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DIVISION III
STATE OF WASHINGTON
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NO. 354822

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

MARIYA TARASYUK,

Appellant/Plaintiff

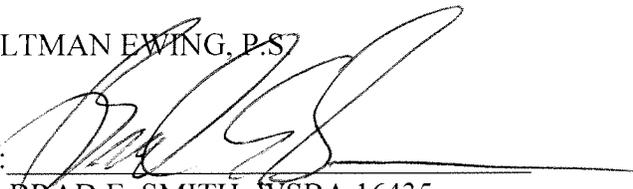
vs.

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

Respondents/Defendants.

BRIEF OF RESPONDENT MUTUAL OF ENUMCLAW
INSURANCE COMPANY

FELTMAN EWING, P.S.

By: 

BRAD E. SMITH, WSBA 16435
Attorney for Respondent/Defendant

421 W. Riverside Avenue, Suite 1600
Spokane, WA 99201-0495
(509) 838-6800

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I. INTRODUCTION

This is the second occasion this matter has been before Division III of the Court of Appeals. On September 1, 2015, this Court issued an unpublished opinion (Case 32389-7-III, hereinafter “First Opinion”) overturning the trial court’s initial grant of summary judgment in favor of Mutual of Enumclaw Insurance Company (hereinafter “Enumclaw”). This Court remanded the case, finding genuine issues of material fact on the question of coverage for Ms. Tarasyuk’s loss under her Enumclaw homeowners policy, as well as Ms. Tarasyuk’s claims of bad faith.

Pursuant to the mandate, a bench trial was held before the Honorable Bruce Spanner, Benton County Superior Court Judge, from May 8, 2017, through May 10, 2017. Ms. Tarasyuk’s appeals from Judge Spanner’s finding in favor of Enumclaw, both that Ms. Tarasyuk’s homeowners policy did not cover the loss to her “separate structure,” as it was used in part for a business, and also that Enumclaw committed no violations of IFCA, the CPA, or its duty of good faith.

Dissatisfied with the result of the trial on the merits *that she requested and received on her first appeal*, Ms. Tarasyuk continues her

prior misunderstanding or misperception of Enumclaw's policy language, the proper application of the facts of this case to the policy and Washington law, and the Court's First Opinion. Her argument to this Court is based on a "house of cards," which collapses quickly based on her erroneous reading of the First Opinion and continued attempt to obtain business coverage under a homeowners insurance policy.

In her briefing, Ms. Tarasyuk continues the confusion she exhibited before the trial court regarding the rulings of this Court in its First Opinion. The Court remanded this case for trial, having found disputed issues of material fact on both the contractual and bad faith issues. There is nothing in the Court's First Opinion that would support Ms. Tarasyuk's current contentions that the Enumclaw exclusionary language was ambiguous in any fashion, or that the Court found bad faith as a matter of law. If she were correct on these assertions, the Court's remand would have included instructions on the entry of judgment against Mutual of Enumclaw on these points, which it did not.

Once this Court confirms the scope of its First Opinion, correctly affirming the "Law of the Case" for the trial, then Judge Spanner's

findings and conclusions can be correctly upheld under the substantial evidence and abuse of discretion standards.

II. STATEMENT OF ISSUES

A. Whether the trial court correctly followed the direction of the Court of Appeals in its First Opinion.

B. Whether the trial court correctly determined that the Enumclaw policy did not cover property damage to Ms. Tarasyuk's separate structure, as it was being used in part for business purposes.

C. Whether estoppel is available to alter the unambiguous terms of the first-party coverage provided under Enumclaw's homeowners policy to Ms. Tarasyuk.

D. Whether the trial court properly considered Ms. Tarasyuk's representations and undisclosed information in considering whether Enumclaw acted in good faith, and did not void coverage under the policy based on alleged "misrepresentations" by Ms. Tarasyuk

E. Whether the trial court correctly held that Enumclaw acted in good faith.

III. STATEMENT OF THE CASE

A. Ms. Tarasyuk Did Not Assign Error To The Trial Court's Findings Of Fact

Notwithstanding the requirement of RAP 10.3(g), Ms. Tarasyuk did not assign a single error to the trial court's findings of fact (CP 719-725). Under a long line of Washington authority, Ms. Tarasyuk's failure to assign error to the trial court's findings of fact makes them verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *Johnson v. County of Kittitas*, 103 Wn.App. 212, 216, 11 P.3d 862 (2000); *Pellino v. Brink's, Inc.*, 164 Wn.App. 668, 682, 267 P.3 383 (2011).

This failure is fatal to Ms. Tarasyuk's arguments on appeal. Although she tries to frame the issues as involving the trial court's "erroneous conclusions of law," her arguments concerning the contract and bad faith issues assert that the trial judge "went against the weight of the evidence." Appellant's Brief, p. 13.

As the trial court's findings of fact are now verities on appeal, Enumclaw's statement of the case will rely predominantly on those findings.¹

B. Statement Of The Findings Of The Trial Court

On January 1, 2011, Ms. Tarasyuk went to the Harvey Monteith Insurance Agency for the purpose of procuring a homeowners insurance policy. Ms. Tarasyuk was a new customer to the agency. FOF 1; CP 719.

