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(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.

SUPPLEMENTAL BRIEF OF PETITIONERS

J. Dino Vasquez, WSBA #25533
Thomas D. Adams, WSBA #18470
Jacque E. St. Romain, WSBA #44167
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
(206) 223-1313
Attorneys for Petitioners
Kut Suen Lui and May Far Lui



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I. IDENTITY OF MOVING PARTY

Kut Suen Lui and May Far Lui (the “Luis”), Plaintiffs in the trial court and Respondents below, submit the following Supplemental Brief pursuant to RAP 13.7(d).

II. INTRODUCTION

This case represents a stark variance from accepted Washington law by the Court of Appeals, Division One, regarding insurance contract interpretation. The Court of Appeals narrowly construed insurance contract “vacancy” provisions despite these provisions being fairly susceptible to more than one reasonable interpretation. In doing so, the Court of Appeals eliminated coverage, which runs against the established principle under Washington law of construing ambiguous insurance contracts against the insurer and in favor of coverage. In a recent case, this Court outlined the principles governing insurance contract interpretation when dealing with ambiguous terms. Applying these principles, the Court should hold in this case that the ambiguous “vacancy” provisions are to be construed in favor of providing coverage.

This is also a case of first impression with respect to judicial interpretation of “vacancy” provisions in Washington insurance policies. Courts in other jurisdictions that have evaluated such provisions have

interpreted the language in favor of coverage just as the Court should do here. At minimum, the Court should find that Essex cannot demonstrate the applicability of the “vacancy” provisions at the summary judgment stage.

III. STATEMENT OF THE ISSUES

On November 5, 2015, this Court granted the Luis’ Petition for Review without modifying or limiting the issues presented. As set forth in the Luis’ Petition for Review, the issues for review are:

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 the 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. SUPPLEMENTAL STATEMENT OF THE CASE

The Luis rely on the Statement of the Case presented in their Petition for Review. Briefly summarized here, the Luis owned a three-story building consisting of 51 individual living units. On or about

January 1, 2011, a water pipe in the second floor ceiling froze and burst, causing substantial damage. The previous tenant had been evicted on or about December 7, 2010, less than a month before. The Luis were in the process of converting the building to provide rental rooms to students attending Tacoma Community College. At the time of loss, the Luis had a commercial insurance policy with Essex, Defendant in the trial court and Petitioner below, effective through June 30, 2011. Essex paid a partial amount of the Luis' covered loss, but then refused to pay the remaining \$465,285.26 of the Luis' insurance claim. Indeed, Essex rescinded its previous acceptance of coverage and asserted that the property was vacant at the time of loss, despite not having raised a "vacancy" issue prior to that time. Essex belatedly asserted a policy endorsement pertaining to "vacancy," in addition to "vacancy" provisions in the original contract (together, the "vacancy provisions"), as grounds for denying coverage. These and other provisions of the policy are the subject of this appeal.

V. SUPPLEMENTAL ARGUMENT

- A. This Court's decision in *Queen Anne Park Homeowner's Association v. State Farm* supports a conclusion that the "Vacancy" Provisions in the Luis' policy are ambiguous

This Court recently reiterated the principles governing judicial interpretation of Washington insurance policy provisions. In *Queen Anne*

Park Homeowner's Association v. State Farm, the Court answered a certified question from the Ninth Circuit as to the definition of “collapse” in Washington insurance policies. *Queen Anne Park Homeowner's Ass'n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 352 P.3d 790 (2015). There, this Court stated that insurance policies “should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Id.* at 489 (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 65, 882 P.2d 703 (1994)) (internal quotation marks omitted). Additionally, an insurance contract term is ambiguous if it is “subject to more than one reasonable interpretation when applied to a particular set of facts.” *Id.* (quoting *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 181, 110 P.3d 733 (2005)). Furthermore, “where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured **must** be applied, even though the insurer may have intended another meaning.” *Id.* at 491 (citing *Jeffries v. General Cas. Co. of Am.*, 46 Wn.2d 543, 283 P.2d 128 (1955)) (emphasis added).

