

**FILED**

JAN 29 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 323897

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**In The Court Of Appeals  
The State Of Washington  
Division III**

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MARIYA TARASYUK,

*Appellants/Plaintiffs,*

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY, a  
Washington Corporation; and JOHN DOE,

*Respondents/Defendants.*

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**APPELLANT'S REPLY BRIEF TO BRIEF OF  
RESPONDENT MUTUAL OF ENUMCLAW  
INSURANCE COMPANY**

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by entering an order granting Mutual of Enumclaw's Motion for Summary Judgment and by not granting Plaintiff's concurrent Motion for Summary Judgment.

### **Issues on Appeal Pertaining to Assignments of Error**

To the extent that Respondent misrepresented Appellant's issues pertaining to assignments of error, they are as follows:

1. Whether the trial court correctly interpreted the insurance contract, giving full effect to its primary purpose, construing the ambiguous "business use" exclusion against the Respondent with added force;
2. Whether the insurance contract's "business use" exclusion was ambiguous, in light of Respondent's inconsistent interpretations deciding that Appellant's activities did not constitute business use before the loss and deciding that Appellant's activities were a business use after the property loss;
3. Whether the Respondent acted in bad faith in holding itself out as covering the Appellant's storage shed, and then unreasonably refusing to cover Appellant's loss using information it already had prior to the loss, and only investigating in order to deny coverage.

4. Whether Respondent's bad faith conduct supports a claim under the CPA and IFCA when it violated various provisions of RCW 48.30.015 (5).

## **II. REPLY AND CORRECTION TO RESPONDENT'S COUNTER STATEMENT OF FACTS**

### **A. The Storage Shed Was Not Used for Business Purposes and Any Auto Repair Was Done Outside of the Shed**

Defendant Mutual of Enumclaw insists several times that it is undisputed that the shed was used for a business purpose, however the opposite is actually true; it is undisputed that no repair work was done inside the shed. *See* CP 104, 127, 228, 230-31, 269, 274, 279-80, 527-28. In fact, the shed was set up in such a way that no cars or heavy equipment could be brought into the shed and the shed was used for storage purposes, with repair work done outside of the shed. CP 269, 279. Defendant repeatedly indicates that because items stored in the shed were used for repair of both personal vehicles and other people's vehicles that the shed was therefore "undisputedly" used for a business purpose. These items were used both for household purposes and outside of the storage shed on cars, but were only stored in the shed, as the storage shed was set up and used for storage. *See* CP 91-100, 127.

**B. Appellant Did Auto Repair For a Minimal Amount of Money**

Appellant (hereinafter "Plaintiff") did repair cars for money. This was fully disclosed to the agent prior to the policy being amended, and, according to Plaintiff's deposition, it was discussed in the first meeting. *See* CP 183-84, 227, 438. In fact, Plaintiff even offered to repair the insurance agent's car. *See* CP 280, 528. It is telling how Defendant completely ignores that Plaintiff was working full time as a caregiver for the elderly as her primary source of income. *See* CP 80. The repair work represented a small amount of the household income with much of the money going back into purchasing tools, repair manuals, and other items.

**C. To Plaintiff, The Auto Repair Was More Like a Hobby Than a Business**

To Plaintiff, the auto repair work was more akin to a hobby. *See* CP 82. Still, Plaintiff fully disclosed the work to the insurance agent and it was open and obvious to the agent who inspected the property and took photographs. *See* CP 183-84, 279-80, 291, 525-28. The repair work was done outside of the shed, not inside. *See* CP 104, 127, 228, 230-31, 269, 274, 279-80, 527-28. The insurance agent did not ask any follow up questions about the repair work and wrote the policy for the storage shed, knowing that repair work was done outside of the shed and even after the Plaintiff asked her if she needed any repair work done. *See* CP 184, 279-

80, 426, 525-28. The agent never informed the Plaintiff that Defendant would insure the shed for \$60,000 and charge an additional premium for the added coverage, but that the coverage wouldn't cover her shed in the event of a fire because she repaired cars near the shed and stored tools and equipment in the shed. *See* CP 183-84, 289-90, 293-94, 435-37, 439-40.

