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

**No. 354822**

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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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**BRIEF OF APPELLANT MARIYA TARASYUK**

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## I. ASSIGNMENTS OF ERROR

1. The trial court unreasonably concluded as a matter of law that the shed was used for business purposes even though Mutual of Enumclaw's own agents determined that it was not used for business purposes and bound Mutual of Enumclaw accordingly, and even though the trial court found that the inside of the shed was not used for auto repair, but storage.
2. The trial court unreasonably concluded by law that Mutual of Enumclaw did not act in bad faith when it unreasonably and deceptively denied plaintiff's claim for loss of her shed.
3. The trial court erred when it ruled in favor of Mutual of Enumclaw based on misrepresentation by plaintiff even though; 1) Misrepresentation is an affirmative defense which was never pleaded by defendant, 2) Mutual of Enumclaw did not deny the claim because of misrepresentation by the insured, and Mutual of Enumclaw testified at trial that they did not believe Plaintiff had misrepresented anything, 3) The court failed to apply any legal standard to its findings of misrepresentation and the defendant never proved the legal claim of misrepresentation or any of the elements of that claim, and, 4) a finding of Misrepresentation was contrary to the Overwhelming Evidence To The Contrary.

4. The trial court erred by not following the Court of Appeals prior decision in this case and failing to follow the law established in that decision on remand.

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

1. Whether the trial court followed the Court of Appeals' prior ruling and mandate in this case;
2. Whether the trial court could decide as a matter of law that storage of equipment and materials in the shed was "business use" and subject to the insurance exclusion, contrary to the prior Court of Appeals ruling;
3. Whether the trial court could shift the burden of proving bad faith back to Plaintiff, after the Court of Appeals had already decided that she had met her burden of proof, and that the burden shifted to Defendant to try to prove reasonable grounds for denial;
4. Whether the trial court could find misrepresentation to support its verdict when misrepresentation was not pleaded, nor proven.

## **II. STATEMENT OF THE CASE**

Plaintiff Mariya Tarasyuk and Vladimir Pugachev, boyfriend and girlfriend, are Ukrainian immigrants who live together with their three children in their home in West Richland, Washington. *See* RP p. 7:13-8:7;

39:22-40:3; 40:9-14; 121:11-17; 153:16-22; 204:12-205:1; 205:14-15. Mariya and Vladimir have lived together in the same house in West Richland since 2007, when they moved to the Tri-Cities from the Seattle area. *See* RP p. 204:12-205:1; 208:17-22. Neither of them speak, read, or write English very well; nevertheless they work hard to provide a good life for their children. *See* RP p. 39:18-21; 205:2-8. Mariya Tarasyuk works as a caregiver approximately 40 hours per week, and also runs a small house cleaning business. *See* RP p. 205:16-206:7; 208:14-211:16. Vladimir is skilled with tools and supplements their meager household income by repairing vehicles and performing handyman work, all while looking after the children. *See* RP p. 54:1-8; 205:16-206:7.

Mariya Tarasyuk and Vladimir live at 5601 West Lattin Road in West Richland. *See* RP p. 40:9-14. The house sits on a large and very open plot of land right on Lattin Road. *See* Ex. P-3, P-4, and P-5. As seen facing the home from Lattin Road, a shed is located to the left of the house, with a short chain link fence surrounding a small portion of the property just in front of the shed. *See* Ex. P-3, P-4, and P-5. Inside the fenced-in area are tools and equipment, including a car lift, a large oil tank and funnel, a gasoline barrel, and blue oil containers. *See* Ex. P-3, P-4, and P-5; RP 208:1-13; 305:10-306:7. Situated on the chain link fence and facing the roadway is a business sign reading “M V Auto & Boat Repair.”

*See* Ex. P-5. Also in the area near the shed at any given time are several vehicles parked in various stages of repair. *See* Ex. P-3, P-4, and P-5; RP p. 208:1-13. The home, the shed, the vehicles, and all of the tools and equipment are very visible from the roadway. *See* Ex. P-3, P-4, and P-5.

In January 2011, Mariya Tarasyuk applied for and purchased a homeowner's insurance policy to cover her home and shed. *See* Ex. P-7. That shed, however, was destroyed in a fire which occurred on August 19, 2011. *See* Ex P-7. When Mariya Tarasyuk made her claim for loss, Mutual of Enumclaw denied her claim and Mariya Tarasyuk initiated this lawsuit. *See* Ex. P-7. At all times relevant to this lawsuit, including at the time of application for insurance, during the time which the insurance policy was in effect, and at the time the fire destroyed the shed, the property was utilized in a similar manner consistent with the scene explained above. *See* RP p. 304:14-305:19; 291:12-293:22; 345:18-24; 41:7-42:3; 207:1-208:13.

When Mariya Tarasyuk had first immigrated to the United States she made ends meet by working for a house cleaning business that cleaned the homes of wealthy people in the Seattle area. *See* RP p. 208:14-211:16. One of her clients suggested to Mariya Tarasyuk that she would make more money by starting her own cleaning business. *See* RP p. 208:14-211:16. The client helped her obtain a business license and she started a

small house cleaning business. *See* RP p. 208:14-211:16. When Mariya and Vladimir moved to the Tri-Cities, and when Vladimir began doing repair work on vehicles on the lift outside the shed, Mariya Tarasyuk amended the business license to add Vladimir's vehicle repair business, M V Auto & Boat Repair. *See* RP p. 208:10-211:16; Ex. P-5.

Excited about the new venture, Vladimir had a sign put up on the fence in front of the shed facing the roadway and made business cards. *See* RP p. 65:25-66:2; 217:5-218:14; Ex. P-5. Unfortunately, business for the repair work was very slow and mostly limited to friends and family comfortable with Vladimir's very broken English. *See* RP p. 217:5-218:14. Nevertheless, they had a small repair work operation underway and a business license. *See* RP p. 64:14-65:12; 208:10-211:16; 211:17-24; Ex. P-5. In 2010, Mariya and Vladimir had an income of approximately \$18,000; \$4,000 of which came from M V Auto & Boat Repair. In 2011, M V Auto & Boat Repair made approximately \$3,000. *See* RP p. 220:3-221:25.

In January 2011, Mariya Tarasyuk began looking for a new homeowner's insurance policy and began communications with the Harvey Monteith Agency to purchase one through Mutual of Enumclaw. RP p. 124:1-4. Mariya Tarasyuk met with Anna Mosesova, an employee of Harvey Monteith Agency and agent of Mutual of Enumclaw, and began

the application process. *Id.* In the early evening of January 17, 2011, right around the time of sunset, Harvey Monteith Agency employee and Mutual of Enumclaw agent, Craig Baumgartner, was sent out to Mariya Tarasyuk's home to inspect and take photographs of the property for purposes of the homeowner's insurance policy application process. *See* RP p. 77:18-78:4; 85:17-86:4; 215:9-25; 333:17-334:15; Ex. P-1. During his inspection of the property, Craig observed the scene in front of the shed and saw all the repair activity going on in the vicinity. *See* RP p. 215:9-25; 333:17-334:15; 335:18-336:5. After inquiring about all of the tools, equipment, and repair work, Craig was informed of the ongoing repair activities. *See* RP p. 215:9-25; 333:17-334:15; 335:18-336:5. He was told that all the repairs were done outside of the shed. *See* RP p. 215:9-25; 333:17-334:15; 335:18-336:5. He took four photos, one of each side of the house, and left. *See* RP p. 90:23-92:1; Ex. P-1. Despite being contrary to what he would typically do, Craig did not take any photographs of the shed or of the property from the roadway. *See* RP p. 80:6-22; 140:6-11; Ex. P-1. Nonetheless, Craig emailed the four photos of the house to Anna, who passed the photos on to Jill Anfinson, an associate underwriter at Mutual of Enumclaw. *See* RP p. 86:12-24;