In assessing whether the particular term “collapse” was ambiguous, the *Queen Anne Park* Court referred to a previous case, decided on different grounds, also addressing the meaning of “collapse.” *Id.* (citing

Sprague v. Safeco Ins. Co. of Am., 174 Wn.2d 524, 276 P.3d 1270 (2012)). In *Sprague*, the concurrence and the dissent differed as to what the term “collapse” meant. 174 Wn.2d at 524. This Court then observed that the disagreement about interpretation alone demonstrated that the term was ambiguous. 183 Wn.2d at 489. Additionally, the Court cited various other decisions (including cases from an Ohio state court, a Utah federal court, and the Third Circuit), each of which adopted a different definition of “collapse,” to show that the term was ambiguous due to the “range of reasonable definitions” adopted by various courts. *Id.* at 489-90.

The Court’s analysis in *Queen Anne Park* should apply here where two courts – the Superior Court and the Court of Appeals – reached different conclusions as to the meaning of “vacancy” in the policy issued by Essex. The Superior Court granted summary judgment on the Luis’ claim that the “vacancy” provisions are ambiguous, ruling that the provisions were in conflict and construing the resulting ambiguity in favor of coverage. CP 35-59, 688-89. The Court of Appeals reversed, holding that the “vacancy” provisions unambiguously eliminated coverage. *Kut Suen Lui v. Essex Ins. Co.*, No. 72835-1-I, 2015 Wash. App. LEXIS 725, at *8-9 (Wash. Ct. App. Apr. 6, 2015). As in *Queen Anne Park*, this disagreement alone should establish that “vacancy,” as used in this policy,

is an ambiguous term. Indeed, it should be noted that the Court of Appeals itself, in granting interlocutory review, found that there was a “substantial ground for difference of opinion” regarding the interpretation of the “vacancy” provisions. *Kut Suen Lui v. Essex Ins. Co.*, No. 45515-3-II, at *6 (Wash. Ct. App. filed Dec. 15, 2013) (order granting review). Accordingly, this Court should reinforce longstanding interpretive precedent by finding the term “vacancy” to be ambiguous and adopting the interpretation favoring coverage of the Luis’ loss.

B. Pursuant to the principles outlined in *Queen Anne Park*, this Court should find that the Court of Appeals deviated from the accepted legal standard in ruling that the “vacancy” provisions eliminated coverage

In evaluating the particular “vacancy” provisions at issue here, the Court should be mindful that the Court of Appeals deviated from the accepted legal standard in determining the insurance contract to unambiguously eliminate coverage. As outlined in *Queen Anne Park*, the proper standard is a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” 183 Wn.2d at 488. This is an objective standard yet the Court of Appeals inserted subjectivity into the analysis. The Court of Appeals made a point of noting that due to previous communications with Essex the “record shows the Luis were aware of Essex’s interpretation of the policy . . . well

before the incident at issue here.” *Lui*, No. 72835-1-I, at *12 n.6. Irrespective of the Luis’ previous experience with Essex—which, in fact, was entirely separate from facts surrounding the loss — the Luis’ subjective experience should not have had any influence on the Court of Appeals’ construction of the policy from the viewpoint of the “average person.” Thus, the Court of Appeals erred in construing the policy based on what it presumed the Luis knew about Essex’s interpretation of the “vacancy” provisions.

This Court should apply the correct “average person” standard as laid out in *Queen Anne Park*. The Court should give the undefined “vacancy” term its “plain, ordinary and popular meaning.” *Queen Anne Park*, 183 Wn.2d at 490-91 (quoting *Queen City Farms, Inc.*, 126 Wn.2d at 77) (internal quotation marks omitted). Furthermore, “[a]mbiguous exclusionary clauses, particularly, should be construed in the manner most favorable to the insured.” *Id.* (citing *Brown v. Underwriters at Lloyd’s*, 53 Wn.2d 142, 332 P.2d 228 (1958)). “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.” *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)). Here, the “vacancy” provisions at issue include provisions in the original insurance contract and in a Change in Conditions Endorsement, both of which operate as exclusionary clauses to eliminate coverage based on certain conditions and neither of which explicitly define “vacancy.” As such, in applying the “average person” standard, the Court should construe these ambiguous provisions in a manner most favorable to the Luis.

