

FILED

JUN 23 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 323897

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

MARIYA TARASYUK,

Appellants/Plaintiffs,

v.

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

Respondents/Defendants.

BRIEF OF APPELLANTS

Brian J. Anderson WSBA# 39061
5861 W. Clearwater Ave.
Kennewick, WA 99336
509-734-1345

Ned Stratton WSBA #42299
5861 W. Clearwater Ave.
Kennewick, WA 99336
509-734-1345

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

ASSIGNMENT OF ERROR..... 1

 Assignment of Error 1

 Issues Pertaining to Assignment of Error 1

STATEMENT OF THE CASE.....2

 Procedural History4

SUMMARY OF ARGUMENT.....5

ARGUMENT7

 STANDARD OF REVIEW.....7

 I. The Court Should Consider Extrinsic Evidence to Interpret Insurance Contracts in a Way That Gives Effect to its Primary Purpose..... 9

 a. The court should have first determined whether the contract’s exclusions were consistent with the primary purpose of the contract.....9

 b. The insurance contract was susceptible to two or more reasonable interpretations, making it ambiguous, and the court should interpret the contract ambiguities in favor of the insured..... 11

 c. In interpreting the insurance contract, the court should construe ambiguous contract exclusions against Defendant with added force. 15

 II. Defendant Owed Plaintiff a Duty to Act in Good Faith and Violated That Duty by Denying Coverage. 16

 a. The Defendant owed the Plaintiff a duty of good faith. 17

b. Defendant breached its duty of good faith if it knew a coverage exclusion applied and continued to accept premiums purportedly covering the subject property, and then denied the Plaintiff coverage based on that coverage exclusion.	18
III. Defendant Violated the CPA by Denying Coverage After it Continued to Accept Insurance Premiums Even Though it Knew an Exclusion to its Policy Applied.	22
IV. Defendant Violated the IFCA by Acting in Bad Faith by Denying Plaintiff's Claim and Only Investigating in Order to Deny Coverage.....	25
V. Washington Law Does Support Coverage by Estoppel in Cases of Bad Faith.....	26
CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<i>Ainsworth v. Progressive Cas. Ins. Co.</i> , 322 P.3d 6 (2014) 25, 26	
<i>Allstate Ins. Co. v. Peasley</i> , 131 Wn.2d 420, 932 P.2d 1244 (1997)	12
<i>American Star Ins. Co. v. Grice</i> , 121 Wn.2d 869, 854 P.2d 622 (1993)	16
<i>Anderson Hay & Grain Co., Inc. v. United Dominion Ind., Inc.</i> , 119 Wn. App. 249, 76 P.3d 1205 (Div. 3 2003).9, 11, 12	
<i>Anderson v. State Farm Mutual Ins. Co.</i> , 101 Wn. App. 323, 2 P.3d 1029 (Div. 1 2000)	17
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 510 P.2d 222 (1990)...10	
<i>Coventry Associates v. American States Ins. Co.</i> , 136 Wn.2d 269, 961 P.2d 933 (1998).....	17, 19
<i>Cummins v. Lewis County</i> , 156 Wn.2d 844, 133 P.3d 458 (2006)	8
<i>Gingrich v. Unigard Sec. Ins. Co.</i> , 57 Wn. App. 424, 788 P.2d 1096 (Div. 3 1990).....	9
<i>Grange Ins. Co. v. Brosseau</i> , 113 Wn.2d 92, 776 P.2d 123 (1989)	8
<i>Greenfield v. Western Heritage Ins. Co.</i> , 154 Wn. App. 795, 226 P.3d 199 (Div. 3 2010)	8, 9
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	22
<i>Industrial Indem. Co. of the Northwest, Inc. v. Kallevig</i> , 114 Wn.2d 907, 792 P.2d 520 (1990)	17, 19, 22
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002)	8
<i>Kenney v. Read</i> , 100 Wn. App. 467, 997 P.2d 455, 4 P.3d 862 (2000)	12
<i>Klem v. Washington Mut. Bank</i> , 176 Wn.2d 771, 295 P. 3d 1179 (2013)	23