Craig Baumgartner, however, relayed the information he learned regarding the repair activities to Anna, and Anna followed up with Mariya

Tarasyuk about it. *See* RP p. 147:14-148:15; 335:18-336:24; 213:22-214:9. Per that conversation, Anna learned that 1) Mariya Tarasyuk's boyfriend ran a vehicle repair business in the area in front of the shed, 2) most of the repair work was done for family and friends, 3) all of the repairs were done outside of the shed, and 4) her boyfriend received money from customers for the repair work he did. *See* RP p. 335:18-336:24; 213:22-214:9; 146:10-22; 331:6-11; 337:8-15; 148:22-149:14.

Meanwhile, after receiving the four photos of the home, Jill did further research of the property online. *See* RP p. 286:19. From her research, she discovered that there was also a shed on the property and she sent a request to Anna at the Harvey Monteith Agency to obtain photos of it. *See* RP p. 287:10-12. After requesting photos of the shed on two separate occasions, each to no avail, Jill went to her supervisor, Pat Boyles, and Pat thought it unusual that their requests for photographs of the shed went unanswered. *See* RP p. 296:11-297:9. Jill reached out to Anna for a third time and informed her that the policy would be rejected if she did not receive photos of the shed. *See* RP p. 273:4-8;

Finally, at some point, Craig went out to the property again to obtain photos of the shed, the timing of this second visit is unknown; however, it is known that Mutual of Enumclaw's underwriters had to request pictures of the shed three times prior to receiving any. *See* RP p.

215:9-12; 333:17-335:17. During this second inspection of the property, Craig again took photos contrary to how he normally would, and only took photos of two sides of the shed, neither of which were of the front of the shed, and both of which did not show any of the repair work going on in front of the shed. *See* RP p. 80:6-22; 140:6-11; Ex. P-2. He also did not take any photos of the home or shed from the roadway. *See* Ex. P-2. Craig himself does not recall going out to the property twice, however, he concedes that he took the photos of the shed and admits that the lighting in the photos of the shed suggest that they were taken on separate occasions – the photos of the home were taken at night with low lighting, and the photos of the shed were taken during the day. *See* RP p. 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. Craig sent two of the photos he took of the shed to Anna who forwarded them to Jill, however some pictures were deleted and the pictures forwarded on were a different format than supported by the camera and much smaller than any of the other pictures taken. *See* CP 677-79.

Jill, in her ignorance at the time of receipt of the photos depicting the shed, assumed that the photos were of the front and one side of the shed, saw no signs of any repair activities going on, and went forward on writing the policy. *See* RP p. 274:18-275:17; 283:4-284:2; 140:12-17; Ex.

P-2. Before officially signing off on the policy, however, Jill asked Anna about the use of the shed. *See* RP p. 288:2-289:21. Despite the fact that Anna knew of the repairs going on around the shed, and despite knowing that those repairs were being done for money, Anna lied and told Jill that Mariya Tarasyuk's boyfriend used the shed to repair vehicles for family and friends but that she knew nothing more. *See* RP p. 288:2-289:21. Anna assured Jill that the shed was not being used for business purposes and that there was no business exposure. *See* RP p. 288:2-290:8. Based on this new knowledge of a shed on the property, Jill decided that the coverage needed to be increased based upon the dimensions of and the materials used to make the shed, and went forward on writing the policy. *See* RP p. 264:1-265:1; 150:19-151:18.

Although Mariya Tarasyuk was disappointed that the coverage would require a higher premium than originally planned, she still bought the policy and paid timely premium payments on it. *See* RP p. 212:20-213:10; 150:19-151:18.

After the August 19, 2011, fire burned down the shed, Mutual of Enumclaw sent John Harrell, the loss adjustor on Mariya Tarasyuk's claim, to inspect the claim. John Harrell inspected the shed and determined that the shed was being used for business purposes. *See* RP p. 327:20-328:2.

As part of his investigation, John spoke with Anna and Craig regarding their work in the initial application process that resulted in the issuance of Mariya Tarasyuk's homeowner's insurance policy. *See* Ex. P-7. Through those conversations, John learned that both Craig and Anna were aware of the repair activities going on around the shed and that those repairs were done for money. *See* Ex. P-7. Despite Craig's and Anna's determination during the application process that those activities did not preclude Mariya Tarasyuk from being issued a homeowner's insurance policy that covered the shed, John disagreed and determined those same activities did constitute a business use, and therefore triggered the business use exception in the insurance contract. *See* Ex. P-7. As a result, on September 29, 2011, and December 21, 2011, John Harrell wrote a letter to Mariya Tarasyuk on behalf of Mutual of Enumclaw formally denying her claim for coverage of the shed on the basis that the shed was used for business purposes. *See* Ex. P-7.

### **III. SUMMARY OF ARGUMENTS**

1. The trial court decided as a matter of law that storage of items in the shed that were used in part for personal use and in part for business constituted a business use of the shed. This finding was contrary to the Court of Appeals prior ruling in this case and was also contrary to the Agents definition of business use at the time the policy was written.

2. The trial court erroneously concluded as a matter of law that Mutual of Enumclaw did not act in Bad Faith when it unreasonably and deceptively denied Plaintiff's claim for loss of her shed, due to misrepresentation. The trial court failed to place the burden of proof on defendant to show that its actions and denial of coverage were reasonable. While material misrepresentation may be an affirmative defense to Plaintiff's bad faith claim, Mutual of Enumclaw admitted that there was no allegation of misrepresentation in this case and they were not using misrepresentation as a defense of the denial in this case.

3. The trial court improperly showed its bias and preconceptions in this case from the very outset, when in its opening remarks the trial court judge summed up the case as "an insurance case where the insurance company is claiming misrepresentations." Even though this was an erroneous summary of the case, which did not involve an affirmative defense of misrepresentation, the trial court continued to think of this as a misrepresentation case and his findings of fact and conclusions of law are riddled with findings of misrepresentation by Plaintiff, which seems to be the primary reason for his finding for Mutual of Enumclaw in this case.

4. The trial court is bound by the Court of Appeals' prior ruling and findings of law. The trial court from the outset seemed to question if it was bound by the court of appeals ruling and even asked at the beginning

of trial if it had to decide the case based on the four corners of the Court of Appeals opinion on remand. In its opinion on remand, the Court of Appeals necessarily found that if repair work was conducted outside of the shed, and if the shed was only used for storage, then it was covered under the policy. The trial court determined that the repair work was open and obvious and constituted a business, and that all repair work was done outside of the shed and the shed was only used for storage. Despite this finding of fact, the trial court then found that, as a matter of law, the storage of items used in part for business constituted a business use, in direct contrast to the Court of Appeals prior ruling in this case. Further, the Court of Appeals stated that it was Mutual of Enumclaw's burden to show that it acted reasonably under the circumstances in order to overcome the bad faith claim. The trial court ignored this portion of the Court of Appeals remand and made no finding of fact or conclusion of law that the insurance company's actions were reasonable; instead, the trial court incorrectly placed the burden of proof on Plaintiff.