**D. It Was Defendant's Agent Who Completed Plaintiff's**

**Insurance Application and Who Considered the Auto Repair Activity "De Minimis"**

Plaintiff Ms. Tarasyuk did not fill out the application for insurance. Defendant Mutual of Enumclaw infers many times that Plaintiff filled out the application for insurance. *See Brief of Respondent Mutual of Enumclaw Insurance Company, p. 4, 11.* However, Plaintiff did not read or write English and has limited English speaking ability. *See* CP 182 (Defendant's agent testified as to Plaintiff's grasp of the English language being "minimal"); *see also* CP 82 (Plaintiff testified that she "cannot read"). Plaintiff went to Defendant's agent, Anna Mosesova, who spoke Russian and filled out her application. *See* CP 181-82, 184, 274, 279. At the time of her deposition, Anna Mosesova did not remember asking Plaintiff about business use of the property as part of the application, or that there was even a question about it on the application. *See* CP 286.

Q. So you went through this application with her?

A. Yes.

Q. In this application did you ever ask her if she had a home business?

A. No. Actually, not on this application...

Plaintiff Ms. Tarasyuk was handed the application and asked to sign, but Agent Mosesova filled the application out and checked the boxes on the application. *See* CP 181-82, 184, 274, 279, 286. Both Agent Mosesova and Plaintiff agree that later that same day, and in subsequent conversations, Agent Mosesova asked about the use of the storage shed and about the car repairs and Plaintiff fully disclosed the full nature of the auto repairs that were taking place outside of the shed, and even asked Agent Mosesova if she had any cars that needed repairs. CP 183-84, 279-80, 426.

**E. Plaintiff Did Not Have Prior Business Insurance Coverage**

Plaintiff especially takes issue with Defendant's repeated assertion that Plaintiff "previously had a business policy but had decided not to maintain it due to the cost," which is completely inaccurate. *See Brief of Respondent Mutual of Enumclaw Insurance Company, p. 9-10.* Defendant relies solely on CP 497 for this assertion, where Defendant's agent asked Plaintiff if "they have and [sic] BOP or CP coverage and they indicated they no longer have this coverage as they were looking to save money." *See* CP 497. It would be difficult for anyone to know what "BOP or CP

coverage” refers to, but it would be much more difficult for Ms. Tarasyuk who has a “minimal” grasp of the English language. *See* CP 497; *see also* CP 182 (Defendant’s agent testified as to Plaintiff’s grasp of the English language being “minimal”). Ms. Tarasyuk did not have prior commercial insurance. Defendant’s assertion that “BOP or CP coverage” means business or commercial insurance, or that Ms. Tarasyuk understood it to mean such is not supported by the record or by extensive discovery, and should not be considered. In addition to being unfounded and untrue, Defendant’s assertion that Appellant had previous business or commercial coverage is a question of fact not considered by the trial court.

The only thing clear from this note at CP 497 is that Defendant was already positioning itself and preparing to deny coverage from the first day the fire was reported to Defendant. *See* CP 497.

**F. The Increase in Insurance Coverage Was Specifically for the Plaintiff’s Storage Shed**

There is plenty of evidence that the shed was not included in the initial \$23,046 figure for Coverage B, and that the March 1, 2011, amendment to the policy was intended to add \$60,000 in coverage just for the shed. *See* CP 368-70, 435. First, after the March 1, 2011 amendment, the coverage for other structures was increased from \$23,046 to \$83,046, not to \$60,000 as Defendant indicates in its response. *See* CP 369-70,

435. Second, the calculation for the increase by \$60,000 was based on the square footage of the shed, 1200 sq. ft., multiplied by \$50, which was the standard value applied to other structures; this was the exact amount added in the March 1 Amendment. *See* CP 302, 370. Third, Ms. Tarasyuk did not want to purchase the additional coverage for the shed and asked if she had to cover the shed and pay the added premium, and she was informed that she was required to add coverage for the shed. *See* CP 293-94, 439-40. Fourth, Defendant claims that prior to going out and inspecting the property and doing some independent research online they did not even know that the shed existed and therefore there was no intent to cover it until the March 1, 2011, amendment and it was indeed not “always covered”. *See* CP 287-89, 293-94. Lastly, there are two other smaller outbuildings and the initial coverage was intended to be adequate to cover those sheds. It is quite obvious, and Defendant admits, that Defendant used the value of the storage shed as the basis of the increase. *See* CP 12, 195-96, 199, 201-02. The primary purpose of the March 1, 2011, amendment to the policy in everyone’s mind was to add coverage to the shed. *See* CP 289-90, 293-94, 368-71, 435-36. The contention that the storage shed was always covered not only served to mislead the Plaintiff into relying on her policy, but also now serves to mislead the court,

because, as it turns out, the storage shed was not “always covered,” otherwise, Defendant would have paid for the damages after the fire.