<i>Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.</i> , 150 Wn. App. 1, 206 P.3d 1255 (2009).....	26
<i>Leingang v. Pierce County Medical Bureau, Inc.</i> , 131 Wash.2d 133, 930 P.2d 288, (1997).....	24
<i>Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh</i> , 123 Wn.2d 678, 871 P.2d 146 (1994).....	10
<i>Matsyuk v. State Farm Fire & Cas. Co.</i> , 173 Wn.2d 643, 272 P.3d 802 (2012).....	19
<i>Munich v. Skagit Commc'n Ctr.</i> , 175 Wn.2d 871, 288 P.3d 328 (2012).....	8
<i>Olympic S.S. Co. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	27
<i>Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.</i> , 144 Wn.2d 130, 26 P.3d 910, 916 (2001)....	10, 27
<i>Peterson-Gonzales v. Garcia</i> , 120 Wn. App. 624, 86 P.3d 210 (Div. 3 2004).....	8, 12
<i>Rasmussen v. Bendotti</i> , 107 Wn. App. 947, 29 P.3d 56 (Div. 3 2001).....	8
<i>Rocky Mt. Fire & Cas. Co. v. Rose</i> , 62 Wn.2d 896, 385 P.2d 45 (1963).....	14
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	7, 16, 19
<i>Smith v. Stockdale</i> , 166 Wn. App. 557, 271 P.3d 917 (Div. 3 2012).....	24
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wn.2d 250, 810 P.2d 221 (1973).....	10
<i>Stuart v. American States Ins. Co.</i> , 134 Wn.2d 814, 953 P.2d 462 (1998).....	9
<i>Suter v. Virgil R. Lee & Son, Inc.</i> , 51 Wn. App. 524, 754 P.2d 155 (Div. 2 1988).....	17
<i>Tank v. State Farm Fire & Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986).....	18
<i>Wright v. Safeco Ins. Co. of America</i> , 124 Wn. App. 263, 109 P.3d 1 (2004).....	19

Statutes

RCW 19.86.090.....	27
RCW 19.86.170.....	22
RCW 4.84.010.....	28
RCW 48.01.030.....	18
RCW 48.30.010.....	18, 22
RCW 48.30.015.....	22, 25, 27
WAC 284-30-300.....	18
WAC 284-30-330.....	22, 23

ASSIGNMENT OF ERROR

Assignment of Error

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

Issues Pertaining to Assignment of Error

For summary judgment purposes and viewing the facts in the light most favorable to Plaintiff as the non-moving party:

I. In interpreting insurance contracts, the primary purpose of the parties entering into an insurance contract should be given full effect;

a) The court in its interpretation should determine whether the contract's exclusions are consistent with the primary purpose of the contract;

b) The insurance contract was susceptible to two or more reasonable interpretations, and ambiguities should favor the insured;

c) Ambiguous coverage exclusions in insurance contracts should be construed against the insurer with added force;

II. Defendant owed the plaintiff a duty to act in good faith; the duty of care applied by the trial court is inapplicable to this case;

a) Defendant owed the plaintiff a duty of good faith;

b) Defendant breached its duty of good faith by knowing of an applicable coverage exclusion, continuing to accept premiums purportedly covering the subject property, and then unreasonably denying Plaintiff coverage;

III. Defendant violated the CPA by amending the insurance policy to add additional coverage for the shed, increasing premiums for the added coverage, and accepting the insurance premiums and then denying coverage of the storage shed after the fire;

IV. Defendant violated the IFCA by acting in bad faith by denying Plaintiff's coverage and only investigating in order to deny coverage;

V. Washington law creates coverage by estoppel in cases of bad faith.

STATEMENT OF THE CASE

On January 11, 2011, the Appellant (hereinafter referred to as Plaintiff), Mariya Tarasyuk, purchased a homeowner's policy from the Respondent (hereinafter referred to as Defendant), Mutual of Enumclaw, an insurance company, which included a small amount for other structures on the property and was later amended to add coverage for Plaintiff's storage shed. Clerk's Papers (CP) p. 2-3, 11, 15, 204, 374, 440. The Defendant's agent, Anna Mosesova, assisted Plaintiff in completion of the insurance application, due to the Plaintiff's inability to read or write in

English and limited ability to speak English. CP p. 11, 182, 184, 274, 330, 373, 432, 439. Plaintiff informed Ms. Mosesova that the storage shed was used in part for vehicle repair. CP p. 12, 183-84, 279-80, 330, 373, 420, 425-26, 437, 486-487, 515-16. The vehicle repair was done outside of the storage shed. CP p. 269, 279-80, 425-26. Later on, another one of Defendant's agents, Craig Baumgartner, inspected and took photos of the additional structure, the storage shed, which was to be insured under the policy. CP p. 12, 187-89, 274, 373-74, 434-37, 440. Mr. Baumgartner photographed the area around the storage shed, which clearly showed vehicle repair activity. CP p. 12-14, 86-89, 187-89, 240-41, 274, 329-31, 373, 420, 434, 437. Additionally, signage around the storage shed also indicated a vehicle repair business purpose. CP p. 12-14, 88, 241, 331.