#### **IV. 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). The above assignments of error as to the trial courts conclusions of law are reviewed de-novo.

## V. ARGUMENT

The trial court failed in four particulars in deciding this case. First, the trial judge went against the weight of the evidence and erroneously concluded by law that the shed was used for business purposes. Second, the trial court went against the weight of the evidence and erroneously concluded that Mutual of Enumclaw did not act in bad faith in denying Plaintiff's claim for the loss of her shed. Third, the trial court erred in finding for Mutual of Enumclaw on a misrepresentation claim without ever applying the correct evidentiary standard required, and even though misrepresentation was not alleged or pleaded by Mutual of Enumclaw. Finally, the trial court erred when it ignored the prior Court of Appeals opinion on remand. 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.

**A. The Trial Court Unreasonably Concluded, As a Matter of Law, That The Shed Was Used For Business Purposes, Even Though Mutual Of Enumclaw's Own Agents Determined That It Was Not, And Bound Mutual Of Enumclaw Accordingly.**

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). In this case, the trial court found as a matter of law that storage of items in a shed that were sometimes used outside the shed for business constituted a business use of the shed. This legal conclusion is subject to de novo review

Notice to an agent when acting within the scope of the agency is notice to his principal. *See Chase v. Beard*, 55 Wn.2d 58, 64, 346 P.2d 315 (1959). Knowledge by the agent of facts relating to the agency is deemed knowledge by the principal. *See American Fidelity & Cas. Co. v. Backstrom*, 47 Wn.2d 77, 287 P.2d 124 (1955). Under this doctrine, an agent's knowledge of the condition of property is imputed to his principal. *See Rothchild Brothers v. Northern Pac. R. Co.*, 68 Wn. 527, 123 P. 1011,

40 L.R.A. (N.S.) 773 (1912). When a duly constituted agent acts in accordance with his instructions, he has power to affect the legal relations of the principal to the same extent as if the principal had so acted. *See Am. Home Assur. Co. v. Hapag Lloyd Container Line, GMBH*, 446 F.3d 313, 318 (2d Cir. 2006); RESTATEMENT (SECOND) OF AGENCY § 12 cmt. a (1958).

In this case, the trial judge's conclusion of law that the shed was used for business purposes was not consistent with the evidence presented at trial or with his own findings of fact. During the application process, Harvey Monteith Agency employees, and agents of Mutual of Enumclaw, Anna Mosesova and Craig Baumgartner, determined that the shed was not used for business purposes and bound Mutual of Enumclaw to this determination when they wrote Plaintiff's insurance policy. Anna Mosesova and Craig Baumgartner came to this conclusion based upon two determinations: 1) even though M V Auto & Boat Repair was paid for its repair work, all repair work was performed outside of the shed and, thus, did not implicate the shed as being used for business purposes, and 2) storage of tools or items used by M V Auto & Boat Repair inside the shed was irrelevant to a determination of business use.

**i. Anna Mosesova And Craig Baumgartner Determined That Even Though M V Auto & Boat Repair Was Paid For The**

**Repair Work It Performed, The Repair Work Was Done Outside The Shed And Thus Did Not Implicate The Shed As Being Used For Business Purposes.**

Anna Mosesova and Craig Baumgartner both learned from their conversations with Plaintiff and her boyfriend during the application process, that no repair work was done inside the shed. *See* RP p. 213:22-214:9; 215:9-25; 331:9-332:7. Vasily Doroshchuk, Victor Grinchak, and Griygoriy Korotkov, witnesses at trial, all confirmed Anna Mosesova's and Craig Baumgartner's determination and testified that no repair work was done inside the shed. *See* RP p. 174:2-14; 180:22-181:17; 185:21-186:13; 189:1-13. Vladimir Pugachev, Plaintiff's boyfriend, and Plaintiff herself also testified that no repair work was done inside the shed. *See* RP p. 71:16-72:1; 210:17-22; 211:1-16; 216:1-6. John Harrell, Mutual of Enumclaw's loss adjustor, also determined that no repair work was performed inside of the shed. *See* RP p. 331:12-332:7.

Testimony also confirmed that Anna Mosesova and Craig Baumgartner were told by Plaintiff and knew that M V Auto & Boat Repair received money for the repair work it performed. *See* RP p. 148:22-149:14; 148:22-150:15; 331:6-11; 337:8-15; *see also* 333:17-334:9; 336:9-337:7; 372:1-373:14. John Harrell repeatedly confirmed that both Anna Mosesova and Craig Baumgartner knew that M V Auto & Boat

Repair was a business doing repair work for money. *See* RP p. 335:18-336:24; 331:6-11; 337:8-15. In fact, Mutual of Enumclaw's own counsel went to great lengths to get John Harrell to confirm that, despite a typo in a note detailing the content of a conversation with Anna Mosesova, John Harrell learned from Anna Mosesova that both she and Craig Baumgartner were unquestionably aware of the operation of a business on the property. *See* RP p. 333:17-334:9; 336:9-337:7; 372:1-373:14.

Craig Baumgartner also went to inspect the property on two occasions. *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. During these visits to the property, Craig Baumgartner observed all of the tools, equipment, and vehicles outside the shed. *See* RP p. 215:9-25; 333:17-334:15; 335:18-336:5.

Thus, after several conversations with Plaintiff and her boyfriend, after learning that the repair work was done outside the shed, after learning of the repair business, after learning that M V Auto & Boat Repair received money for the repair work it performed, and after two inspections of the property by Craig Baumgartner, Anna Mosesova and Craig Baumgartner determined that the shed was not used for business purposes. *See* RP p. 104:25-105:5; 148:22-150:15. During the application process, when Mutual of Enumclaw underwriter, Jill Anfinson,

specifically asked if the shed was used for business purposes, Anna Mosesova reiterated her and Craig Baumgartner's determination that it was not. *See* RP p. 288:2-290:8.

When John Harrell investigated the claim, he disagreed with Anna Mosesova and Craig Baumgartner. *See* RP p. 327:20-328:2. While he agreed that no repair work was done inside the shed, John Harrell testified that because M V Auto & Boat Repair was being run on the premises near the shed, the shed was implicated in the business and, thus excludable under the insurance policy. *See* RP p. 327:20-328:2; 331:12-332:7. In other words, unlike Anna Mosesova and Craig Baumgartner, John Harrell was not concerned with how the shed was being used; his only concern was whether there was a business on the property. He defined a repair business as one which does repairs for money. *See* RP p. 338:3-5. Because it was no secret to him, Anna Mosesova, and Craig Baumgartner that Plaintiff had a repair business being operated for money on the property near the shed, his inquiry ended there. *See* RP p. 333:17-334:9; 336:9-337:7; 372:1-373:14; *see also* 327:20-328:2.

