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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 354822

**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.

**REPLY TO BRIEF OF RESPONDENT MUTUAL OF
ENUMCLAW INSURANCE COMPANY**

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I. ASSIGNMENTS OF ERROR TO TRIAL COURT'S

FINDINGS OF FACT AND LAW

Contrary to the statement by defense counsel that “Ms. Tarasyuk did not assign error to the trial court’s findings of fact,” numerous errors in the courts findings of fact and conclusions of law were outlined throughout the Brief of Appellant. For example, Findings of Fact 4, 13, and 15 were discussed in detail in Brief of Appellant as erroneous because they directly related to a finding of misrepresentation by Ms. Tarasyuk in the procurement of the insurance policy. *See Brief of Appellant*, p. 33-34. These findings of fact were erroneous in light of the fact that Mutual of Enumclaw not only failed to plead misrepresentation as a defense, but also because Mutual of Enumclaw’s agents stated numerous times throughout trial that they found NO misrepresentation on the part of Ms. Tarasyuk.

Throughout Respondent’s Brief there is an underlying tone that this policy was procured by misrepresentation on the part of Ms. Tarasyuk—these arguments are inaccurate, as the agents and underwriters unequivocally stated that Ms. Tarasyuk had not misrepresented anything during the application process, and that they were not denying the claim based on any misrepresentation. Further, the disclosure of the storage of business items in the shed was also immaterial, because the agents, and

even John Harrell, believed that storage of business items in the shed was immaterial to coverage.

In addition to the errors pointed to in the Findings of Fact, the Brief of Appellant also pointed out numerous inconsistencies between the Finding of Fact and the Conclusions of Law, and errors of law made by the trial court. For example, in Finding of Fact number 11, the trial court found that all repair activity was conducted outside, where it was visible to anyone. Finding of Fact number 15 pointed to numerous visual indications, including a business sign on the property, which indicated a business was conducted on the property. Also, Conclusion of Law number 3 points out that storage of things inside “was a necessary ancillary activity,” which should have been obvious to anyone viewing the property from the outside after seeing the repair work which was conducted on the property. However, despite these findings of fact, the trial court concluded, as a matter of law, that the agent who went out to the property twice to inspect it and take pictures somehow could not see the repair activity or signs on the property. The trial court’s Conclusions of Law (hereinafter COL) are inconsistent with its own Findings of Fact (hereinafter FOF) in this case.

II. SUMMARY OF ARGUMENTS

The uncontroverted facts support Appellant Tarasyuk's position. First, the finding of fact that no repair activities were performed inside of the shed (FOF 11) supports Ms. Tarasyuk's position that the inside of the shed was not being used for business, which was a concern in the previous Court of Appeals decision. Second, the trial court's findings of fact that the pictures taken by Mutual of Enumclaw were altered, and that an agent visited the property twice (FOF 17), supports Ms. Tarasyuk's claim of bad faith. The photos of the Tarasyuk property were altered while within Mutual of Enumclaw's chain of custody, and according to Mutual of Enumclaw's own agent, appeared to have been purposely taken to omit business use (FOF 20). Third, in its first opinion, the Court of Appeals indicated that Ms. Tarasyuk had met her burden on her bad faith claims, and that the remand was to determine whether Mutual of Enumclaw acted reasonably in light of all the circumstances. *See Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 11.

III. STANDARD OF REVIEW

Generally, findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *See Wenatchee*

Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Questions of law and conclusions of law, however, are reviewed de novo. See *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). Assignments of error as to the findings of fact are reviewed under a substantial evidence standard, and the errors based on the trial court's conclusions of law are reviewed de-novo.

IV. ARGUMENT

A. The Trial Court Failed to Follow the Court of Appeals Mandate

The Court of Appeals remanded this case for trial to determine two factual issues at trial: 1) whether the inside of the shed was used for repair activity, and 2) whether Mutual of Enumclaw acted reasonably under the circumstances, with regard to the bad faith claim.