On January 14, 2011, Defendant's underwriter, Jill Anfinson, requested photos of the Plaintiff's property. CP p. 208, 247-48, 300-301. Although Mr. Baumgartner had taken 9 photos of the Plaintiff's property, Ms. Mosesova only sent Ms. Anfinson 4 photos. CP p. 208, 248-49. After Ms. Anfinson insisted on additional photos, Ms. Mosesova then sent Ms. Anfinson an additional two photos which had been altered and cropped and other photos of the storage shed area were deleted. CP p. 208, 209-10, 232-38, 244, 248-49, 250-51. After having an agent inspect the property and take photos, Defendant then insisted that additional coverage for

Plaintiff's detached storage shed be added to the policy and charged increased premiums for the additional coverage and wrote a new policy on March 1, 2011. CP p. 3, 222-25, 302, 329, 373-74, 434-37, 440. The initial policy written on January 11, 2011 contained language that stated "We do not cover other structures: used in whole or in part for business". CP p. 38. The primary purpose of the March 1, 2011 amended contract was to add \$60,000 in coverage to the storage shed, and this was after the inspection of the property by a Mutual of Enumclaw agent and full disclosure of repair activities done outside of and around the storage shed. CP p. 436.

On August 19, 2011, Plaintiff's storage shed burned down due to an electrical fire, and was deemed a total loss. CP p. 2-3, 15, 374. The Defendant then denied coverage for the shed, arguing that an exclusion concerning "business use" applied because the storage shed "was used to store tools and repair manuals for the business". CP p. 3, 15, 329, 375-77.

Procedural History

The plaintiff, Mariya Tarasyuk, filed a claim against the defendant, Mutual of Enumclaw Insurance Company, for the Defendant's denial of coverage of her storage shed in Benton County Superior Court. Plaintiff's causes of action included: breach of contract, violation of the IFCA,

violation of the CPA, breach of the duty of good faith, and estoppel from denial of coverage.

After extensive written and oral arguments, the trial court granted the Defendant's Motion for Summary Judgment based on a lack of duty. The court stated that "the general duty of care which an insurance agent owes his client does not include the obligation to procure a policy affording the client a complete liability protection." Verbatim Report of Proceedings (RP) p. 27, l. 18-21. The "duty of care" referred to by the trial court is a negligence duty of care, which does not apply to any of Plaintiff's claims, so Plaintiff filed a motion for reconsideration with the trial court. The motion for reconsideration was also denied, primarily based on disputed questions of fact, such as the business use of the building that was insured. Plaintiff appealed the trial court's decision.

SUMMARY OF ARGUMENT

The Court should interpret insurance contracts to give full effect to the primary purpose of the contract. In its interpretation the Court should determine whether the contract's exclusions are consistent with the primary purpose of the contract. If insurance contracts contain ambiguous clauses susceptible to two or more reasonable interpretations, the

ambiguities should favor the insured. Moreover, ambiguous exclusionary clauses should be construed against the insurer with added force.

In this case, the court should give effect to the primary purpose of the amended contract—which was coverage for the storage shed. The exclusionary clauses were subject to two or more reasonable interpretations, making them ambiguous. Because of their ambiguity, the Court should construe the contract's exclusionary clauses against Defendant with added force, and in favor of Plaintiff.

Defendant, as an insurer, owed Plaintiff a duty of good faith and the violation of that duty gives rise to an action for bad faith. The underlying facts giving rise to bad faith claims may support similar claims for violation of the CPA and IFCA. Finally, in cases of bad faith, Washington law allows for coverage by estoppel.

In this case, Defendant acted in bad faith by unreasonably denying Plaintiff coverage, and, as such, is liable to Plaintiff for the tort of bad faith. Defendant breached its duty of good faith when it was told that repair activities were done around the storage shed and inspected the property and knew that a coverage exclusion may apply, and instead of informing Plaintiff of the possible coverage exclusion, Defendant demanded that the insurance contract be amended to add \$60,000 in additional coverage for the storage shed and increased insurance

premiums, and continued to accept the increased premiums until the fire destroyed the shed, and then denied coverage once a claim was made. Alternatively, Defendant breached its duty of good faith by ratifying an insurance contract and interpreting the contract and exclusionary clauses one way at the time the policy was written, and then brought up the exclusionary clause and investigated only to deny Plaintiff coverage after a claim was made. Further, because the insurer acted in bad faith coverage can be created by estoppel. Even if the insurance contract coverage exclusion applied to the Plaintiff's storage shed, coverage should be extended to cover the Plaintiff's damages because of Defendant Mutual of Enumclaw's bad faith actions in writing the policy and investigating the claim.