John Harrell and other witnesses at trial all testified that at all times relevant to this litigation, the property and shed were being utilized in a consistent manner. *See* RP p. 41:7-42:3; 207:1-25; 208:1-13; 291:12-293:22; 304:14-305:19; 345:18-24. When shown photographs of the

property, John Harrell was incredulous that Craig Baumgartner was not alerted to obvious business exposure “red flags” on the property around the shed. *See* RP p. 344:11-345:5; 345:18-24; 348:3-9; 381:1-13.

Pat Boyles, another underwriter at Mutual of Enumclaw, was also shocked, and stated that had she seen the property she would have been alerted to business exposures on the property. *See* RP p. 304:14-305:9; 304:14-305:19.

Jill Anfinson agreed with John Harrell and Pat Boyles that Craig Baumgartner should have been alerted to the obvious business exposures on the property. *See* RP p. 283:4-284:24; 291:12-293:22.

Craig Baumgartner testified that if he goes out to inspect a property and sees something that would alert him to a possible exclusion, he has a responsibility to alert the underwriters assisting on that policy. *See* RP p. 104:16-24. However, he also testified that when he went out to inspect Plaintiff’s property, despite seeing all the tools, equipment, and vehicles around the shed, and he did not think any of those things rose to a level that would alert him an exclusion might apply. *See* RP p. 104:25-105:5; 105:12-106:16.

Nevertheless, John Harrell, Pat Boyles, and Jill Anfinson all conceded that Mutual of Enumclaw is bound by the actions of its authorized agents. *See* RP p. 263:2-14; 297:10-23; 379:19-380:5. Even

Mutual of Enumclaw's own counsel stipulated before trial and conceded in his closing argument that Mutual of Enumclaw is bound by the acts of Anna Mosesova and Craig Baumgartner. *See* RP p. 30:2-23; 421:18-422:6.

Anna Mosesova and Craig Baumgartner made a determination during Plaintiff's application for insurance that the shed was not used for business purposes. While it seems as though John Harrell, Pat Boyles, and Jill Anfinson are at odds with Anna Mosesova and Craig Baumgartner as to what does, or does not, constitute a business use of the shed, unfortunately for Mutual of Enumclaw, infighting between its authorized agents should not come at the expense of one of their insureds.

Rather than imputing the knowledge and determinations of Anna Mosesova and Craig Baumgartner on the principal, the trial judge pit Harvey Monteith Agency agents against Mutual of Enumclaw agents. The trial judge unreasonably engaged in an analysis as to whether he thought Team Anna Mosesova's or Team John Harrell's conception of what constitutes a business use of the shed was more reasonable.

As is evident from his Conclusions of Law, the trial judge ultimately sided with John Harrell's conception of what constitutes a business use and disregarded Anna Mosesova's and Craig Baumgartner's. *See* CP 725, ¶¶ 1-4. The trial judge erroneously concluded that the shed

was implicated in the business's use, even though agents Anna Mosesova and Craig Baumgartner determined that it was not. *See* CP 725, ¶ 1.

**ii. Anna Mosesova, Craig Baumgartner, And John Harrell All Determined That Storage Of Tools Or Items Used By M V Auto & Boat Repair Inside The Shed Was Unimportant To A Determination Of Business Use.**

As mentioned above, Anna Mosesova and Craig Baumgartner's determination that the shed was not used for business was also based on their belief that whether tools or items used by M V Auto & Boat Repair were stored inside the shed was unimportant.

At trial, Mutual of Enumclaw's counsel spent considerable time detailing what items were stored inside the shed, and if those items were ever used in M V Auto & Boat Repair. *See* RP p. 51:9-17; 52:2-16; 52:17-24; 58:10-59:4; 60:18-61:17; 63:10-64:12; 233:12-235:24; 236:3-24; 237:3-238:21. However, such time was wasted, because when 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.

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.

This time, John Harrell, Anna Mosesova, and Craig Baumgartner seem to be on the same team, while their own counsel seems to be on another. This inconsistency between agents and their own counsel only goes to show that Mutual of Enumclaw has no clear guidelines as to what is, or is not, important in determining business use. But, again, disagreements between authorized agents and their own counsel should not come at the expense of the premium-paying insured. Perhaps, instead, Mutual of Enumclaw should create guidelines about how their agents ought to go about determining a business use.

The trial court judge, however, unreasonably decided to engage in an analysis as to whether the agents' determination that the storage of business items in the shed is irrelevant was more reasonable than

counsel's theory that storage of business items in the shed is relevant. Ultimately, the trial judge sided with counsel's conception of business use and concluded that even though the storage of business items in the shed was not important to Anna Mosesova, Craig Baumgartner, and John Harrell, it was important to both him and defense counsel. *See* CP 725, ¶ 3.

Consequently, the trial judge erred in determining that the shed was used for business purposes as a matter of law, when authorized agents Anna Mosesova and Craig Baumgartner clearly bound Mutual of Enumclaw to a different conclusion—that storage of items inside the shed did not constitute a business use.

**B. The Trial Court Erroneously Concluded By Law That Mutual Of Enumclaw Did Not Act In Bad Faith When It Unreasonably and Deceptively Denied Plaintiff's Claim For Loss Of Her Shed.**

As with the prior assignment of error, because the trial court found that as a matter of law Mutual of Enumclaw did not act in bad faith, this conclusion of law is reviewed de novo.

Insurance companies owe a duty of good faith, to abstain from deception, to practice honesty and equity, and to preserve inviolate the integrity of insurance. RCW 48.01.030; *see also St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 129-130, 196 P.3d 664, 667-668

(2008). An insurer's breach of the insurance policy is evidence of common law bad faith. See *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 276-279, 961 P.2d 933, 935-938 (1998); *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 132, 196 P.3d 664, 668-669 (2008).

An insurer acts in bad faith when its acts or omissions are unreasonable, frivolous, or unfounded. See *Lloyd v. Allstate Ins. Co.*, 167 Wn. App. 490, 496, 275 P.3d 323, 326 (2012). Whether an insurer's alleged act or omission was unreasonable, frivolous, or unfounded depends on the facts and circumstances that existed at the time of the alleged act or omission. See *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 633-634, 915 P.2d 1140, 1145 (1996) ("To determine whether a defendant acted reasonably, fairly, or deceptively, it is necessary to consider the circumstances surrounding the allegedly improper act"); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329-330, 2 P.3d 1029, 1033 (2000); *Lloyd v. Allstate Ins. Co.*, 167 Wn. App. 490, 496, 275 P.3d 323, 326 (2012).

Mutual of Enumclaw acted unreasonably and deceptively by: 1) failing to have clear guidelines for its agents about what constitutes business use, 2) being aware that a business was being run on the premises yet claiming they were not, 3) issuing Plaintiff an insurance policy based

upon one definition of business use, and then later applying a different definition of business use when it denied Plaintiff's claim at the time of loss, 4) taking photos of the property that did not follow their own protocol, 5) taking photos that deliberately hid the business activities going on around the shed, and 6) shifting the blame to Plaintiff claiming that she was not forthright about the business activities going on around the shed.

In his Conclusions of Law, the trial judge based, in part, his holding that Mutual of Enumclaw did not act in bad faith on his conclusion that Mutual of Enumclaw agents were unaware that a business was being conducted on the premises as defined by Mutual of Enumclaw. *See* CP 725, ¶ 7.