C. Decisions of Courts in other jurisdictions are instructive in the circumstances presented here

“Vacancy” as used in commercial insurance policies has not been definitively defined by Washington courts. As such, it may be helpful for the Court to evaluate outside authority in considering whether a “vacancy” finding should be precluded by the particular facts in this case.¹

1. *Physical Presence May Preclude a “Vacancy” Determination*

A recent Pennsylvania decision may assist the Court in determining the applicability of the “vacancy” provisions in this case. In *Gray v. Allstate Indemnity Company*, No. 3:313-CV-1232, 2015 U.S. Dist. LEXIS

¹ Explicit definitions of “vacancy” terms in recent outside authority are rare. If the Court wishes to construct such a definition, it may find a Florida district court opinion helpful, which ruled: “For purposes of the Vacancy Requirement, a building is not vacant when any portion of it is used for any activity whatsoever except showing it to prospective buyers or renters for the purpose of selling or leasing it.” *Windward on Lake Conway Condo. Ass’n v. United Nat’l Ins. Co.*, No. 6:14-cv-607-Orl-37KRS, 2015 U.S. Dist. LEXIS 153915, at *4-6 (Mid. Dist. Fl. Nov. 13, 2015).

21109 (M.D. Pa. Feb. 23, 2015), the U.S. District Court for the Middle District of Pennsylvania assessed the potential ambiguity of “vacancy” provisions in an insurance contract for a commercial rental. As in Washington, no Pennsylvania court had defined “vacancy” under a similar insurance policy. *Id.* at *16. The district court applied a standard analogous to *Queen Anne Park*: “A policy exclusion is ambiguous if reasonably intelligent [persons] on considering it in the context of the entire policy would honestly differ as to its meaning, and if more precise language could have eliminated the ambiguity.” *Id.* at *13, *17 (quoting *Hollingsworth v. State Farm Fire & Cas. Co.*, No. 04-3733, 2005 U.S. Dist. LEXIS 3694, at *5 (E.D. Pa. Mar. 9, 2005)) (internal quotation marks omitted).² This action involved a claim for insurance proceeds following a fire loss and included both a “vacancy” clause and a fire policy endorsement. *Id.* at *4-6. The term “vacant” was not defined in either the policy or the endorsement. The policy, combined with the endorsement, eliminated coverage if the property was “vacant” for more than sixty days. *Id.* at *13-14. The opinion was issued in the summary judgment context,

² Additionally, Pennsylvania case law provides the following standards for interpreting insurance contracts: “terms must be given their ordinary meaning”; “ambiguous terms should be construed against the insurer”; and “exclusions are always strictly construed against the insurer.” *Id.*

with the insurer moving for summary judgment that the rental property was “vacant” at the time of loss, thus eliminating coverage.

The district court found that the insurer did not meet its burden of establishing the applicability of the “vacancy” clauses due to the insured’s undisputable physical presence at the property during the alleged period of “vacancy” and the fact that the building was arguably under construction (addressed below). *Id.* at *26-27. The insured maintained a continuous presence after previous tenants moved out to personally refurbish and renovate the property in preparation for new occupants. *Id.* at *21. Here, the Luis took possession of the building after the eviction on or about December 7, 2010 and began preparing the property to rent rooms to Tacoma Community College students. CP 37. The Luis maintained a continuous physical presence at the property because “there were cosmetic things that needed to be taken care of, such as . . . cleaning or removing the carpet, painting interior walls.” CP 205. The principle is the same as in *Gray*. This Court should find that the Luis’ continuous physical presence at their insured building precludes a finding of “vacancy” under the policy’s language because the building was not actually “vacant.”