Because the primary purpose of the amended contract was to cover the storage shed, the trial court erred in granting Defendant's Motion for Summary Judgment and in not granting Plaintiff's Motion for Summary Judgment.

ARGUMENT

STANDARD OF REVIEW

The appellate court reviews a trial court's summary judgment decisions de novo, engaging in the same inquiry as the trial court. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003) (citing *Jones v.*

Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). Summary judgment is appropriate when the record demonstrates no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Greenfield v. Western Heritage Ins. Co.*, 154 Wn. App. 795, 799, 226 P.3d 199 (Div. 3 2010); CR 56(c). On appeal, when reviewing a summary judgment order, the court views all facts, evidence, and reasonable inferences in the light most favorable to the nonmoving party. *Greenfield*, 154 Wn. App. at 799. However, on de novo review, the appellate court reviews the trial court's conclusions of law by determining whether the court applied the correct legal standard to the facts under consideration. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 954, 29 P.3d 56 (Div. 3 2001).

Several other more specific issues in this matter are also reviewed de novo. Interpretation of an insurance policy is an issue of law that appellate courts review de novo. *Peterson-Gonzales v. Garcia*, 120 Wn. App. 624, 630, 86 P.3d 210 (Div. 3 2004) (Citing *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 92, 95, 776 P.2d 123 (1989)). In a negligence action, whether the defendant owed a plaintiff an actionable duty is a question of law that is reviewed de novo. *Munich v. Skagit Commc'n Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012); *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). Finally, questions of insurance

coverage disposed of at summary judgment are also reviewed de novo.

Greenfield, 154 Wn. App. at 799-800.

I. The Court Should Consider Extrinsic Evidence to Interpret Insurance Contracts in a Way That Gives Effect to its Primary Purpose.

The court should give effect to the primary purpose of the insurance contract—coverage for damages. *See Anderson Hay & Grain Co., Inc. v. United Dominion Ind., Inc.*, 119 Wn. App. 249, 254, 76 P.3d 1205 (Div. 3 2003); *Stuart v. American States Ins. Co.*, 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998). In interpreting contracts, in order to determine the primary intent of the contract, the court must consider extrinsic evidence along with the contract language, including the factual circumstances. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 431, 788 P.2d 1096 (Div. 3 1990). Only when an interpretation does not depend on extrinsic evidence, or the extrinsic evidence leads to only one reasonable interpretation, can the intent of the parties be decided as a matter of law on summary judgment. *Anderson Hay*, 119 Wn. App. at 255.

- a. The court should have first 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) (further stating that “This principle makes it difficult to accept [the insurance’s] exclusionary interpretation when one considers the premium charged.”).

The Supreme Court of Washington also stated the following:

Determination of the intent of the contracting parties is to be accomplished by 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 by the parties.

Berg v. Hudesman, 115 Wn.2d 657, 667, 510 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 810 P.2d 221 (1973)). 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). The terms of a binding agreement between parties are evidenced by their objective manifestation of mutual intent. *Lynott*, 123 Wn.2d at 684.

The primary purpose of the January 11, 2011, insurance contract was for coverage of the Plaintiff’s home and property. The primary

purpose of the March 1, 2011, amended policy was to add \$60,000 in coverage for the detached storage shed, evidenced by premiums specifically increased for the detached storage shed. *See* CP p. 222-25. Initially, Plaintiff contracted to insure her home and received additional coverage for other structures surrounding her home. *See id.* However, after an investigation by Defendant which included pictures of the storage shed, Defendant's agents and its underwriters decided to increase the Plaintiff's coverage and her premiums, specifically to include and increase coverage for the Plaintiff's detached storage shed. *See id.*; CP p. 287, 301-02, 329, 373-74, 440. This change in coverage not only operated to cover the storage shed specifically, but was done at the insistence of Mutual of Enumclaw after sending an agent to inspect and take pictures of the property. CP p. 301-02, 373-74.

b. The insurance contract was susceptible to two or more reasonable interpretations, making it ambiguous, and the court should interpret the contract ambiguities 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*, 119 Wn. App. at 255 (Citing *Kenney v. Read*, 100 Wn. App. 467, 475, 997 P.2d

455, 4 P.3d 862 (2000)). What the parties intended in a contract is a question of fact, and improperly decided at summary judgment. *Anderson Hay*, 119 Wn. App. at 255. Only when an interpretation does not depend on extrinsic evidence, or the extrinsic evidence leads to only one reasonable interpretation, can the intent of the parties be decided as a matter of law on summary judgment. *Anderson Hay*, 119 Wn. App. at 255. Further, 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*, 120 Wn. App. at 630 (Citing *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 423-24, 932 P.2d 1244 (1997)).