There are two problems, however, with the trial judge's conclusion of law in paragraph 7. First, it implies that Mutual of Enumclaw had a clear and fixed definition of business use. As articulated in the business use argument above, Mutual of Enumclaw did not. If Mutual of Enumclaw clearly defined what is or is not a business use, how then could Anna Mosesova, Craig Baumgartner, and John Harrell learn about and inspect the same property yet come to two different conclusions as to whether the shed was used for business purposes? *See Plaintiff's Appeal* "Argument I." (Plaintiff incorporates by reference her arguments set for in

Argument I. above). Moreover, Anna Mosesova admitted at trial that ultimately she was not really clear as to what was, or was not, important to Mutual of Enumclaw in defining business use. *See* RP p. 171:23-172:9.

Second, the trial judge's conclusion in paragraph 7 that Mutual of Enumclaw agents were unaware that a business was being conducted on the premises is false. *See* CP 725, ¶ 7. At trial, John Harrell defined a repair business as one that does repair work for money. *See* RP p. 338:3-5. Yet also at trial, it was well established that both Craig Baumgartner and Anna Mosesova knew that repair work was performed on the property for money. *See* RP p. 148:22-149:14; 148:22-150:15; 331:6-11; 335:18-336:24; 337:8-15; *See also* 333:17-334:9; 336:9-337:7; 372:1-373:14. Furthermore, Mutual of Enumclaw's own counsel went to great lengths to confirm that despite a typo in John Harrell's note detailing the content of a conversation he had with Anna Mosesova, John Harrell learned from Anna Mosesova that both she and Craig Baumgartner were unquestionably aware of the operation of a business on the property. *See* RP p. 333:17-334:9; 336:9-337:7; 372:1-373:14. Therefore, the trial judge erred in concluding that Anna Mosesova and Craig Baumgartner were unaware of the business being run on the property.

Even more telling, however, is the fact that Craig Baumgartner inspected Plaintiff's property on two separate occasions and saw all of the

tools, equipment, and vehicles around the shed. *See* RP p. 77:18-78:4; 90:3-16; 98:11-99:3; 215:9-25; 333:17-334:15; 335:18-336:5; 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. Pat Boyles, Jill Anfinson, and John Harrell all testified that had they been on and inspected the property as 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.

Given 1) Anna Mosesova's and Craig Baumgartner's knowledge of the business being run on the property, 2) Craig Baumgartner's inspection of the property and observation of the all of the business activity, and 3) the testimony from Mutual of Enumclaw's own agents that there were obvious business exposures on the property, it is difficult to understand how the trial judge could conclude that Mutual of Enumclaw was unaware of the business being operated on the premises.

In his Conclusions of Law, the trial judge also concluded that Mutual of Enumclaw did not apply different definitions of business use. *See* CP 725, ¶ 8.

Again, as stated in Argument I. above, that is precisely what Mutual of Enumclaw did. *See Plaintiff's Appeal* "Argument I." (Plaintiff incorporates by reference her arguments set for in Argument I. above).

Despite the evidence at trial set forth in this argument, the trial judge still erroneously concluded that Anna Mosesova and Craig Baumgartner did not apply different definitions of business use than John Harrell, Pat Boyles, and Jill Anfinson.

In his Conclusions of Law, the trial judge also concluded that there was no evidence that Mutual of Enumclaw agents attempted to hide the business activities going on around the shed in the photographs that were taken in conjunction with Plaintiff's application for insurance. *See* CP 726 ¶ 9.

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. Anna Mosesova testified that she was not sure why Craig Baumgartner did not follow protocol in taking photos of the property. *See* RP p. 140:12-17. Image expert Eric Archer testified that the images of the shed were unquestionably altered and some were deleted. *See* CP 677-679.

Jill Anfinson testified that when she received the photos from Anna Mosesova at the time of application, she mistakenly believed that the photos of the shed were photos of the front and back of the shed. *See* RP p. 140:12-17; 274:18-275:17; 283:4-284:2; Ex. P-2.

At trial, Mutual of Enumclaw agents testified that Craig Baumgartner was deceptive in how he took the photos of the shed. Pat Boyles testified that the photos of the shed appear to have deliberately hidden the business activities going on around the shed. *See* RP p. 140:3-5; 304:3-9; 314:5-17. Jill Anfinson agreed with Pat Boyles and stated that she does not know what Craig Baumgartner was thinking in taking the photos how he did. *See* RP p. 276:25-279:1. Even Anna Mosesova conceded that the photos taken by Craig Baumgartner were taken in such a way so as to hide the area around the shed. *See* RP p. 140:3-5.

Furthermore, Jill Anfinson, Pat Boyles, and John Harrell all testified that had they seen the property more completely, they would have immediately been alerted to the business exposures on the property. *See*

RP p. 283:4-284:24; 291:12-293:22; 293:8-294:7; 304:14-306:14; 315:9-316:4; 348:3-9; 381:1-13.

At trial, Craig Baumgartner admitted that he took the photos of the shed, but had no explanation as to why the photos were taken in such a way so as to hide what was going on around the shed or why the images were altered. *See* RP p. 97:24-99:3; 97:24-98:10.

Notwithstanding all of this, the trial judge concluded that it was Plaintiff who was unreasonable and deceptive. *See* CP 725-26, ¶¶ 5, 6.

At trial, Mutual of Enumclaw admitted that they were not alleging any misrepresentation by plaintiff in this case and that it was not a basis for the denial of coverage. *See* RP p. 299:9-300:20. However, despite this admission by defendant, the trial judge summed up the case as one in which the insurance company was claiming the Plaintiff made misrepresentations. *See* RP p. 6:6-16. At trial, Mutual of Enumclaw's own agent, Pat Boyles, testified that, in her opinion, Plaintiff made no misrepresentations. *See* RP p. 299:9-300:20.

Despite the unambiguous statements by Mutual of Enumclaw agents that they did not think Ms. Tarasyuk made any misrepresentations, counsel for Enumclaw tried several times to point the blame on Ms. Tarasyuk, and ultimately the trial court judge concluded, in a large part because of misrepresentations by Plaintiff, that Mutual of Enumclaw did

not act in bad faith, violate the Consumer Protection Act, or violate the Insurance Fair Conduct Act. *See* CP 727 ¶ 11.

In sum, Mutual of Enumclaw acted unreasonably and deceptively by having unclear guidelines for their agents about what constitutes business use. It also acted unreasonably and deceptively when its failure to have clear guidelines led to the usage of different conceptions of business use in procuring an insurance contract versus when investigating a claim for loss under the same insurance contract. Unclear and inconsistent conceptions of what constitutes business use is unreasonable and deceptive because insurance companies can either 1) procure insurance contracts under one definition that perhaps never should have been written under another definition, or 2) deny insurance claims on the basis of one definition even though they are bound under a different concept as applied by its agents when the policy was written.

Mutual of Enumclaw also acted unreasonably and deceptively by failing to provide photographs of the property that were 1) consistent with its own internal protocol, and 2) forthright in accurately depicting the property.

For these reasons, Plaintiff respectfully asks that this court reverse the trial judge's conclusion of law and hold that Mutual of Enumclaw

acted in bad faith, violated the Consumer Protection Act, and violated the Insurance Fair Conduct Act.