### **III. SUMMARY OF ARGUMENT IN REPLY**

1. The trial court did not interpret the insurance contract, but granted summary judgment based on an improper duty analysis. An interpretation of the contract would have led the trial court to an opposite conclusion because the ambiguous “business use” exclusion would have precluded summary judgment. Defendant’s agent’s interpretation that Plaintiff’s business activities fell outside of the “business use” exclusion before the loss and Defendant’s contradictory re-interpretation after Plaintiff’s loss shows that the “business use” exclusion was ambiguous. Ambiguous insurance exclusions should be construed against the insurer with added force, and in favor of the insured.

2. Plaintiff disclosed her auto repair activities to Defendant’s agent, and it was Defendant’s agent who completed Plaintiff’s insurance application and interpreted her responses. Defendant’s agent knew that Plaintiff was paid for auto repairs conducted outside of the storage shed. Defendant’s agent interpreted Plaintiff’s auto repair activities to be “de minimis” and amended the policy to include \$60,000 in coverage for the storage shed. This policy amendment was a contract with a primary purpose to add coverage to the storage shed. The policy amendment,

amount of coverage, and increase in premiums were all requested and required by Defendant Mutual of Enumclaw. That amendment was after an inspection of the property by Defendant and full disclosure of the repair activities by Plaintiff.

3. The trial court should have determined that the primary purpose of the amended insurance contract was for coverage for damages of the storage shed. The trial court should have also determined that the “business use” exclusion was inconsistent with the primary purpose of the contract and should have strictly construed it against the Defendant.

4. Defendant acted in bad faith. It was unreasonable for Defendant to insist on amending the policy if it had information that it knew would preclude coverage under the policy, while increasing, and then continuing to accept, premiums. Defendant’s bad faith conduct supports a claim under the CPA and IFCA when it violated various provisions of RCW 48.30.015(5), WAC 284-30-330, and WAC 284-30-350.

#### **IV. ARGUMENT**

##### **A. The Trial Court Did Not Interpret, or Even Attempt to Interpret, the Insurance Contract; If It Did, the “Business Use” Ambiguity Would Have Precluded Summary Judgment.**

The trial court did not engage in an interpretive analysis of the insurance contract as Defendant contends. If it had, it would not have granted Defendant's summary judgment because of the "business use" exclusion's ambiguity. Contract interpretation is a question of law, but "interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence." *Tanner Elec. Coop. v. Puget Sound Power and Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Summary judgment would have only been proper "if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning." *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997). Summary judgment is not proper if the parties' written contract has two or more reasonable but competing meanings. *Hall*, 87 Wn. App. at 10.

Defendant's agent, Ms. Mosesova, reasonably interpreted Plaintiff Tarasyuk's responses to mean that she did not use her storage shed for "business use," and Defendant later had a different interpretation of Plaintiff's activities as "business use," making the contract susceptible to different interpretations. *See* CP 182-84, 227-28, 274, 279-80, 286, 290-94. Defendant incorrectly asserts that Plaintiff marked the "no" answer to the application's question on business use. It was Defendant's agent who

selected the responses while assisting Plaintiff in the completion of her insurance application. *See* CP 182-84, 227, 274, 279-80, 286, 290-94.

Plaintiff Tarasyuk has a “minimal” grasp of the English language and cannot read. *See* CP 182 (Defendant’s agent testified as to Plaintiff’s grasp of the English language being “minimal”); *see also* CP 82 (Plaintiff testified that she “cannot read”). Defendant’s agent, Ms. Mosesova, quite literally interpreted the insurance contract and application for Plaintiff. *See* CP 182-84, 227, 274, 279-80, 286, 290-94. Regardless of how much money Plaintiff made repairing vehicles, or what area of the property was used in the auto repair, or who her customers were, Plaintiff Tarasyuk told Defendant’s agent that she repaired autos for pay and the agent interpreted Plaintiff’s responses. *See* CP 182-84, 227, 274, 373, 420, 425-26, 509-11.

