudiced by its insured's breach is on the insurer. *Pederson's Fryer Farms, Inc. v. Transamerica Insurance Co.*,

83 Wash.App. 432, 922 P.2d 126 (1998). Mere speculation is not enough. To establish prejudice the insurer must show concrete detriment resulting from the delay together with some specific harm to the insurer caused thereby. *Canron v. Federal Insurance Co.*, 82 Wn. App. 480, 487, 918 P.2d 937 (1996).

The declarations of Mr. Kelly Keith and Mr. John Halladin are simply Monday morning quarterbacking. Safeco identified possible detriments resulting from Appellants' delay, but presented no evidence of specifics and no evidence of actual harm. Mr. Halladin asserts: "Ms. Stone's failure to report the October 2001 and June 2002 water losses deprived Safeco of the opportunity to inform her of the required mitigation and assist her with information and recommendations to accomplish it." (CP 314.) Mr. Keith opines: "Mold spores can begin to grow within forty-eight hours of exposure to moisture." (CP 310.) Other than these bare allegations, there is no evidence that Safeco's ability to investigate was compromised.

Once notified, Safeco conducted only a minimal investigation. There is no evidence that any of Safeco's representatives actually advised Appellants that they should take efforts to mitigate water damage or mold. They did not do it after the 1996 incident and they did not do it in May 2002. (CP 419.) The contemporaneous actions of Safeco should be given

more weight than these self serving affidavits. The weight to be given these affidavits and the credibility of the witnesses are material issues of fact.

Scott Hess viewed the Stone residence in May 2002, did not observe any obvious water intrusion issues and did not advise Ms. Stone of any steps to take to clean up or otherwise mitigate the mold which he did observe. (CP 419.) If Mr. Hess could not discover the problem, how could Appellants have been expected to do so? A jury should determine whether Mr. Hess' investigation and actions were reasonable.

Moreover, the October 2001 water incident occurred in the hall bathroom. Water dispersed to the master bedroom bathroom and caused extensive mold there as well. It is mere speculation that any remediation in the hall bathroom would have prevented mold spores. Mere speculation is not enough. *Canron*, 82 Wn.App. at 487.

It ultimately took experts specializing in the field of water intrusion investigations and industrial hygienists to uncover the full extent of water intrusion and resulting mold problems. Appellants solved this puzzle at great personal expense and without the assistance of Safeco. The array of water intrusion problems which were observed and reported by Energy Options Northwest should have been uncovered by Safeco if

they had sent out an engineer or industrial hygienist with sufficient expertise and proper equipment to perform a reasonable investigation.

The earliest Safeco correspondence advising Ms. Stone to protect the property or mitigate any damages was August 26, 2002. (CP 472, 491.) By that time the Stones mitigated damages by removing the drywall as soon as they realized that mold was present in the wall cavities.

Since there were material issues of fact regarding whether Safeco was actually and substantially prejudiced, summary judgment was inappropriate

5. Safeco Estoppel or Waiver of the Notice Requirement

In an insurance context, estoppel precludes an insurer from asserting a right where it would be inequitable to permit the assertion. *Buchanan v. Switz. Gen Ins. Co.*, 76 Wn.2d 100, 108, 455 P.2d 344 (1969). In general, the elemental analysis of estoppel involves issues of fact. *Litz v. Pierce County*, 44 Wn. App. 674, 683, 723 P.2d 475 (1986). Since the court is reviewing summary dismissal, unless only one reasonable inference can be drawn from the evidence, estoppel is a question for the triers of facts. *Colonial Imports, Inc. v. Carlton NW, Inc.* 121 Wn.2d 726, 737, 853 P.2d 913 (1993).

Estoppel lies 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 to his prejudice. *Buchanan* at 108. In other words estoppel applies where a person, by his acts or representations, causes another to change his position or refrain from performing a necessary act to such person's detriment or prejudice, the person who performs such acts or makes such representations is precluded from asserting the conduct or forbearance of the other party to his own advantage. *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 788, 466 P.2d 515(1970). The assertion of estoppel does not require the proponent to show that the insurer intentionally, voluntarily or purposely relinquished the right or privilege. *Buchanan*, 76 Wn. 2d at 108.