1. The only remaining question about the use of the shed not already before the Court of Appeals, to be decided on remand, was whether repair activity was done inside of the shed

Ms. Tarasyuk did not dispute that she had an auto repair business, and the only remaining issue on remand was whether the storage shed was used for business. Facts concerning the auto repair activity, the tools and equipment near and around the shed, and the storage use of the shed were

already before the Court of Appeals in Ms. Tarasyuk's prior appeal. *See Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 10-11 (Div. 3 2015). The only issue left to be decided was whether the repair activity was done inside of the shed, and whether that constituted "business use" of the shed. *See id.* at 11. Otherwise, the "business use" issue could have been decided by the Court of Appeals in the prior appeal. The storage of all the items pointed to in the Brief of Respondent was disclosed and admitted in the prior appeal, and the Court of Appeals addressed this in their opinion by distinguishing this storage use from business use. *Id.* Because the storage of business items and equipment in the shed was already an undisputed fact before the Court of Appeals in the prior appeal, and because Mutual of Enumclaw was arguing that there was some evidence that repair work was done inside the shop, the reason for the remand from the Court of Appeals could not have been for a determination of an admitted fact—that the shed was used for storage, including storage of many items used for auto repair. Instead, the remand was to determine the only remaining and contested issue, which was to determine if repair work was conducted inside of the shed. *See Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 10-11 (Div. 3 2015). The trial court concluded that no repair work was conducted inside of the shed and that the shed was instead used for storage. *See* FOF 11.

At trial, the above facts supported a conclusion of law that the shed was covered under the policy. However, instead the trial court found that, even though storage of items was not important to the agents or the underwriters at the time the policy was written, it was important to the trial court, and was grounds for denying coverage.

2. The Court of Appeals remanded the question of bad faith for a determination as to whether Mutual of Enumclaw acted reasonably under the circumstances

The Court of Appeals decided that Ms. Tarasyuk had met her burden of showing bad faith on Mutual of Enumclaw's part, and the remaining issue to be determined at trial was whether Mutual of Enumclaw acted reasonably. *See Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 14, 16 (Div. 3 2015). The Court of Appeals decided that Ms. Tarasyuk met her burden "of showing that Enumclaw breached [the duty of good faith] and acted in bad faith by leading her to believe that the shed was covered under the policy to collect premiums." *Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 14 (Div. 3 2015).

B. The Trial Court Erred in Deciding That Storage of Tools and Equipment Was Business Use, To Exclude Coverage, When The Only Question Remaining Was Whether Repair Activity Occurred Within The Shed

With regard to business use, the only issue left for the trial court to decide was whether repair activity occurred within the storage shed, and its finding of fact goes contrary to its decision. It has always been undisputed that tools, repair manuals, and other repair equipment was stored inside of the shed, and the only remaining question left to be answered was whether repair activity occurred within the shed. *See Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 10-11 (Div. 3 2015). Indeed, in the Court of Appeals' first decision they concluded that a genuine issue of material fact remained as to whether the shed was being used for business. *See Tarasyuk v. Mut. Of Enumclaw Ins.*, No. 32389-7-III, p. 11 (Div. 3 2015). However, they also noted that Ms. Tarasyuk had a business license, that the shed was listed on the license application, that there was large repair equipment outside the shed, and that repair work was done outside the building. *Id.* at 10-11. It was always undisputed that Ms. Tarasyuk used the shed to store tools, repair manuals, and equipment, when not in use, whether used for business or not. The only remaining dispute was whether the inside of the shed was used for repair activity. *See id.* at 11. The trial court found that no repair activity occurred within the storage shed. *See* FOF 11. This should have led to a decision supporting coverage for the burned down storage shed, because no repair activity

occurred within the storage shed, and therefore no “business use” went on inside the storage shed.

C. The Trial Court Erroneously Relied On Alleged Misrepresentation by Ms. Tarasyuk to Absolve Mutual of Enumclaw of Bad Faith

The trial court applied the improper standard in determining whether Mutual of Enumclaw acted in bad faith. While the trial court should have focused on what Mutual of Enumclaw did, in light of the circumstances, to determine if it acted in bad faith, instead it focused on “misrepresentations” by Ms. Tarasyuk to absolve Mutual of Enumclaw of its bad faith. However, the focus should have been on Mutual of Enumclaw, and whether its actions were reasonable.

D. The Trial Court Erred In Finding No Bad Faith On The Part of Mutual of Enumclaw

At trial, there was ample evidence of Mutual of Enumclaw’s bad faith conduct, and the trial court ignored it, or applied an incorrect legal standard.

1. Ms. Tarasyuk’s arguments about Mutual of Enumclaw’s bad faith conduct are not new, and simply reiterate what would have been reasonable in the context of bad faith claims

Ms. Tarasyuk has presented the same bad faith arguments she presented at trial. Ms. Tarasyuk has always contended that it was bad faith for Mutual of Enumclaw to have a different policy or interpretation when writing a policy than when denying a claim. In this case there was no clear policy or guideline for how to interpret business use, and, as a result, Mutual of Enumclaw did not consider Ms. Tarasyuk's auto repair activities "business use" when it wrote the policy, but then decided it was business use in order to defeat coverage.