At the agency, Ms. Tarasyuk met with Anna Mosesova, an insurance agent who spoke Russian. FOF 2; CP 720. Although Ms. Tarasyuk is Ukrainian, by her own admission she had no problem understanding Ms. Mosesova's Russian. RP 232, Ins. 7-9.

The Harvey Monteith Insurance Agency was authorized to bind and issue homeowners policies for Enumclaw. As such, Mosesova was an agent for Enumclaw. FOF 3, CP 720. Within the context of the preparation

¹ Because the Court of Appeals may choose to overlook or forgive Ms. Tarasyuk's failure to assign error to the trial court's findings, Enumclaw will include in its statement of the case additional references to the Report of Proceedings to support its argument on appeal. If the Court of Appeals chooses to consider Ms. Tarasyuk's arguments regarding "additional evidence" not contained in the trial court's findings of fact, Enumclaw reserves the right to supplement this brief and directly address those contentions.

of the initial quote, Ms. Tarasyuk clearly and unequivocally denied that a business was operated on the premises. Ms. Tarasyuk also signed a homeowners application, which contained the question, “Any farming or other business conducted on premises (including day/child care)?” The response to this question on the application was “No.” FOF 4; CP 270.

As Ms. Tarasyuk was a new customer to the agency, Ms. Mosesova testified that she would have read all of the questions on the application to Ms. Tarasyuk. RP 154, ln. 8.

The homeowners application was forwarded to Enumclaw. Based on the agent’s binding authority, a homeowners policy, No. HO011287249, with an effective date of January 11, 2011, was issued to Ms. Tarasyuk. The policy provided coverage under Coverage A for the primary residence in the amount of \$230,462. The policy also initially provided, under Coverage B, coverage for “other structures” in the amount of \$23,046 (automatically set at 10 percent of the Coverage A amount), which included shops, sheds, or detached garages. FOF 5; CP 720.

The policy specifically provided:

We do not cover other structures:

1. Used in whole or in part for “business”....

FOF 6; CP 720; Ex. 101.

The policy also provided coverage for personal property under Coverage C in the amount of \$161,323. The policy provided a limitation under Coverage C of \$5,000 on personal property “used at any time or in any manner for any “business” purpose. FOF 7; CP 721.

The policy defined “business” to include “trade, profession or occupation.” FOF 8; CP 721; Ex. 101.

Prior to her application for and issuance of the Enumclaw policy to Ms. Tarasyuk, she and her partner operated an auto repair business on the premises. They advertised to the general public. They offered their services to the general public. They had business cards made. They had a business license, and had registered the trade name of the business, “M & V Auto Repair.” They had previously applied for a conditional use permit from Benton County so they could lawfully conduct the business on the premises. FOF 9; CP 721. Hereinafter, these factors are referred to as the “business attributes.”

The need for a conditional use permit was communicated to Ms. Tarasyuk in 2010, the year before the fire, and before her application of the Enumclaw policy, when Ms. Tarasyuk was approached by a Benton County representative about her conducting an automobile repair business

on the property. RP 209, 210, 222. On June 1, 2010, Ms. Tarasyuk applied with the Benton County Board of Adjustment for a special use permit. Ex. 104; RP 222, 223. On the application for that permit, Ms. Tarasyuk represented the size of the structure used for the business would be 1,200 square feet, and provided the following answers to the County's questions:

- e. What is the total square footage of the detached building to be used for the business? **1200**
- f. What is the total square footage that will be used for the business activity? **1200 square feet**

Ex. 104; RP 224.

Ms. Tarasyuk had a profit motive as evidenced by the profit made in both 2010 and 2011 from the auto repair business, which was reported as income to the IRS. FOF 10; CP 721.

In 2010, Ms. Tarasyuk's tax records reflect that she earned nearly \$4,475 from her auto repair business, which was approximately 25 percent of Ms. Tarasyuk's total wages or earnings. In 2011, Ms. Tarasyuk earned and reported \$3,370 for her auto repair business, reflecting earnings from January through August, after which no business was conducted in 2011 due to the fire. Exs. 109, 110; RP 222.

None of the car or boat repairs performed by Ms. Tarasyuk were performed within the outbuilding. FOF 11; CP 721.

At the time of the fire, tools and equipment used in the repair of vehicles were stored within the outbuilding. Parts were stored within the outbuilding. Computers and printers used in the business were stored within and used within the outbuilding. Diagnostic scanners were stored in the outbuilding. Service manuals and CDs for diagnostic purposes were stored within and used within the building. Electricity for the compressor and other equipment was accessed from electrical outlets in and on the outbuilding. All business bank records were stored within the outbuilding. Customer receipt books and parts receipts were kept within the outbuilding. FOF 12; CP 721-22.

In inventory forms submitted to Enumclaw after the fire, Ms. Tarasyuk acknowledged that many of the tools, inventory, and supplies that were damaged in the fire were used for both business and personal use. Ex. 106; RP 248-251.