Here, Safeco, on at least three occasions, encouraged and requested that Appellants provide additional facts or analysis to support additional damages or another cause that Appellant had not addressed.

In the coverage letter dated May 24, 2002 Safeco asserted that they stand ready to review any additional facts or analysis you (Ms. Stone) wish to provide. (CP 471, 483-484.) It was the policy within Safeco to provide the insured the option of getting back a hold of them should she find additional damages or another cause that Safeco had not addressed. (CP 471, 485-486.)

On or about August 22, 2002, Safeco advised Appellants that if she wants to pursue the claim, she has fifteen days to respond to the letter. (CP

477, 487, 501.) The next day, Appellants sent a letter to Safeco, which asserted that she wants an investigation of the claim by Safeco so that she can figure out how to restore her home to a healthy living environment free from water damages and associated health risks. (CP 471, 488-489, 502.)

On August 26, 2002, Safeco requested that Appellants forward any information from any independent contractors or investigators she may have retained to investigate the cause of loss. (CP 471, 487, 504-505.) On August 26, 2002, Safeco advised Ms. Stone of her obligation to “protect the property from further damage, make reasonable and necessary repairs required to protect the property and to keep an accurate record of repair expenses.” (CP 472, 491, 504-505.)

On September 20, 2002, Safeco invites Appellant to submit a report from any consultant or contractor she may had had out on her home: “If a contractor or industrial hygienist has inspected your home at any time, please provide a copy of their report for review.” (CP 472, 494, 508-509.)

Furthermore on at least two occasions Safeco advised the Washington State Insurance Commissioner’s Office that Safeco would conduct further investigation and review of Ms. Stone’s claim. On September 10, 2002, Safeco advised the Washington State Insurance

Commissioner's Office that "Safeco stands ready to review any additional facts or analysis Ms. Stone has to provide us. In addition, we stated we will conduct further investigation." (CP 472, 493, 506-507.) On October 3, 2002, Safeco advised the Washington State Insurance Commissioner's Office: "We (Safeco) will investigate the new information presented (information presented in the Energy Options Report) and determine the applicability of coverage for these events. After the additional information is reviewed, and our investigation is complete, we will determine the applicability of coverage under Ms. Stone's Safeco Insurance Company of America Homeowner's Policy." (CP 472-473, 495-496, 519.) Safeco has failed to issue a coverage decision with respect to the issues set forth in the letter from counsel.

Clearly, Appellants provided the information requested by Safeco. Appellants retained Energy Options Northwest, at considerable expense, to fully investigate the water intrusion problems and to remediate the mold damage. On September 27, 2002, Appellants' attorney wrote an extensive letter to Safeco which forwarded the Energy Options Report, outlined several specific incidents which would be covered events and requested Safeco to re-evaluate its coverage position, withdraw its denial letter and accept the claim. (CP 421, 450-458.) It is also clear that Appellants protected the property by having Energy Options Northwest immediately

remediate mold contamination that they uncovered. There are certainly material issues of fact regarding whether Safeco by its actions and conduct either waived or are estopped to assert the notice provisions.

IV. CONCLUSION

Viewing these factual issues and all inferences from the evidence most favorable to Appellants, there certainly appears to be sufficient issues of material fact regarding, timely notice, actual prejudice and estoppel which should be determined by the jury. Appellants respectfully request that the case be remanded for trial.

DATED this 28th day of April, 2006.

THE LAW OFFICES OF
DANIEL S. MCMONAGLE



Daniel S. McMonagle, WSBA# 11114
Attorneys for Appellants

APPENDIX

APPENDIX A

FILED

SEP 28 2005

JoAnne McBride, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

PAULA STONE and JOHN N. FANNING,)
 wife and husband and the marital)
 community composed thereof,)
)
 Plaintiff,)
)
 vs.)
)
 SAFECO INSURANCE COMPANY OF)
 AMERICA,)
 Defendant.)