In this case, Plaintiff did repair vehicles around the outside of the storage shed. This was a small operation and at the time of application, Plaintiff told Defendant's agent, Ms. Mosesova, that she repaired cars outside of the shed and was paid for these repairs. CP p. 12, 183-84, 330, 420, 425-26, 437, 486-87, 515-516. Initially, Defendant's agent reasonably interpreted Plaintiff's response to the question about "business use" as a "no" and answered the question accordingly, possibly because of the limited nature of the auto repair activities or because they occurred outside of the shed. CP p. CP p. 12, 183-84, 269, 279-80, 330, 373, 420, 425-26, 437, 486-487, 515-16. Because it was reasonable to think that

Plaintiff's auto repair activity did not constitute "business" activity in the shed, as determined by the Defendant's insurance agent, it was also reasonable to conclude that the "business" exclusion did not apply to Plaintiff's external auto repair activity. *See* CP p. 274, 373-74. Even after inspecting the property and seeing the repair activities and taking pictures, the agents interpretation led to an increase in coverage for the storage shed. *See* CP p. 3, 12-14, 86-89, 187-89, 222-25, 240-41, 274, 280, 302, 329-31, 373-74, 420, 425-26, 434-37, 440. So at the time the policy was written both the agents and the plaintiff concluded that the exclusionary clause in the insurance contract did not apply likely because of the location and extent of Plaintiff's auto repair activity, however after the fire the exclusionary clause was interpreted differently. Both Plaintiff's and Defendant's primary intentions were to amend the policy to add coverage of Plaintiff's storage shed, evidenced by the amended policy, and payment of premiums under the homeowner's policy, and payment of increased premiums specifically for the shed. The insurance contract contained an ambiguous "business" use exclusion clause that was susceptible to two or more interpretations, and in the event that there was an ambiguity in the insurance contract, the court should have favored the insured.

It is relevant to note that Defendant did know of the auto repair business through its agents who had binding authority and made decisions

regarding what coverage was needed. CP p. 298-302. The Defendant is bound by all acts, contracts, or representations of its agent which are within the scope of its apparent authority. *Fanning v. Guardian Life Ins. Co.*, 59 Wn.2d 101, 366 P.2d 207 (1961). It is the established rule of law that the knowledge which an agent acquires while acting as such and within the scope of his authority is imputed to his principal and that an insurance company is bound by the acts, contracts, or representations of its agent, which are within the scope of his authority. *Rocky Mt. Fire & Cas. Co. v. Rose*, 62 Wn.2d 896, 385 P.2d 45 (1963). Defendant's Agency-Company Agreement for Mutual of Enumclaw states: "The Company hereby grants authority to the Agent to receive and accept proposals for such contracts of insurance as the Company is licensed to write, as set forth in Product and Binding Authority Guides located on the Company's Agent website, herein ("Binding Authority"), subject to any restrictions imposed by law." CP p. 402-13.

According to the depositions taken by policy underwriters at Mutual of Enumclaw Jill Anfinson and Patricia Boyles, Mutual of Enumclaw was well aware of the authority of Harvey-Monteith Insurance agents to bind Mutual of Enumclaw. CP 444, 454-55.

Ms. Mosesova and Mr. Baumgartner were agents of Mutual of Enumclaw, and thus had the authority to bind Mutual of Enumclaw by

both their actions and their knowledge. It is clear that the agents knew about the auto repairs, they were told about them, and they inspected the property and saw the signs, fence, large car lift, vehicles, boats, and equipment all used for these repairs. CP p. 12-14, 86-89, 183-84, 187-89, 240-41, 274, 279-80, 329-31, 373, 420, 425-26, 434, 437, 486-487, 515-16. Knowing that these cars were being repaired around the shop, they still wrote the amended policy adding coverage to the storage shed. Mutual of Enumclaw is bound by the actions and knowledge of its agents. Because this knowledge is undisputed and clearly established in the evidence, the trial court erred by not granting Plaintiff's Motion for Summary Judgment as to coverage of the storage shed.

c. In interpreting the insurance contract, the court should construe ambiguous contract exclusions against Defendant with added force.