It was also bad faith to place blame on Ms. Tarasyuk, even though she disclosed the auto repair activity, and Mutual of Enumclaw knew of the auto repair activities. Ms. Tarasyuk's arguments that Mutual of Enumclaw acted in bad faith have not changed.

2. Mutual of Enumclaw agents were aware of the repair business, but ignored it or thought it didn't matter and wrote the policy anyway, only to change their mind in order to try to defeat coverage after the fire

Mutual of Enumclaw makes an untenable argument that its adjusters were not aware of Ms. Tarasyuk's business because of *de minimis* receipt of money for repairs. However, this argument attempts to split hairs, considering that Ms. Tarasyuk mentioned that they repaired vehicles for money, but did not mention exact amounts of money

exchanged. Mutual of Enumclaw even goes on to argue that they did not know it was a “business” until they knew exact financial information, and they only determined there was a profit motive after the fire. This argument actually supports Ms. Tarasyuk’s argument that Mutual of Enumclaw acted in bad faith by applying one standard in order to extend coverage, and applying another standard after the fire in order to defeat coverage. Put a different way, in the first instance, it did not matter to Mutual of Enumclaw how much was made repairing vehicles, and Mutual of Enumclaw gave it little importance, but after the fire, Mutual of Enumclaw investigated the issue and it even became the determinative factor in deciding coverage. Mutual of Enumclaw did not care to know how much Ms. Tarasyuk earned in auto repair activities before the fire, and only sought the information after the fire in an effort to try to defeat coverage for the shed. This is bad faith.

3. Mutual of Enumclaw’s differing interpretations of business use were a result of having no clear guidelines and show that Mutual of Enumclaw acted in bad faith.

At trial, none of Mutual of Enumclaw’s witnesses alleged that Ms. Tarasyuk misrepresented her repair activity. On the contrary, Mutual of Enumclaw did not claim misrepresentation in this case. *See* RP p. 423:21-25. Also, during testimony, underwriter Patricia Boyles admitted that

Mutual of Enumclaw was not accusing plaintiff of misrepresentation. *See* RP p. 299:9-300:25.

The court's findings that the repair activity was all conducted outside (FOF 11), where it could be seen from the road and was open and obvious, and that the use of the inside of the shed would have been "necessarily ancillary" (COL 3) and obvious from the outside, contradict the court's findings against bad faith. If the repair work was open and obvious, and anyone could see it from the street, it follows that the agent who went out to the property, twice, to take pictures would have necessarily seen it.

This is consistent with the trial testimony where everyone admitted that it was obvious from a street view photo that repair activity was conducted on the property. When shown photographs depicting the property, underwriters Patricia Boyles and Jill Anfinson, and claims adjuster John Harrell all testified that, had they been on, and inspected, the property as Mutual of Enumclaw agent Craig Baumgartner had, they would have immediately been alerted to the business being run on the property. *See* RP p. 104:25-105:5; 283:4-284:24; 291:12-293:22; 304:14-305:9; 304:14-305:19; 344:11-345:5; 345:18-24; 348:3-9; 381:1-13; *see also* RP p. 41:7-42:3; 207:1-25; 208:1-13; 291:12-293:22; 304:14-305:19; 345:18-24.

Given these findings by the trial court, the only reasonable finding of fact would be that the agent saw the activity, but either ignored it or decided that, because it was conducted outside, it did not preclude coverage of the shed. Either of these two scenarios resulted in one interpretation of coverage before the fire, and another after the fire, which is bad faith.

Both agents clearly explained why these different interpretations happened. Because Mutual of Enumclaw had no clear guidelines on what constituted business use, agents were able to come to completely different definitions and interpretations of the same exact facts. When Mutual of Enumclaw agent Anna Mosesova was asked directly whether storage of items used in the business inside the shed was important, her initial impression was that she thought it was not. *See* RP p. 171:23-172:9. She then backtracked and stated that she is unclear as to what Mutual of Enumclaw's guidelines are with respect to storage and business use. *See* RP p. 171:23-172:9. Craig Baumgartner inspected the property on two occasions, observed all of the tools, equipment, and vehicles around the shed, but did not inquire into what items were stored inside the shed. *See* RP p. 77:18-78:4; 90:3-16; 98:11-99:3; Ex. P-1; P-2; *see also* RP p. 282:10-24; 139:7-25; 215:9-12; 233:12-23; 333:17-335:17; *See also* RP p. 215:9-25; 333:17-334:15; 335:18-336:5. Claims adjuster John Harrell

agreed with Anna Mosesova and Craig Baumgartner and testified that a determination of whether items used in the business of M V Auto & Boat Repair were stored in the shed is unimportant for a determination of business use. *See* RP p. 355:2-19.