Additionally, this appeal arises from the trial court’s grant of summary judgment in the Luis’ favor, which the Court of Appeals later

overturned. Because this case's facts parallel those in *Gray* and the dispute arises in the same stage of proceedings as in *Gray*, the Court, if it declines to construe the policy's ambiguity in the Luis' favor, should at minimum find that the particular facts here preclude Essex from establishing the "vacancy" provisions' applicability on summary judgment.

2. *A Building under Construction May Preclude a "Vacancy" Finding*

The provisions at issue in *Gray* also included the language "vacant, unoccupied, or **under construction.**" *Gray*, No. 3:313-CV-1232 at *22 (emphasis added). The insured argued that by adding "under construction" that term became something different and separate from "vacant." *Id.* at *22-23. The district court ruled that this ambiguity must be construed against the insurer, as the insurer could have added language clarifying the "vacancy" clauses to resolve any ambiguity in the "under construction" phrase. *Id.* at *22-23. Furthermore, the insured presented additional evidence to show that he continuously visited the property to perform repair work during the alleged "vacancy." *Id.* at *21. Thus, the district court also ruled that there were disputed facts as to whether the property was "under construction," which precluded a finding of summary judgment for the insurer. *Id.* at *25.

Section (E)(6)(a)(2) of the Luis' insurance policy presents similar language to create an explicit exception to "vacancy" for unoccupied buildings under renovation: "Buildings **under construction or renovation** are **not** considered vacant." CP 290 (emphasis added). The record shows that the Luis' property was under renovation at the time of loss. The Luis were preparing to re-lease the property to Tacoma Community College students. CP 5, 37. Because the Luis' building was in fact under renovation, it should not be considered "vacant" under Essex's own chosen policy language. This Court should rule, like the *Gray* court, that if Essex wished to have resolved this ambiguity, it should have added clarifying language. This ambiguity should be construed against Essex, which would put the building under renovation at the time the loss occurred and preclude a finding of "vacancy." This Court should reverse the Court of Appeals' decision on these alternative grounds. At minimum, it should find that Essex cannot establish the "vacancy" provisions' applicability at the summary judgment stage.

VI. CONCLUSION

The Luis respectfully request the Court to reverse the Court of Appeals' decision below and reinstate the trial court's ruling that the commercial insurance contract's "vacancy" provisions are ambiguous and

should be construed in favor of providing coverage. Alternatively, the Luis request the Court to rule that the building was under renovation and the Luis were physically present during the alleged “vacancy,” both of which preclude a “vacancy” finding under the insurance contract. At minimum, the Court should find that Essex cannot establish the “vacancy” provisions’ applicability on summary judgment.

Respectfully submitted this 7th day of December, 2015.

KARR TUTTLE CAMPBELL

By: 

J. Dino Vasquez, WSBA #25533
Thomas D. Adams, WSBA #18470
Jacque E. St. Romain, WSBA #44167
Attorneys for Plaintiffs/Petitioners Kut Suen
Lui and May Far Lui

CERTIFICATE OF SERVICE

The undersigned certifies that on December 7, 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 <i>Counsel for Respondent Essex Insurance Company</i>	<input checked="" type="checkbox"/> via hand delivery via ABC Legal Messengers. <input type="checkbox"/> via first class mail, postage prepaid. <input checked="" type="checkbox"/> via email.
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No. 91777-9
Supplemental Brief of Petitioner

Filed by Heather Hattrup, hhattrup@karrtuttle.com on behalf of:
Thomas D. Adams, WSBA #18470
J. Dino Vasquez, WSBA #25533
Jacque E. St. Romain, WSBA #44167

HEATHER HATTRUP
LEGAL SECRETARY | HHATTRUP@KARRTUTTLE.COM | OFFICE: 206.224.8190
KARR TUTTLE CAMPBELL | 701 Fifth Avenue, Suite 3300 | Seattle, WA 98104 | www.karrtuttle.com

HEATHER HATTRUP
LEGAL SECRETARY | HHATTRUP@KARRTUTTLE.COM | OFFICE: 206.224.8190 | FAX: 206.682.7100
KARR TUTTLE CAMPBELL | 701 Fifth Avenue, Suite 3300 | Seattle, WA 98104 | www.karrtuttle.com

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