Defendant’s own agents interpreted what “business use” meant and decided to write the policy. Plaintiff never tried to interpret what constituted a business use, but, when asked, informed the agent of the repair activities and offered to repair the agent’s car. *See* CP 184, 279-80, 426, 525-28. This disagreement on the meaning of “business use” was internal to Defendant Mutual of Enumclaw and was between its own agents and employees. Mutual of Enumclaw cannot have the luxury of interpreting the exclusion one way prior to the loss, and another way after the loss. In any case, the different interpretations certainly raise a question

of fact, and clearly show the ambiguity in the “business use” exclusion clause, precluding summary judgment.

- i. Because the “business use” exclusion is susceptible to two or more interpretations, it is ambiguous, and should be interpreted in favor of the insured.**

Contract interpretation is a question of law, but summary judgment is improper where there are two or more reasonable meanings to a contract, because that presents a question of fact. *Anderson Hay & Grain Co., Inc. v. United Dominion Ind., Inc.*, 119 Wn. App. 249, 255, 76 P.3d 1205 (Div. 3 2003) (citations omitted). When an insurance contract’s “language on its face is fairly susceptible to two different, but reasonable interpretations, ambiguity exists, and the court will apply the interpretation most favorable to the insured.” *Peterson-Gonzales v. Garcia*, 120 Wn. App. 624, 630, 86 P.3d 56 (Div. 3 2001) (citations omitted).

Plaintiff Tarasyuk would not have been able to come to the legal conclusion that her auto repair activities were “de minimis,” as asserted by defense counsel (*Respondent’s Brief*, p. 34), considering that she needed assistance just to complete her insurance application. See CP 82, 182-83, 274, 277. It was Agent Mosesova, who is familiar with business use exclusions in insurance policies, who decided that the auto repair was “de

minimis”. Defendant’s agents interpreted Plaintiff’s responses in filling out her insurance application. *See* CP 177-78, 182-83, 227, 286. This determination was made after Plaintiff disclosed that she repaired autos near the storage shed for pay, and again after Defendant’s agents inspected the property and saw the open and obvious repair activities, and again a month later when Defendant amended the policy to add coverage to the storage shed. *See* CP 182-84, 227, 274, 279-80, 291, 373, 420, 425-26, 509-11, 525-28. Plaintiff did not make the legal determination that her auto repair activity was “de minimis”—she would have had to engage in legal analysis to make that determination. Plaintiff simply, and reasonably, thought that she didn’t make very much money from the auto repair activity. *See* CP 279-80. Whether it was because Plaintiff’s auto repair activities were “de minimis” or whether it was because the activities were done outside of the storage shed, it was Defendant’s agent that determined that the auto repair activities were not “business use” within the policy exclusion.

To ask that an insured engage in legal analysis to determine whether policy exclusions apply to its activities every time it enters into an insurance contract is bad policy. Further, hiring an attorney to look over every insurance contract and to interpret every insurance clause would be very costly to consumers. Here, Plaintiff relied on the interpretation of

Defendant's agent, who knew of the business exclusion clause and who reasonably interpreted information about the auto repair activity as falling outside of the exclusion. Plaintiff did not make the determination that her activity was "de minimis," Defendant's agent made that determination, and it was reasonable for Plaintiff to rely on it. It is bad faith for Defendant to now repudiate its own agent's determination and ratification of the policy.

**B. The Trial Court Should Have Decided That the Primary Purpose of the Insurance Contract Was For Coverage of the Storage Shed and Given Effect to Its Primary Purpose**

It is completely reasonable for courts to hold insurance companies liable for the promises they make to consumers, and enforce the primary purpose of those contracts (which is for coverage of losses and damages). In all cases, courts must give effect to the primary purpose of the contract by considering the parties' intent, viewing "the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated." *Anderson Hay*, 119 Wn. App. at 254-255 (this case *implicitly* supports the assertion that courts should consider the primary purpose of the contract). In the case of insurance contracts, courts

must give effect to its fundamental “protective” purpose—which is coverage for losses. *See Stuart v. American States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998). In fact, Black’s law dictionary defines insurance as “an agreement by which one party (the *insurer*) commits to do something of value for another party (the *insured*) upon the occurrence of some specified contingency.” *Black’s Law Dictionary*, 802 (7<sup>th</sup> Edition 2001) (emphasis in original). It goes on to explain that insurance is a “contract by which one party, for a consideration... paid in money... promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance... the thing insured is property.” *Id.* (citations omitted). It is quite obvious, and not outrageous, that the primary purpose of insurance contracts is coverage for a loss or damages. The March 1, 2011, amendment’s primary purpose was to add \$60,000 in coverage to the storage shed in case of loss.