**C. The Trial Court Erred When It Ruled In Favor Of Mutual Of Enumclaw Based On Misrepresentation By Plaintiff.**

The trial court erred when it ruled in favor of Mutual of Enumclaw based on misrepresentation by plaintiff. Even though; 1) misrepresentation is an affirmative defense which was not pleaded by defendant, 2) Mutual of Enumclaw did not deny the claim because of misrepresentation by the insured, and Mutual of Enumclaw testified at trial that they did not believe plaintiff had misrepresented anything, 3) the court failed to apply any legal standard to its findings of misrepresentation and the defendant never proved the legal claim of misrepresentation, and, 4) a finding of misrepresentation was contrary to the overwhelming evidence to the contrary.

For these reasons, we ask this court to reverse the trial court's conclusion of misrepresentation. A finding of misrepresentation is a legal conclusion and is reviewed de-novo by the Court of Appeals.

**i. The Trial Court Erred By Finding Misrepresentation When Misrepresentation Is An Affirmative Defense Which Was Not Pleaded By Defendant.**

Misrepresentation is an affirmative defense. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703 (1994). Washington is a notice pleading state and requires that a party give the opposing party fair notice of affirmative defenses in its pleadings. *See Gunn v. Riely*, 344 P.3d 1225 (2015). CR 8(c) requires an affirmative defense to be pleaded in the party's answer. *See* CR 8(c).

Nowhere in Mutual of Enumclaw's Answer is there any assertion of the defense of misrepresentation. *See* RP 423:21-25. Despite not being properly pleaded, the trial court found that Plaintiff made misrepresentations. In fact, the trial judge's Findings of Fact and Conclusions of Law is riddled with his opinions regarding Plaintiff's alleged misrepresentations. *See* CP 719-727. In paragraph 4 of the Finding of Facts section, the trial judge found that Plaintiff made misrepresentations in her application for insurance. *See* CP 725 ¶ 4. In Paragraph 13, the judge found that Plaintiff improperly concealed information from Craig Baumgartner about why there were so many cars on the property. *See* CP 727, ¶ 13. In paragraph 15, the trial judge found that Plaintiff made misrepresentations to Anna Mosesova. *See* CP 727, ¶ 15. In Paragraph 15, the judge further points out that Plaintiff's "representation" of and "failure to disclose" certain facts regarding business activities conducted on the premises led Anna Mosesova to issue

the insurance policy. *See* CP 727, ¶ 15. These findings of fact by the trial judge clearly demonstrate that he reached his decision in this case in large part on findings of misrepresentation.

The Conclusions of Law section reinforces the trial judge's improper finding based on an un-asserted misrepresentation claim. In paragraphs 5 and 6, the trial judge concluded that Plaintiff failed to deal honestly with the insurance company. *See* CP 725-26, ¶¶ 5, 6. In paragraphs 7 and 8, the trial court judge concluded that it was Plaintiff's misrepresentations that procured Mutual of Enumclaw to accept premium payments on a policy that otherwise would not have been issued in the first place. *See* CP 726, ¶¶ 7, 8.

Even at the outset of trial before opening statements, the judge himself placed Plaintiff's alleged misrepresentations as the center issue of the trial. The judge summed up the case saying this is "an insurance case where the insurance company is claiming misrepresentations." *See* RP p. 6:6-16.

At trial, defendant and defense counsel admitted that they were not intending to use the defense of misrepresentation and that they did not feel that Ms. Tarasyuk had made any misrepresentations in this case. *See* RP p. 423:21-25, 299:9-300:25. However, in the end, the trial court judge could

not get over his preconceived prejudices regarding this case and decided this case based on the misrepresentations of Plaintiff.

The law is clear in that an affirmative defense of misrepresentation must be pleaded in a defendant's Answer. For this reason alone, this court should reverse the trial court judge's finding of misrepresentation and remand the case for a new trial.

**ii. Mutual Of Enumclaw Did Not Deny The Claim Because Of Misrepresentation By The Insured, And Mutual Of Enumclaw Testified At Trial That They Did Not Believe Plaintiff Had Misrepresented Anything.**

The Trial Courts findings of fact and law regarding misrepresentation were contrary to Defendant's own testimony and arguments.

Mutual of Enumclaw did not claim misrepresentation in this case. *See* RP p. 423:21-25. During testimony, Patricia Boyles admitted that Mutual of Enumclaw was not accusing plaintiff of misrepresentation. *See See* RP p. 299:9-300:25. She went on to say that if they deny a claim for misrepresentation they would void the policy and send back premiums. *Id.* In this case, no premiums were returned, and there was no accusation by Mutual of Enumclaw that Plaintiff misrepresented anything during the underwriting process. *Id.* Defense counsel, during his own closing,

confirmed that Mutual of Enumclaw was not, and did not, raise the affirmative defense of misrepresentation. *See* RP p. 423:21-25.

However, even though Enumclaw did not properly raise the issue of misrepresentation the Trial Court decide this case based on misrepresentation by Plaintiff stating that: “Notwithstanding repeated opportunities to do so, Tarasyuk represented that she did not conduct a business on her property, referred to it merely as a "hobby," and did not disclose to the Harvey Monteith agents the many attributes of her “business” as identified above in paragraph 12.” *See* CP p. 725, ¶ 6. This allegation of misrepresentation appears throughout the Courts Findings of Fact and Conclusions of Law and seems to be the primary basis for his decision. *See* CP p. 719-727.

**iii. The Trial Court Erred In Failing To Apply The Correct Legal Standard And In Failing To Apply The Burden Of Proof On Defendant Insurance Company In Proving An Affirmative Defense Of Misrepresentation.**

Misrepresentation is an affirmative defense, and the burden of proof is on the defendant [Enumclaw] to prove it. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703 (1994); *See also Haslund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976); *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968). Misrepresentation

in obtaining insurance must be proved by clear, cogent, and convincing evidence. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703 (1994); *See generally Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969). The standard of proof is a high one, requiring “that the trier of fact be convinced that the fact in issue is ‘highly probable.’” *Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703 (1994); *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

The trial judge’s Findings of Fact and Conclusions of Law is full of findings of fact and conclusions of law supporting Plaintiff’s alleged misrepresentations. *See* CP 719-727. However, nowhere in his Findings of Fact and Conclusions of Law does the trial judge state that he arrived at such conclusions by a clear, cogent and convincing standard. *See* CP 719-727. Moreover, despite declaring at the outset of trial that the court considered this case to be “an insurance case where the insurance company is claiming misrepresentations,” the trial judge made no mention throughout the trial that the burden of proving such misrepresentations was on the defendant, Enumclaw, let alone that Enumclaw must do so by the heightened standard of clear, cogent and convincing evidence. *See* RP p. 6:6-16. The implication of such silence on the matter suggests that the

trial judge was altogether unaware of the heightened standard demanded by law for such a defense.

**iv. The Trial Court Erred By Unreasonably Ruling on a Misrepresentation Claim that was never properly asserted and Despite Overwhelming Evidence To The Contrary**

Even if this court holds that the trial judge was proper in ruling on a theory of misrepresentation, the trial judge was unreasonable in drawing such a conclusion because the evidence did not warrant it. The trial court seemed to find misrepresentation as a matter of law and this finding would be reviewed de novo.