The reason for the different interpretation of what constitutes business use at the time the policy was written and after the fire, was a result of this lack of clear guidance by Mutual of Enumclaw, because no one inquired about the use of the inside of the shop or even thought it was important at the time the policy was written, even though the auto repair activity outside the shop was clear and uncontested.

Thus, Mutual of Enumclaw came to one conclusion before the fire to extend coverage, and a different conclusion after the fire to deny coverage, even though the use did not change and was open and obvious and fully disclosed at the time the policy was written. This is what the Court of Appeals in the first appeal defined as bad faith.

4. The failure of Mutual of Enumclaw to follow its own guidelines with regard to photographs led to the issuing of an illusory insurance policy

While Mutual of Enumclaw had no guidelines or policy on what constituted business use, they did have established policies and procedures on how pictures were to be taken. These established policies and

procedures were ignored in this claim which led to the policy being written and Ms. Tarasyuk to believe that she was covered.

The agents and underwriters testified that the normal procedure was to take photos first from the street view and then to take a photo of each side of the structure. At trial, Mutual of Enumclaw agents testified that the photos taken by Craig Baumgartner were not taken in accordance with protocol. Craig Baumgartner, Anna Mosesova, and Jill Anfinson all testified that the photos provided to Mutual of Enumclaw underwriters by Craig Baumgartner and Anna Mosesova were not taken of the correct sides of the shed. *See* RP p. 80:6-22; 140:3-11; 140:12-17; 274:18-275:17; 283:4-284:2; Ex. P-2. Craig Baumgartner and Anna Mosesova also admitted that despite being contrary to protocol, none of the photos they provided to underwriters at Mutual of Enumclaw were photos taken of the property from the street. *See* RP p. 80:6-22; 140:6-17; Ex. P-1; P-2. Testimony at trial confirmed that the property was accessible and nothing would have prohibited anyone from taking photos of all sides of the shed or photos from the street. *See* RP p. 49:2-50:14; 214:10-215:8.

The failure to take the correct photos in this case led to coverage being issued and subsequently led Ms. Tarasyuk to believe her shed was covered. Underwriters in this case testified that, had they seen photos from the street, they would have known that there was business exposure and

would have required a different policy. *See* RP p. 104:25-105:5; 283:4-284:24; 291:12-293:22; 304:14-305:9; 304:14-305:19; 344:11-345:5; 345:18-24; 348:3-9; 381:1-13; *see also* RP p. 41:7-42:3; 207:1-25; 208:1-13; 291:12-293:22; 304:14-305:19; 345:18-24. The trial court found that the photos of Ms. Tarasyuk's property were altered. Moreover, the photos were always within Mutual of Enumclaw's chain of custody, and there is no reason to believe anyone outside of Mutual of Enumclaw altered the photos. Mutual of Enumclaw also testified that they have a set policy on how pictures are to be taken, and what pictures are submitted, and that the agents did not follow that set policy in this case. However, the trial court went to great lengths to speculate as to why certain missing photos were missing and not produced, but gave no explanation for why Mutual of Enumclaw failed to follow its own policy. The trial court erred in not considering, and in summarily dismissing, evidence of missing and altered photos in its deliberation of the bad faith claims.

There was little question by the underwriters that their agents' failure to follow their standard procedure for taking photos led to the policy being written the way it was. This failure led Ms. Tarasyuk to believe her shed was covered. This failure had nothing to do with actions by Ms. Tarasyuk, and was caused by the bad faith conduct of Mutual of

Enumclaw's agents. This should have been adequate in itself for a finding of bad faith by Mutual of Enumclaw.

V. CONCLUSION

In sum, the trial judge went against the weight of the evidence and disregarded this court's prior ruling when it decided as a matter of law that storage constituted a business use, and that Mutual of Enumclaw did not act in bad faith. For these reasons, Plaintiff asks that this court reverse the trial court's decision and rule in favor of Plaintiff, or, in the alternative, remand the case for a new trial with instructions.

Dated this 22 day of May, 2018.

Respectfully submitted,



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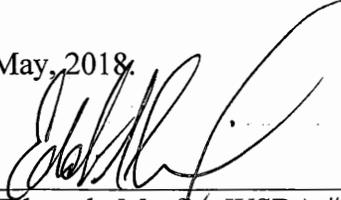
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CERTIFICATE OF SERVICE

I certify that on the 23rd day of May, 2018, 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:

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