The trial court did not interpret and enforce the homeowners policy issued to Ms. Tarasyuk, but rather decided the case on different grounds and did not even engage in an interpretive analysis of the contract or the exclusions. *See* VP 27-30. Plaintiff’s summary judgment motion regarding breach of contract and contract interpretation was not even heard or considered at the trial court. CP 549. The court decided the case

based on a “lack of duty” to “procure a policy affording the client complete liability protection,” which was not even argued by Plaintiff. *See* VP 27-30.

Plaintiff did not, and does not now, argue that Enumclaw specifically and expressly intended to apply “business” coverage to Plaintiff’s policy, but rather that Defendant added coverage specifically for the storage shed and that it knew of the auto repair activity at the time it added coverage. *See* CP 373, 420, 425-26, 437. Plaintiff further does not argue that she should have been offered business coverage, but quite the opposite—if Defendant did not intend on covering the storage shed, it should have cancelled the policy instead of amending and increasing coverage, collecting increased premiums, and purporting to cover the storage shed. Again, it is very telling that Defendant would refuse to write the policy if Plaintiff did not increase coverage, but took no issue with her auto repair activity. *See* CP 274, 293-94. It would have been reasonable for Defendant to offer business coverage after learning of the auto repair activities, but it also would have been reasonable for Defendant to cancel the policy upon learning of the repair activities. Instead, Mutual of Enumclaw increased coverage and premiums and allowed Plaintiff to rely on Defendant’s objective manifestations that the storage shed was covered.

- i. **The court should have determined whether the contract's exclusions were consistent with the primary purpose of the contract.**

In Washington, the controlling law is clear on this subject, “an interpretation of an insurance clause must be reasonable and take into account the purpose of the contract at issue.” *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Any exclusionary term must be read so as to give validity to the primary terms of the contract and be strictly construed against the insurer. *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 141, 26 P.3d 910, 916 (2001).

Indeed, the court should seek to avoid absurd consequences when deciding the way it will interpret an insurance contract. However, “a policy should be given a practical and reasonable interpretation rather than a strained or forced construction that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective.” *Public Util. Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 799, 881 P.2d 1020 (1994) (emphasis added) (citing *Transcontinental Ins. Co. v. Washington Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988)). The type of absurd and strained consequences courts try to avoid is exclusion of coverage, as in this case, where an insurance

company ignores information suggesting that a policy is illusory, while continuing to collect premiums, only to use that information after a loss to exclude coverage, making the policy nonsensical and ineffective.

It is also true that the terms of a binding agreement between parties are evidenced by their objective manifestation of mutual intent. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Further, even where there is no express agreement, assent may be derived or adduced from parties' conduct. *See Jackson v. Gardner*, 197 Wn. 276, 285-86, 84 P.2d 992 (1938).

Defendant's own objective manifestations suggest that it intended to cover the storage shed, despite the auto repair activity. *See* CP 227-28. Defendant objectively manifested its intent through its conduct, by increasing Plaintiff's insurance premiums specifically for the storage shed, accepting payment for those premiums, and not cancelling the policy after Defendant and its agents had information that Plaintiff was conducting auto repair activities around her storage shed. *See* CP 227-28, 288-294. The increase in coverage for the storage shed was done at the insistence of Mutual of Enumclaw after sending an agent to inspect and take pictures of the property. CP 301-02, 373-74.

Defendant implies that Plaintiff did not objectively manifest intent to have her storage shed covered, but the opposite is true, because she paid

the increased premiums specifically for the storage shed and she also relied on the coverage purportedly extended. Both parties objectively manifested their mutual intent that the storage shed be covered because Defendant charged a premium, and increased it specifically for coverage of the storage shed, even though it knew of auto repair activity, and Plaintiff paid the increased premiums.