Misrepresentation is an affirmative defense, and the burden of proof is on the defendant [Enumclaw] to prove it. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703 (1994); *See also Hashund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976); *Olpinski v. Clement*, 73 Wn.2d 944, 950, 442 P.2d 260 (1968). Misrepresentation in obtaining insurance must be proved by clear, cogent, and convincing evidence. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 882 P.2d 703 (1994); *See generally Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462, 457 P.2d 603 (1969).

To prevail on a defense of misrepresentation, an insurance company must prove by clear, cogent and convincing evidence the

following: 1) that the insurance company requested the material fact be disclosed on the insurance application, 2) that the insured concealed the material fact during the application process, 3) that the insured knowingly concealed the material fact with the intent to deceive the insurance company, 4) that the insurance company was unaware of the concealed fact when they issued the policy, 5) that the concealed facts were material to the issuance of the insurance. *See Queen City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 97, 882 P.2d 703 (1994). The facts concealed were material to the issuance of the insurance if knowledge of the true facts would have influenced the insurer's decision about the insurance contracts. *See Id.*, 126 Wn.2d 50, 97, 882 P.2d 703 (1994).

Where a party must prove its case by clear, cogent and convincing evidence, the evidence must be more substantial than in the ordinary civil case in which proof need only be by a preponderance of the evidence. *See In re Hall*, 99 Wn.2d 842, 849, 664 P.2d 1245 (1983). In other words, the findings must be supported by substantial evidence in light of the "highly probable" test. *See In re Pawling*, 101 Wn.2d 392, 399, 679 P.2d 916 (1984).

In his Findings of Fact section, the trial judge made specific factual findings about Plaintiff's alleged misrepresentations. In Paragraph 13, the

judge found that Plaintiff improperly concealed information from Craig Baumgartner about why there were so many cars on the property. *See* CP 722, ¶ 13. In paragraph 13, the trial judge found that when asked about the cars on the property, Plaintiff supposedly stated that cars were fixed but refrained from informing Craig Baumgartner that the cars were fixed for money. *See* CP 722, ¶ 13.

In paragraph 15, the trial court judge found that Plaintiff made misrepresentations to Anna Mosesova, and ultimately found that Plaintiff's "representation" of and "failure to disclose" certain facts regarding the business activities conducted on the premises led Anna Mosesova to issue the insurance policy. *See* CP 722, ¶ 15.

In paragraphs 5 and 6 of the Conclusions of Law section, the trial judge concluded that Plaintiff failed to deal honestly with the insurance company. *See* CP 725-26, ¶¶ 5, 6. In paragraphs 7 and 8, the trial judge concluded that it was Plaintiff's misrepresentations that procured Mutual of Enumclaw to accept premium payments on a policy that otherwise would not have been issued in the first place. *See* CP 726, ¶¶ 7, 8.

At trial, however, it was well established that both Craig Baumgartner and Anna Mosesova inquired extensively into the repair work going on around the shed. Through their inquiries into the property, Anna Mosesova and Craig Baumgartner learned that there was repair work

done on the property, but that none of it was done inside the shed. *See* RP p. 213:22-214:9; 215:9-25; 331:9-332:7. It was also well established that they knew that the repair work performed on the property was done for money. *See* RP p. 335:18-336:24; 331:6-11; 337:8-15; 148:22-149:14; 148:22-150:15. John Harrell repeatedly confirmed that both Anna Mosesova and Craig Baumgartner knew that there was a business on the property doing repair work for money. *See* RP p. 335:18-336:24; 331:6-11; 337:8-15. Mutual of Enumclaw's own counsel went to great lengths to confirm that despite a typo in John Harrell's note detailing the content of a conversation he had with Anna Mosesova, John Harrell learned from Anna Mosesova that both she and Craig Baumgartner were unquestionably aware of the operation of a business on the property. *See* RP p. 333:17-334:9; 336:9-337:7; 372:1-373:14.

This testimony establishes that both Anna Mosesova and Craig Baumgartner knew of the repair business, inquired from Plaintiff about where those repairs were performed, knew that none were performed inside the shed, and knew that the repair work was done for money. As summed up by Mutual of Enumclaw's own line of questioning on cross examination of John Harrell, Anna Mosesova and Craig Baumgartner knew that there was a business being run on the property and told John Harrell that they did. *See* RP p. 333:17-334:9; 336:9-337:7; 372:1-373:14.

Beyond what Ms. Tarasyuk told Anna Mosesova and Craig Baumgartner, however, is the fact that Ms. Tarasyuk opened her home to Craig Baumgartner for inspection on two separate occasions and that Craig Baumgartner walked the property and saw the business with his own eyes. *See* RP p. 77:18-78:4; 90:3-16; 98:11-99:3; 215:9-25; 333:17-334:15; 335:18-336:5; 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. When shown photographs depicting the property, Pat Boyles, Jill Anfinson, and John Harrell all testified that had they been on, and inspected, the property as 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. Between the testimony regarding what Craig Baumgartner saw, and the testimony about what he and Anna Mosesova knew from Plaintiff about the property, elements 2, 3, and 4 for a claim of misrepresentation, as outlined above, were not met.

Furthermore, Pat Boyles explicitly testified at trial that, in her opinion, Plaintiff made no misrepresentations in procuring the subject insurance policy. *See* RP p. 299:9-300:20. Pat Boyles was, however, suspicious of the actions of Craig Baumgartner and Anna Mosesova. In

fact, she testified that she thought that the photos of the property provided to Mutual of Enumclaw by Craig Baumgartner and Anna Mosesova during the application process appeared to have deliberately hidden all of the tools, equipment, and vehicles in the area around the shed. *See* RP p. 140:3-5; 304:3-9; 314:5-17. Jill Anfinson echoed her sentiments and testified that she does not know what Craig Baumgartner was thinking in providing the photos he did. *See* RP p. 276:25-279:1. Even Anna Mosesova conceded that the photos taken by Craig Baumgartner were taken in such a way so as to hide the area around the shed. *See* RP p. 140:3-5.

Despite the trial judge's findings and conclusions, the evidence does not warrant a finding of misrepresentation; rather, the evidence suggests that while Anna Mosesova and Craig Baumgartner knew about the business on the premises, disagreements existed amongst Mutual of Enumclaw about what should alert an agent to a business exposure, and what photos provided to underwriters should depict. In this case, the infighting and finger-pointing amongst agents of Mutual of Enumclaw came at the expense of the insured, Ms. Tarasyuk.

Because 1) Plaintiff told Anna Mosesova and Craig Baumgartner of the repair work being done on the property for money, 2) Craig Baumgartner inspected the property and saw all the tools, equipment, and

vehicles around the shed, 3) Mutual of Enumclaw's own agent, Pat Boyles, testified that she did not think Plaintiff made any misrepresentations in procuring her insurance policy, and 4) Mutual of Enumclaw's own agents, Pat Boyles and Jill Anfinson testified that Anna Mosesova and Craig Baumgartner were the ones potentially engaging in dishonest behaviors, this court should reverse the trial judge's findings of fact and conclusions of law for misrepresentation and find that Mutual of Enumclaw breached their contract and acted in bad faith as a matter of law.