No. 02-2-04464-0

OPINION

The undisputed material facts are that the plaintiffs were aware of the water intrusion in October of 2001. While they may not have known of the consequences of the leak, the fact that water had leaked into the wall was acknowledged. The experts agree that this exposure of water will promote the growth of mold if not treated within the first few days of the leak. The issue is whether the failure to notify the defendant's insurance company prejudiced the ability of Safeco to mitigate their potential loss.

The fact that Safeco may have delayed or misled plaintiffs regarding liability **after** notice of claim was received is irrelevant to the issue of prejudice, as the "die had been cast" within the first few days after the leak.

Plaintiffs rely on Pederson's Fryer Farms, 83 Wn. App. 432 (1996); for the proposition that the issue of substantial prejudice to the insurer **must** be submitted to the trier of fact. In most

cases this is true, however, Schwindt v. Commonwealth Ins. Co., 140 Wn.2d 348 (2000) at 359

recognized four factors that should be considered:

Cases discussing the prejudice determination indicate that the following factors are relevant: (1) when the **insured** discovered its loss; (2) whether the delay in making a claim left the **insurer** without an opportunity to pursue a claim against the tortfeasor, to adequately defend the **insured** in an underlying action brought by a third party, or to pursue subrogation claims against other entities; (3) whether the **insured** destroyed evidence relevant to a policy exclusion; and (4) whether the **insured** failed to control remediation costs. See, e.g., Sears, Roebuck & Co. v. Hartford Acc. & Indem. Co., 50 Wn.2d 443, 452-53, 313 P.2d 347 (1957); Pederson's Fryer Farms, 83 Wn. App. at 439-40; Felice v. St. Paul Fire & Marine Ins. Co., 42 Wn. App. 352, 358-60, 711 P.2d 1066 (1985); Thompson v. Grange Ins. Assn., 34 Wn. App. 151, 163-64, 660 P.2d 307 (1983); Pulse v. Northwest Farm Bureau Ins. Co., 18 Wn. App. 59, 61, 566 P.2d 577 (1977).

In the case at bar, the plaintiffs' failure to notify or take immediate remediation action exposed defendant to a substantial increase in damages. Thus defendant was substantially prejudiced by the lack of notice and would not be able to mitigate any potential loss.

Defendant's motion for summary judgment is granted. Please draft the proper order reflecting this decision.

Dated this 28th day of September 2005.



John F. Nichols
Judge Clark County Superior Court

APPENDIX B

SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR CLARK COUNTY
DEPARTMENT NO. 3
P.O. BOX 5000
VANCOUVER, WASHINGTON 98666-5000



JOHN F. NICHOLS
JUDGE

TELEPHONE (360) 397-2260
FAX (360) 397-6078
TDD (360) 397-6172

January 9, 2006

Daniel S. McMonagle
Attorney at Law
216 First Avenue South, Suite 480
Seattle, WA 98104

Mark E. Olmsted
Attorney at Law
12th Floor
1000 SW Broadway
Portland, OR 97205

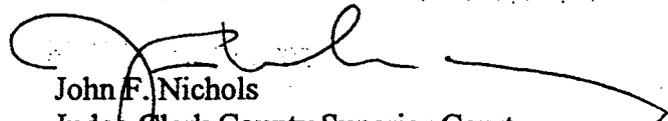
Stone v. Safeco, Cause No. 02-2-04464-0
RE: Motion for Reconsideration

Dear Sirs,

Having reviewed the recent submissions and having determined that pursuant to our Local Rule that oral argument is not necessitated; I do hereby deny the Motion for Reconsideration. This determination is based primarily on the fact that plaintiff admitted knowledge of the water intrusion "behind" the wall. This was established by excerpts from her deposition. The "clarification" attached to the motion for reconsideration is substantially similar to self-impeachment which is improper as a defense to Summary Judgment.

I have enclosed a copy of my Order denying this motion.

Sincerely,


John F. Nichols
Judge Clark County Superior Court

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

Paula Stone
Plaintiff/Petitioner,
v.
Safeco Insurance
Defendant/Respondent.