**C. Plaintiff's Bad Faith Claims Survive Her Breach of Contract**

**Claim.**

Plaintiff's Bad Faith claim is independent of and survives her breach of contract claim, should it fail. The Washington Supreme Court has specifically held that "an insurer's duty of good faith is separate from its duty to indemnify if coverage exists" and a plaintiff may still prevail on a bad faith claim, despite not prevailing on a breach of contract claim. *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 278-79, 961 P.2d 933 (1998). Even if an insurer correctly interprets the insurance contract, there may still be bad faith because the real test is "whether the insurer's *conduct* was reasonable." *Wright v. Safeco Ins. Co. of America*, 124 Wn. App. 263, 280, 109 P.3d 1 (2004). The court should consider "the determinative question [as to the] reasonableness of the insurer's actions in light of all the facts and circumstances of the case" in deciding whether the insurer acted in good faith. *Anderson v. State Farm Mutual*

*Ins. Co.*, 101 Wn. App. 323, 329-30, 2 P.3d 1029 (Div. 1 2000) (Citing *Industrial Indem. Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990)).

In this case, Defendant's conduct in investigating and denying Plaintiff's claim was done in bad faith. Here, Defendant possessed sufficient information to ascertain (and was even told by Plaintiff) that Plaintiff conducted auto repair work for pay outside of her storage shed well in advance of the loss of the storage shed and before the policy was amended to add coverage for the storage shed. Plaintiff told Defendant's insurance agent that she repaired vehicles outside of her storage shed and that she was occasionally paid for it, and even offered to fix the agent's car. CP 12, 183-84, 330, 420, 425-26, 437. Further, another one of Defendant's insurance agents went to Plaintiff's home and took photos of the shed, which clearly indicated that she was involved in auto repair. CP 12-14, 86-89, 187-89, 240-41, 274, 329-31, 373, 420, 434-37. Even despite all of this information, instead of offering business coverage or cancelling Plaintiff's policy, Defendant instead increased coverage specifically for the storage shed and collected increased premiums, and allowed Plaintiff to rely on its apparent coverage. CP 439-40. It is very telling that Defendant would refuse to write the policy if Plaintiff did not increase coverage, but yet Defendant took no issue with her auto repair

activities. *See* CP 439-40. Defendant only raised and investigated the “business use” issue in order to deny coverage after a fire destroyed the storage shed, in bad faith.

**i. Bad Faith claims are not limited to denial of coverage, but also apply to dealing in Bad Faith**

Bad faith is not limited to insurance contracts or to the denial of coverage and can exist in many different forms outside of the denial of coverage. Failing to inform a customer of exclusions that may apply is bad faith. Selling someone a good or service that has known defects is also bad faith. *Liebergesell* held only that “the duty to disclose relevant information to a contractual party [during negotiation] *can* arise as a result of the transaction itself within the parties’ general obligation to deal in good faith.” *Liebergesell v. Evans*, 93 Wn.2d 881, 893, 613 P.2d 1170 (1980) (footnote omitted). The court noted that historically, as far back as the time of the Romans, consensual contracts required absolute good faith and “[i]t was bad faith not only if one party actively deceived the other on some material point, but *even if he did no more than passively acquiesce in the other’s self-deception.*” *Liebergesell*, 93 Wn.2d at 893 n.1 (emphasis added) (citations omitted).

The duty of good faith is not specific to the main benefits of an insurance contract but permeates the insurance arrangement. *St. Paul Fire*

*and Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129, 196 P.3d 664 (2008) (citing *Kallevig*, 114 Wn.2d at 916; and RCW 48.01.030). The duty of good faith is broad and “conduct that does not amount to intentional bad faith or fraud may be a breach of duty.” *Am. Mfrs. Mut. Ins. v. Osborn*, 104 Wn. App. 686, 697, 17 P.3d 1229 (Div. 2 2001) (citations omitted). The good faith duty between an insurer and an insured arises from a source akin to a fiduciary duty. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986). “This fiduciary relationship, as the basis of an insurer’s duty of good faith, implies more than the ‘honesty and lawfulness of purpose’ which comprises a standard definition of good faith. It implies ‘a broad obligation of fair dealing’ ...and a responsibility to give ‘equal consideration’ to the insured’s interests.” *Tank*, 105 Wn.2d at 385-86 (quoting *Tyler v. Grange Ins. Ass’n*, 3 Wn. App. 167, 173, 177, 473 P.2d 193 (1970)). Both Washington courts and the legislature have consistently imposed a duty of good faith on the insurance industry. *Tank*, 105 Wn.2d at 386.