When courts interpret insurance contracts, they should give effect to the contract's primary purpose—coverage, and should construe ambiguous exclusions against the insurer with added force. In cases where an insurer tries to deny coverage by means of an exclusion clause, the rule “construing ambiguities in favor of an insured applies with added force to exclusionary clauses which seek to limit policy coverage.” *American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875, 854 P.2d 622

(1993). Further, exclusions of coverage will not be given effect past their “clear and unequivocal” meaning. *Id.* Once an insured establishes a prima facie case giving rise to coverage under the policy, the burden shifts to the insurer to prove that an exclusion applies to deny coverage for a loss. *Id.*

In this case, the court should have found that the primary purpose of the amended contract was for coverage of the storage shed and should have construed ambiguities in the insurance contract in favor of the Plaintiff with added force. The “business use” clause in the insurance contract was ambiguous and susceptible to different interpretations. This “business use” exclusion should be construed to favor Plaintiff with added force.

II. Defendant Owed Plaintiff a Duty to Act in Good Faith and Violated That Duty by Denying Coverage.

Defendant owed Plaintiff a duty to act in good faith and violated that duty when it denied Plaintiff coverage for her shed. An insurer has a duty of good faith to its policyholder and violation of that duty may give rise to a tort action for bad faith. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). The court should apply the duty of good faith, rather than the duty of care. The duty of good faith is a separate and distinct duty from that of the duty of care, but the trial court applied an inapplicable duty of care in rendering its decision in this case, based on a

negligence case, *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 754 P.2d 155 (Div. 2 1988). At summary judgment, the court applied a “duty of care,” to justify excusing Defendant’s “obligation to procure a policy affording the client a complete liability protection.” RP at 27, l. 18-21.

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.” *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 279, 961 P.2d 933 (1998). The court also held that “an insured may maintain an action against its insurer for bad faith investigation of the insured’s claim and violation of the CPA regardless of whether the insurer was ultimately correct in determining coverage did not exist.” *Coventry*, 136 Wn.2d at 279. 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)). The duty of good faith is distinct from the duty the trial court applied at summary judgment.

a. Defendant owed the Plaintiff a duty of good faith.

Defendant owed a duty of good faith to the Plaintiff, as defined by precedent offered by plaintiff. The Court has defined “good faith” as “a state of mind indicating honesty and lawfulness of purpose.” But the court went further, providing that Defendants owe Plaintiffs a duty of good faith and broad obligation of fair dealing that rises to a higher level than mere honesty and lawfulness of purpose. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986).

Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well. RCW 48.01.030 provides, in relevant part: “The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.” RCW 48.01.030.

In addition, the Insurance Commissioner, pursuant to legislative authority under RCW 48.30.010, has promulgated regulations defining specific acts and practices that constitute a breach of an insurer's duty of good faith. *See WAC 284-30-300 et seq.; see also Tank*, 105 Wn.2d at 381 (1986).

- b. Defendant breached its duty of good faith if it knew a coverage exclusion applied and continued to accept premiums purportedly covering the subject**

property, and then denied the Plaintiff coverage based on that coverage exclusion.

The trial court committed error by not considering the facts and circumstances supporting Plaintiff's bad faith claim and arbitrarily dismissing it without consideration, based on a lack of (an inapplicable) duty of care. A bad faith claim should only be dismissed "if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 662, 272 P.3d 802 (2012). Even if a plaintiff does not prevail on a breach of contract claim, the plaintiff may still prevail on a bad faith claim. *See Coventry*, 136 Wn.2d at 278-79. Further, whether a claim is paid, and whether coverage exists or not, is immaterial to maintain bad faith or CPA claims. *See Coventry*, 136 Wn.2d at 279. The "test for bad faith denial of coverage is not whether the insurer's interpretation is correct, but whether the insurer's conduct was reasonable." *Wright v. Safeco Ins. Co. of America*, 124 Wn. App. 263, 280, 109 P.3d 1 (2004). In order for a party to succeed on a bad faith claim at summary judgment, there must be "no disputed facts pertaining to the reasonableness of the insurer's action in light of all the facts and circumstances of the case." *Smith*, 150 Wn.2d at 486 (citing *Kallevig*, 114 Wn.2d at 920).

In this case, prior to amending the policy and increasing premiums Defendant possessed sufficient information to ascertain (and was told by Plaintiff) that Plaintiff conducted auto repair work outside of her storage shed, but only raised and investigated the issue in order to deny coverage after a fire destroyed the 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 p. 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 p. 12-14, 86-89, 187-89, 240-41, 274, 329-31, 373, 420, 434-37. Afterwards, Defendant's own agent fraudulently refused to produce, and altered, photos which clearly showed auto repair business activity. CP p. 208-10, 232-38, 244, 248-51, 274. It was only after Plaintiff's shed burned in a fire, that Defendant *then* investigated any potential business use, *only to deny coverage*, in bad faith. Defendant only had to conduct a cursory investigation to find that Plaintiff was involved in auto repair activities outside of her shed, and was well aware of this information prior to the loss. However, as long as there was not a loss to be paid, Defendant willingly amended the policy to include the shed and accepted increased premiums, specifically for the shed. Defendant knew that Plaintiff was

involved in the business of auto repair prior to the loss, and prior to amending the policy, and only investigated after the fire for the sole purpose of denying coverage for the shed, in bad faith.