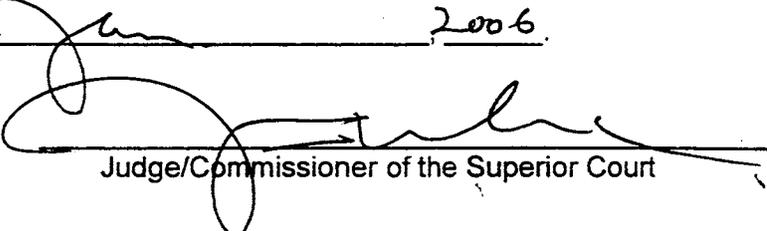
No. 02-2-04464-0

ORDER Denying Reconsideration

THIS MATTER, having come before the court on the motion of the
Petitioner/Respondent on this ____ day of _____, _____, the Court having
heard counsel, having read the pleadings and records filed herein, and being otherwise fully
informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: Plaintiff's motion
for reconsideration is hereby denied

Dated this 9 day of June, 2006.


Judge/Commissioner of the Superior Court

Attorney for
WSBA #
ORDERED _____

Attorney for
WSBA#

APPENDIX C

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Pancrease EC

For allergic reactions and mal-absorption problems. Prescribed by Dr. Heuser, 2003.

Home Oximeter

To measure oxygen saturation rates. Prescribed by Dr. Heuser, 2003.

Hydroxyz HCL 25 mg

For allergic reactions. Prescribed by Dr. Heuser, 2003.

Special Blood Draw Needles and Syringes

Prescribed for home blood draws by Dr. Heuser, 2004.

Valtrex

For shingles on the neck and chest region brought on failing immune system caused by toxic mold exposure and stress. Diagnosed and prescribed by Dr. Scribner and Dr. Bartha, 2005.

Non-toxic or Low Toxic Health and Environmentally Safe Products

To be used on Paula Stone's newly remodeled home. Prescribed by Dr. Heuser, Dr. Miller and Dr. Bartha as being medically necessary.

INTERROGATORY NO. 22:

Please state the names, addresses, and telephone numbers of all experts upon whom plaintiff intends to rely and/or intend to call as a witness at trial or arbitration. For each expert, please state: his or her field of specialty; the subject matter upon which

1 he or she is expected to testify; the substance or the facts and opinions upon which he or
2 she is expected to testify; whether the expert has examined, or intends to examine, any
3 of the injured parties to this lawsuit; and, whether the expert has prepared a report or
4 other documents summarizing his or her opinions.

5
6
7 **ANSWER:**

8
9 Dr. Gunnar Heuser
10 Neurotoxicologist and immunotoxicologist
11 28240 W Agoura Rd, Suite 203
12 Agoura Hills, CA 91301
13 818-865-1858

14 Dr. Heuser is a pre-eminent neurotoxicologist and immunotoxicologist. Dr.
15 Heuser's qualifications and curriculum vitae are included in documents numbered PS
16 02035 through 02050. He has reviewed Ms. Stone's extensive medical history and
17 consulted with her in person at her home in Vancouver, Washington. Dr. Heuser has
18 also consulted with the various doctors that have treated Ms. Stone. Dr. Heuser will
19 testify that Ms. Stone has had a significant toxic exposure which has impacted her
20 immune system causing anaphylactic and allergic reactions and intolerance to many
21 things including food, medication and even the environment around her along with
22 significant breathing problems. Dr. Heuser will testify that these injuries are permanent
23 and provide many restrictions and limitations on Ms. Stone's day to day living. Dr.
24 Heuser has written letter reports dated September 8, 2003, March 21, 2004 and May 24,
25 2005. Pursuant to Civil Rule 33c, Plaintiff has produced copies of these reports and
incorporates the reports herein.