In *Coventry*, the court held that a first-party insured has a cause of action for bad faith investigation even where there is ultimately no coverage. *Coventry*, 136 Wn.2d at 279. The court in *Coventry* reasoned that an “insurer’s duty of good faith is separate from its duty to indemnify if coverage exists.” *Id.* This holding reflects settled Washington bad faith

law. *Coventry* simply recognized the principles enunciated by the legislature in chapter 48.01 RCW: that the insurance business requires good faith, honesty, and equity in all insurance matters. *Id.* at 276 (quoting RCW 48.01.030). Courts have consistently recognized that the duty of good faith is broad and all-encompassing, and is not limited to an insurer's duty to pay, settle, or defend. *St. Paul Fire*, 165 Wn.2d at 132.

Mutual of Enumclaw and its agents acted in bad faith when they insisted on adding coverage for the storage shed after inspection and disclosure of auto repair activities. They acted in bad faith when they failed to disclose pertinent exclusions in the policy at time of purchase (when the policy was amended to cover the storage shed). Finally, they acted in bad faith by interpreting the business use exclusion one way when the policy was written, and another way after a claim was made, in order to deny coverage.

**D. Mutual of Enumclaw's bad faith conduct was also a violation of the CPA and IFCA.**

As outlined in Plaintiff's Appellate Brief, Defendant's bad faith conduct supports a claim under the CPA and IFCA. The Court has "recognized that a single violation of a claims-handling regulation may violate the CPA." *St. Paul Fire*, 165 Wn.2d at 129 (citations omitted). This conduct includes violations of various provisions of RCW 48.30.015

(5) and WAC 284-30-330, including unreasonably investigating Plaintiff's claim only to deny coverage, misrepresenting pertinent facts or insurance policy provisions, not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear, and compelling a first party claimant to initiate or submit to litigation, and also, violation of WAC 284-30-350, misrepresentation of or failure to disclose pertinent policy provisions and exclusions.

Defendant and its agents were aware, well before the Plaintiff's loss, that Plaintiff repaired cars outside of the storage shed. *See* CP 183-84, 227, 279-80, 291, 525-28. However, Defendant chose to ignore the auto repair, increased coverage and premiums for the storage shed, and held itself out as covering the storage shed, despite the potential for exclusion of coverage to Plaintiff. *See* CP 227-28, 288-94. Further, Defendant's own agent interpreted the auto repair activity as falling outside of the "business use" exclusion, and only contradicted that interpretation after the loss. *See* CP 227-28. Defendant only investigated in order to deny Plaintiff coverage, because it knew of the auto repair prior to the loss. *See* CP 227-28.

## V. CONCLUSION

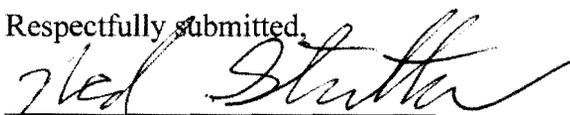
Plaintiff in this case paid premiums increased specifically for the storage shed and Defendant denied Plaintiff the benefit of her bargain, in

bad faith. Defendant objectively manifested its intent to cover Plaintiff's damage to her storage shed by increasing premiums specifically for the storage shed, in the amount of the replacement value of the storage shed. Plaintiff paid the increased premiums and relied on Defendant's representations of increased coverage. Defendant's agents made the determination that Plaintiff's business activity was "de minimis" and that the business exclusion did not apply, though they had knowledge of Plaintiff's paid auto repair activity. However, after the loss, Defendant unreasonably retracted that determination in order to deny coverage, in bad faith.

Summary judgment for Defendant was not appropriate in this case. Plaintiff respectfully requests that this court reverse the trial court and grant summary judgment in favor of Plaintiff and award attorneys' fees and costs. Alternatively, Plaintiff requests that this court reverse the trial court and remands this case for trial for all of Plaintiff's claims, and for a determination of the extent of the Plaintiff's damages, to include attorneys' fees and costs.

Dated this 28 day of January, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 28 day of January, 2015, I caused a true and correct copy of APPELLANT'S REPLY BRIEF TO BRIEF OF RESPONDENT MUTUAL OF ENUMCLAW INSURANCE COMPANY to be served on the following in the manner indicated below:

Counsel for Respondents	via	<input checked="" type="checkbox"/> U.S. Mail
Brad E. Smith, WSBA #16435		<input type="checkbox"/> Hand Delivery
EWING ANDERSON, PS		<input type="checkbox"/> Express Mail
522 W. Riverside Avenue, Suite 800		<input type="checkbox"/> E-Mail
Spokane, WA 99201-0519		

Dated this 28 day of January, 2015.

  
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