Because only two options exist, and both are bad faith, the trial court should have denied Defendant's Motion and granted Plaintiff's Motion for Summary Judgment as to Defendant Mutual of Enumclaw's bad faith. Either (1) Defendant initially intended on providing coverage for the shed under the insurance contract knowing of the auto repair activity, and then denied coverage in bad faith, or (2) Defendant collected premiums but never intended on providing coverage for the shed, in bad faith.

In option one, Defendant intended at all times to cover the shed despite the auto repair activity, evidenced by increased premiums and insisting on added coverage specifically for the shed, and then changed its mind about covering the shed after the loss, in bad faith. In option two, the Defendant deceptively purported to cover the shed, while collecting increased insurance premiums, even though it never intended to cover the shed because it knew of a condition that would preclude coverage from the very beginning, in bad faith.

In either case, summary judgment should have been granted in favor of the plaintiff. The same arguments apply to the CPA violation and

IFCA violations. If MOE did have the intent to insure the shed (which appears manifest by the agents and MOE's actions), then it was bad faith and a violation of the IFCA to deny coverage of an insured claim. RCW 48.30.015.

III. Defendant Violated the CPA by Denying Coverage After it Continued to Accept Insurance Premiums Even Though it Knew an Exclusion to its Policy Applied.

Defendant violated the CPA by purporting to cover the plaintiff's property and only asserting that an exclusion applied in order to deny Plaintiff insurance coverage after the fire. To establish a CPA claim, a plaintiff must show 1) an unfair or deceptive act; 2) that the act occurred in trade or commerce; 3) that there is an impact on the public interest; 4) proximate cause; and 5) damages. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

A single violation of WAC 284-30-330 constitutes a violation of RCW 48.30.010. Under RCW 19.86.170, a violation of RCW 48.30.010 is a per se unfair trade practice and satisfies the first element of the 5-part test for bringing a CPA action. *Kallevig*, 114 Wn.2d 907. WAC 284-30-330 defines 19 types of conduct determined to be "unfair or deceptive acts or practices in the business of insurance, specifically applicable to the

settlement of claims", constitutes a per se unfair trade practice under the Consumer Protection Act (CPA). *See* WAC 284-30-330. These include (1) Misrepresenting pertinent facts or insurance policy provisions. (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. (7) Compelling a first party claimant to initiate or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy.... *See* WAC 284-30-330 (1), (6), and (7). A violation of the CPA can also be based upon unfair or deceptive acts in the absence of such a legislative declaration or per se unfair trade practice. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 786, 295 P. 3d 1179 (2013).

In this case there are really only two options: (1) Mutual of Enumclaw had one interpretation of the policy provisions at the time the policy was written (that the storage shed was covered) and then had a completely opposite interpretation when the fire occurred; or (2) Mutual of Enumclaw knew from day one that the storage shed was not covered and proceeded to collect premiums on the shed and even raised the premiums on the shed, with no intent to ever pay out in the event of a fire. Because Mutual of Enumclaw conducted an inspection of the premises prior to writing the policy and there is no evidence that the use of the property changed in any way during the insurance period there is no other valid

possibility. In either case, these actions would constitute a deceptive act or practice.

Further, as early as one month after the fire, Mutual of Enumclaw knew about the missing photos (CP p. 396-397), the inspection by Craig Baumgartner (CP p. 227), the full disclosure that cars were being repaired at the time the policy was written (CP p. 227), and that it was bound by the actions and knowledge of its agents (CP p. 402-13, CP 444, 454-55); Yet Defendant continued to deny coverage after liability had become reasonably clear, and forced the insured to submit to litigation in order to get recovery.

As stated by the Washington Supreme Court, the other prongs of the CPA violation are easily established; "[t]rade or commerce" includes the insurance industry and the public has per se interest in the business of insurance. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wash.2d 133, 137, 930 P.2d 288, (1997); *Hangman Ridge Training Stables, Inc.*, 105 Wash.2d at 791, 719 P.2d 531 (citing RCW 48.01.030). Even a \$5.00 entry fee has been found adequate to establish the injury element. *Smith v. Stockdale*, 166 Wn. App. 557, 261-62, 271 P.3d 917 (Div. 3 2012).