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Dr. Jack McAnulty
Professor of Medicine
Division of Cardiology
Oregon Health Sciences University Hospital
3151 SW Sam Jackson Park Rd
Portland, OR 97239-3098
503-494-8311

Dr. McAnulty has acted as Ms. Stone's primary gatekeeper physician and cardiologist. Dr. McAnulty has had the opportunity to track Ms. Stone's many clinical test results and labs. Dr. McAnulty is the doctor that ordered Ms. Stone to vacate her residence as a result of her exposure to toxic mold. The substance of the facts and opinions upon which we expect that Dr. McAnulty's will testify are set forth in the letter reports he prepared dated September 23, 2002, May 2003, October 12, 2003 and April 19, 2005. Dr. McAnulty may also testify regarding the extensive and specialized blood testing performed on Ms. Stone and sent to Immunosciences Lab, Inc. for analysis as well as information provided to him by consultant physicians and industrial hygienists.. Pursuant to Civil Rule 33c, Plaintiff has produced copies of these reports and incorporates the reports herein.

Dr. Lillian Bartha
Industrial hygienist, internal and occupational medicine
942 Cedar Lake Ct, SE
Olympia, WA 98501
360-357-6443

Ms. Stone has been a patient of Dr. Bartha since the fall of 2004. The substance of the facts and opinions upon which we expect Dr. Bartha to testify are set forth in the

1 letter report dated March 8, 2005 and April 18, 2005. Pursuant to Civil Rule 33c,
2 Plaintiff has produced copies of these reports and incorporates the reports herein.
3
4

5 Harriet Amman, PhD, D.A.B.T.
6 Senior toxicologist
7 Ammann Toxicology Consulting LLC
8 333 N. Sherman Street, NW PO Box 47600
9 Olympia, WA 98502
10 360-352-6321

11 Over the past several years, Dr. Amman has been the senior toxicologist for the
12 Washington State Department of Health's Office of Health Assessments. She was a
13 member of the Institute of Medicine's Committee on Damp Indoor Spaces and Health
14 which was responsible for the preparation of the reference manual entitled Damp Indoor
15 Spaces and Health published by the Institute of Medicine of the National Academies in
16 2004.

17 The substance of the facts and opinions upon which we expect Dr. Amman to
18 provide expert testimony are set forth in letter reports she prepared dated January 25,
19 2004 and March 14, 2004. She will offer testimony, from a toxicology point of view,
20 regarding the environmental investigations performed by Energy Options Northwest,
21 American Management Associates LLC, and any other firms that may conduct
22 environmental testing of the premises, the health impacts to Ms. Stone resulting from
23 her exposure to toxic mold, the high likelihood that the home cannot be restored to a
24 condition that would be healthful for any person exposed to toxic substances produced
25 by the molds and other issues which may develop from her review of the facts

1 associated with this claim. Pursuant to Civil Rule 33c, Plaintiff has produced copies of
2 these reports and incorporates the reports herein.

3 Charles McConnell
4 American Management Associates LLC
5 2707 Main Street
6 Philomath, Oregon 97370
7 541-929-3100

8 Mr. McConnell is a Senior Environmental Specialist that conducted an
9 environmental inspection of Ms. Stone's residence on or about August 9, 2002. Mr.
10 McConnell took environmental samples and uncovered mold contamination in bathroom
11 walls, kitchen decking and master bedroom sheet rock. The substance of the facts and
12 opinions upon which we expect Mr. McConnell to testify are set forth in a letter report
13 dated August 24, 2002. The results of the laboratory testing performed by GM
14 Laboratories, Inc. are contained at document number PS 03310 through PS 03336.
15 Pursuant to Civil Rule 33c, Plaintiff has produced copies of the report and incorporates
16 the report herein. Mr. McConnell charged \$1,357.50 for his services.

17 Scott Finley
18 Energy Options Northwest
19 6835 38th Avenue Northeast
20 Seattle, WA 98115
21 206-526-2700

22 On or about August 5, 2002, Energy Options Northwest, at the request of
23 Plaintiffs, inspected the home to determine the causes and extent of reported water
24 damage and mold contamination. Their investigation revealed an array of obvious
25 water intrusion problems with the home, including evidence of sudden-onset accidental

1 water damage in the bathrooms and kitchen; water intrusion at the exterior siding on the
2 south side of the home and water leaks at plumbing stack penetrations through the roof.