**D. The Trial Court Erred By Not Following the Court of Appeals Decision At Trial**

The doctrine of stare decisis provides that lower courts must follow the mandate of, and precedent set by, higher courts, including the appellate courts for trial courts. The trial court should have followed the mandate by the Court of Appeals on remand.

The trial court from the outset questioned if it was bound by the Court of Appeals ruling, and even asked at the beginning of trial if it had to decide the case based on the "four corners" of the Court of Appeals opinion on remand. RP p. 32-34. In the end, the trial court did not follow the prior Court of Appeals ruling on remand.

**i. The Trial Court Applied a Different Bad Faith Standard Than That Prescribed By The Court of Appeals**

The Trial Court erred by deciding that Plaintiff had failed to prove her bad faith claim. The trial court erred by placing the burden of proving bad faith back onto Plaintiff, when the Court of Appeals had already decided Plaintiff met her burden, and that the burden had shifted to Defendant to disprove bad faith at trial. In deciding that summary judgment was not appropriate, as to Enumclaw's duty to act in good faith, the Court of Appeals also decided that "Ms. Tarasyuk met her burden of showing that Enumclaw breached this duty and acted in bad faith by leading her to believe that the shed was covered under the policy to collect premiums." *Court of Appeals, Div. III, Decision, on Case 32389-7-III* (hereinafter "*COA Decision*"), p. 14. The Court of Appeals went on to explain that "in actions where the insured claims that coverage was unreasonably denied, the insured has the initial burden of showing that the insurer acted unreasonably." *Id.*, p. 13 (citing *Indus. Indem. Co. of the NW, Inc., v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990)). The Court of Appeals decided, as a matter of law, that "Ms. Tarasyuk met her burden of showing that Enumclaw breached this duty and acted in bad faith" but then explained that "in response, the insurer has the opportunity to identify reasonable grounds for its action." *Id.* (citing *Kallevig*, 114 Wn.2d at 920).

The trial court erred by not following the Court of Appeals' mandate on Ms. Tarasyuk's bad faith claims. Again, the Court of Appeals found that Mutual of Enumclaw had denied the claim and that the burden of proof was now on them to identify reasonable grounds for their actions and remanded to trial for a determination on the reasonableness of Enumclaw's actions in light of all the facts and circumstances. *COA Decision*, p. 16. The court did not find that Mutual of Enumclaw had met this burden of proof, however, the trial court's decision included a conclusion of law that "the claims for bad faith, for violations of the Consumer Protection Act, and for violation of the Insurance Fair Conduct Act have not been established by the evidence." CP 727, ¶ 11. The trial court did not follow the Court of Appeals' mandate, and applied the wrong burden of proof, by shifting it back to Ms. Tarasyuk.

There was no showing by Mutual of Enumclaw that their actions were reasonable, and the trial court had no findings of fact or conclusions of law related to Mutual of Enumclaw's actions. Instead, the facts and evidence presented at trial, and even many of the ones outlined by the trial court in their ruling, show that Mutual of Enumclaw had no reasonable basis for any of its bad faith actions.

**ii. The Trial Court Erred By Failing To Follow The Court of Appeals Decision In Its Own Decision And Verdict**

The Court of Appeals had already decided, as a matter of law, that storage of business equipment and materials was not a business use, nor was it subject to the business use exclusion. The Court of Appeals remanded this case for trial so that a factual determination as to whether vehicle repair activity occurred inside the shed, and whether a business use exclusion applied. The Court of Appeals first found, as a matter of law, that Enumclaw had a duty to cover the Tarasyuk's "house and outbuildings, except if used for business." *COA Decision*, p. 10. The Court of Appeals conclusively states that "there is no question that Ms. Tarasyuk's automobile repair activity is a business." *COA Decision*, p. 10. The Court of Appeals then goes on to decide that there was still a genuine issue of material fact as to whether the shed was used for business. *Id.* at 11. The Court of Appeals heard arguments from Mutual of Enumclaw that there was a business use application and other evidence that some repair work was done inside the shed. *Id.* at 11. They also considered evidence and argument from Ms. Tarasyuk that all vehicle repairs were done outside of the shed and that the shed was used for storage and not for business use. *Id.* at 11. Ms. Tarasyuk admitted that items stored in the shed were sometimes used to repair cars for pay. The Court of Appeals decided that "whether the business use exclusion applied to the shed is a disputed issue of fact to be decided by the trier of fact." *Id.* at 11.

As matter of law, the Court of Appeals had to decide that storage of business equipment and materials was not a business use. The Court of Appeals conclusively held that Ms. Tarasyuk's auto repair activity was business. Ms. Tarasyuk admitted that she used the shed for general storage and for storage of business equipment and materials. Because storage of business equipment and materials was an undisputed fact presented at the Court of Appeals, the Court of Appeals necessarily decided that storage of business equipment and materials was not "business use," as defined in the insurance policy, as a matter of law. The only aspect left to be decided by the trial court was whether any of the repair work was done inside of the shed.

However, at trial, the trial court determined that all repair work was done outside the shed and then decided that storage of business materials in the shed was business use, as a matter of law, in contravention of the Court of Appeals decision. The trial court's conclusions of law indicated that "storage of tools, parts, books, records, service manuals, and equipment... was a necessary and ancillary activity of... [the] repair business... [and] occurred within the subject outbuilding..." and concluded that "therefore, the business was conducted 'in whole or in part' within the outbuilding." CP 725, ¶ 3. This was contrary to the Court of Appeals decision, which determined that if used for storage and if all

repair work was conducted outside the shed the business use exclusion did not apply.

#### **VI. ATTORNEY'S FEES AND COSTS ON APPEAL**

Ms. Tarasyuk is entitled to recover her attorney's 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's fees and costs incurred below and on Appeal. Ms. Tarasyuk is also entitled to an award of costs and statutory attorney's fees pursuant to RCW 4.84.010.

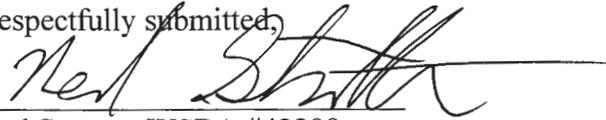
#### **VII. CONCLUSION**

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 8 day of March, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ned Stratton", written over a horizontal line.

Ned Stratton WSBA #42299

Brian J. Anderson WSBA #39061

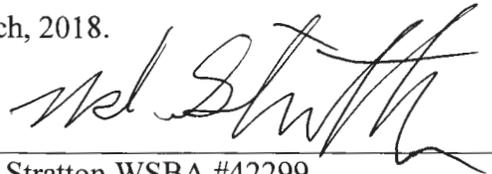
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CERTIFICATE OF SERVICE

I certify that on the 6 day of March, 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:

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 8 day of March, 2018.



Ned Stratton WSBA #42299

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March 8, 2018

Renee S. Townsley  
Clerk/Administrator  
COURT OF APPEALS, DIV III  
500 N Cedar Street  
Spokane, WA 99201-1905

*Sent via U.S. Mail*

**RE: *Mariya Tarasyuk vs. Mutual of Enumclaw  
Court of Appeals, Div III Case No. 354822  
Benton County Superior Court No: 12-2-01120-3***

Dear Ms. Townsley:

Please find enclosed with regard to the above matter the original of our BRIEF OF APPELLANTS together with proof of service.

Best regards,

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