In this case, injury is easily established. Ms. Tarasyuk made payments for insurance on the storage shed, then when those premiums were increased she paid again. The actions of Mutual of Enumclaw led her

to believe that her storage shed was covered. The storage shed was destroyed by fire and Mutual of Enumclaw has refused to pay for the insured damages. Mutual of Enumclaw's unfair or deceptive acts or practices are the cause of Ms. Tarasyuk's injuries.

Mutual of Enumclaw's actions of amending the policy to cover the shed and collecting premiums on the shed and then denying coverage after the fire for activities that were disclosed at the time the policy was purchased is an unfair and deceptive act and a violation of the CPA.

IV. Defendant Violated the IFCA by Acting in Bad Faith by Denying Plaintiff's Claim and Only Investigating in Order to Deny Coverage.

Aside from a lack of good faith and a violation of the CPA, Defendant also violated the IFCA by unreasonably denying Plaintiff's claim. Under the IFCA, a "first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action... to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs." RCW 48.30.015. Under the IFCA, claimants can bring actions for unreasonable denial of coverage and unreasonable denial of payment of benefits. *Ainsworth v. Progressive Cas. Ins. Co.*, 322 P.3d 6, 20 (2014). An unreasonable interpretation of an

insurance contract and subsequent denial of coverage can give rise to a claim for violation of the IFCA. *See Ainsworth*, 322 P.3d at 20-21.

In our case, Defendant unreasonably denied coverage and unreasonably denied payment for Plaintiff's loss of her shed. Under the IFCA, Plaintiff should recover actual damages together with the costs of the action to recover damages for Defendant's unreasonable denial of her claim. Defendant unreasonably interpreted the insurance contract either before or after the loss, and enforced a different interpretation of the contract after Plaintiff's loss in order to deny coverage.

V. Washington Law Does Support Coverage by Estoppel in Cases of Bad Faith.

In Washington State, coverage by estoppel is created in cases of bad faith. Although Defendant has correctly stated that "estoppel does not operate to create coverage," it is also true that an "insurer acting in bad faith forfeits defenses to the claim tendered and handled in bad faith, including the defense that the claim was never covered at all." *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10-11, 206 P.3d 1255 (2009). Further, the court has even held that "the remedy for insurer bad faith is compensation for the harm caused thereby and estoppel as to policy defenses to the claim." *Id.* at 10. As such, if an

insurer acts in bad faith in cases where coverage would otherwise be excluded, insurance coverage can be created by estoppel.

In this case, the defendant itself admits that “the shed was always covered” and coverage was only excluded due to the “business” exclusion (the amended policy added coverage for the previously uncovered storage shed on March 1, 2011). *See* CP p. 562-63. Under that reasoning, estoppel would not serve to create coverage, but rather to enforce already existing coverage, which was denied in bad faith. Because Defendant acted in bad faith, it forfeits the defense that coverage was excluded under the policy or that the shed was never covered at all. Estoppel in this case would not be creating coverage, but merely affirming already existing, and paid for, coverage.

VI. ATTORNEYS' FEES AND COSTS ON APPEAL

Ms. Tarasyuk is entitled to recover her attorneys' fees and costs under IFCA, RCW 48.30.015(1), (3) (entitled to an award of attorney fees and treble damages); the CPA, RCW 19.86.090; and Washington common law, *see Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 53,811 P.2d 673 (1991) (An insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees); *Panorama Vill. Condo. Owners' Ass'n Bd. Of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 144, 26 P.3d 910 (2001).

Accordingly, pursuant to RAP 18.1, Ms. Tarasyuk requests an award of reasonable attorney fees and costs incurred below and on Appeal. Ms. Tarasyuk is also entitled to an award of costs and statutory attorney fees pursuant to RCW 4.84.010.

CONCLUSION

Summary judgment for Defendant was not appropriate in this case. Appellants respectfully request that this court reverse the trial court and grant summary judgment in favor of Plaintiff and award attorneys' fees and costs. Alternatively, Appellants request that this court reverse the trial court and remand 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 19 day of June, 2014.

Respectfully submitted,



Brian J. Anderson WSBA# 39061



Ned Stratton WSBA #42299

Attorneys for Appellants
5861 W. Clearwater Ave.
Kennewick, WA 99336
509-734-1345

CERTIFICATE OF SERVICE

I certify that on the 20th day of June, 2014, I caused a true and correct copy of BRIEF OF APPELLANTS 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 checked="" type="checkbox"/> E-Mail
Spokane, WA 99201-0519		

Dated this 20 day of June, 2014.



Ned Stratton