3 Energy Options Northwest discovered that all the drywall on the walls and
4 ceilings in both bathrooms were damaged by water or mold and removed. The
5 remaining framing materials, which up to this time were hidden from view, showed
6 clear signs of water staining and mold growth with indications of previously accidental
7 water damage and heavy mold growth in the wall cavity behind the tub faucet which
8 appeared from a catastrophic water incident in October 2001. Energy Options
9 Northwest further discovered that the underlayment and sub-floor below the kitchen
10 cabinet, as well as an area of wall behind it were wet and moldy. This material was also
11 removed.
12

13 In the course of its investigation Energy Options Northwest conducted
14 environmental sampling and found evidence of growth of certain molds that grow
15 indoors in damp environments, including *Stachybotrys Charatum*, *Penicillium*,
16 *Chaetomium*, *Cladosporium*, *Aspergillis* and others that produce very toxic poisons.
17 Energy Options Northwest worked to remediate the damage, removing contaminated
18 materials and replacing portions of walls and floor underlayments and cleaning surfaces
19 of moldy studs exposed.
20

21 The results of the environmental investigation performed by Energy Options
22 Northwest are generally set forth in a letter report dated August 23, 2002. We have also
23 produced the entire business records of Energy Options Northwest which provides
24 further details of the investigation. The results of the laboratory results performed at
25 GM Laboratories, Inc. are contained at document number PS 03337 through PS 03354.

1 Pursuant to Civil Rule 33c, Plaintiff has produced copies of the report and business
2 records and incorporates them herein. Energy Options Northwest charged \$9,173.81
3 for their services.

4 George J. Mueller, Ph.D
5 Senior Mycologist/President
6 GM Laboratories, Inc.
7 4131 Southwest Rose Street
8 Seattle, WA 98136
9 206-933-1312

10 Both American Management Associates and Energy Options Northwest sent
11 samples taken from the Stone residence to GM Laboratories, Inc. for analysis. Mr.
12 Mueller may testify regarding the procedures at the laboratory and the test results. The
13 business records depicting Dr. Mueller's work are contained at document number PS
14 03309 through PS03354. Pursuant to Civil Rule 33c, Plaintiff has produced copies of the
15 business records and incorporates them herein.

16 Other Experts

17 Plaintiff is currently analyzing whether other experts may be required for the
18 claim and will provide updated answers to this interrogatory should she identify
19 additional experts.

20 **INTERROGATORY NO. 23:**

21 Please identify the hospitals, dates of hospitalization, and addresses of the
22 hospitals where plaintiff has been examined or treated on either an inpatient or
23 outpatient basis during the past 20 years. For each hospitalization, please give a brief
24

FILED
COURT OF APPEALS

06 MAY -3 PM 2:43

STATE OF WASHINGTON

NO. 34214-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

YN
CITY

PAULA STONE and JOHN F. FANNING.,
wife and husband and the marital community composed thereof,

Plaintiffs-Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Respondent.

APPELLANTS' DECLARATION OF SERVICE

Daniel S. McMonagle, WSBA No.11114
THE LAW OFFICES OF
DANIEL S. McMONAGLE
Grand Central on the Park
216 First Avenue S, Suite 480
Seattle, Washington 98104
206-328-9400
Counsel for Plaintiffs-Appellants

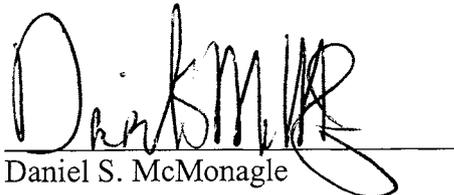
Cecil A. Reniche-Smith, WSBA No.37132
HOFFMAN, HART & WAGNER
1000 SW Broadway, 20th Floor
Portland, Oregon 97205
503-222-4499
Attorneys for Defendant-Respondent

DECLARATION OF SERVICE

I DECLARE that on May 1, 2006 I caused to be served a true and correct copy of Appellants' Opening Brief upon the parties indicated below by U.S. Mail:

Cecil A. Reniche-Smith, WSBA No.37132
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1000 SW Broadway, 20th Floor
Portland, Oregon 97205
503-222-4499
Attorneys for Defendant-Respondent

Court of Appeals
950 Broadway, Suite 300
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253-593-2970


Daniel S. McMonagle