After issuance of the homeowners policy to Ms. Tarasyuk, pursuant to Enumclaw underwriting requirements, a Harvey Monteith agent, Craig Baumgartner, went to the Tarasyuk property to take photographs. While on

the premises he asked Ms. Tarasyuk why so many cars were parked there. Ms. Tarasyuk answered merely that they “fix them.” FOF 13; CP 772. At this time, Ms. Tarasyuk did not identify any of the business attributes or business profits identified above. Id.

Enumclaw underwriters, without photographic evidence of the property or knowledge of the business being conducted there, noted that the outbuilding in question was large enough that it would not be “insured to value” if destroyed, based upon the insufficient coverage found under Coverage B. Enumclaw therefore insisted that additional coverage of \$60,000 be added to Coverage B, representing the estimated cost to replace the building in question. This was done through an HO 48 Endorsement on the property, which increased the premium, which was paid by Ms. Tarasyuk. The additional coverage was not required because of a suspected business; rather, it was required because of the size of the outbuilding. FOF 14; CP 722.

As part of this process involving the HO 48 Endorsement, Ms. Tarasyuk and Ms. Mosesova had an additional conversation where Ms. Tarasyuk again reported she did not operate a business. Rather, she represented that the cars were repaired as a “hobby.” Ms. Tarasyuk did not

inform Ms. Mosesova of any of the business attributes identified above. Based on this representation and failure to disclose relevant information, Ms. Mosesova reasonably concluded, and relied upon Ms. Tarasyuk's representations, that she was not operating a business. FOF 15; CP 722-23.

Throughout her dealings with Ms. Mosesova, whenever the repair of vehicles was mentioned, Ms. Tarasyuk represented that they only did repairs for "friends and family," notwithstanding the fact that Ms. Tarasyuk solicited and performed repairs for customers who were not friends and family. RP 217, 218, 65. She did not inform Ms. Mosesova of the substantial profits made from her car repair activity. FOF 15; CP 722.

During the underwriting process, Enumclaw requested that the agency send photographs of the shed/outbuilding, which was the reason for the HO 48 Endorsement. Ms. Mosesova subsequently sent two photographs of the outbuilding, taken by Mr. Baumgartner, to Enumclaw's underwriters. These photographs did not show the front of the building or show evidence of a business. FOF 16; CP 723.

The two photographs of the shed/outbuilding were smaller than the photographs taken of the residence and had metadata removed. Mr. Baumgartner lacked the skill and knowledge to alter the photographs.

He had no motivation to do so, as he earned no commission from the sale, and providing false information to Enumclaw would jeopardize the agency's relationship with Enumclaw, and perhaps impair the loss/ratio of the agency and negatively impact its bonus from Enumclaw. There was no evidence that Mr. Baumgartner is familiar with the proposed Tarasyuk policy beyond the belief that it was intended to be a "regular" homeowners policy. He was simply sent to take photographs, a task which required two visits. FOF 17; CP 723.

There was evidence that photographs taken by Mr. Baumgartner would not be sent by the agency to Enumclaw if they were out of focus, poorly taken, or over-exposed. They would then be deleted. FOF 18; CP 273.

There is no evidence that Ms. Mosesova attempted to hide the photographic evidence of the business. Ms. Mosesova had no motivation to do so, as she was not earning a commission on this policy. She lacked the knowledge and skills to alter photographs. FOF 19; CP 724.

Ms. Tarasyuk presented evidence through Eric Archer, an expert in photographic editing, which supported the contention that the photographs of the shed/outbuilding were smaller in size than photographs taken of the

residence, and had the metadata removed, which removed the date they were taken. Mr. Archer admitted that the photographs could be resized or have metadata removed due to programs that may have been on Mr. Baumgartner's or Ms. Mosesova's computers. Mr. Archer admitted it is common, based upon cellphone usage (Mr. Baumgartner used his cell phone to take these subject photos), that photos would not turn out, would be repetitive or duplicative, or commonly deleted if they were of poor quality. FOF 19; CP 724.

Although Enumclaw underwriter Patricia Boyles indicated after the loss that the photographs appeared to have been deliberately taken so as to omit the pictures of the front of the shed/outbuilding or show the business, there was no evidence this believe extended to the agents' intentional wrongdoing. FOF 20; CP 724.

On August 19, 2011, the shed was destroyed by an electrical fire. During the investigation of that fire by Enumclaw adjuster John Harrell, Ms. Tarasyuk acknowledged to Mr. Harrell that she had insurance coverage for her structures, but had let it lapse as it was too expensive. FOF 21; CP 724.

Ms. Tarasyuk subsequently made a claim for the loss of the shed, as well as personal property stored therein. Enumclaw indemnified Tarasyuk for the loss of her personal property in the approximate amount of \$36,700 (which included \$5,000 for business personal property), but declined coverage for the loss of the shed itself because it was used “in whole or in part for business). FOF 22; CP 724-25.

Regarding Mr. Harrell’s investigation of her claim, Ms. Tarasyuk found that he was “extremely reasonable” in the processing of her claim. RP 253.

IV. LEGAL ARGUMENT

A. The Trial Judge Properly Applied The Mandate Of The Court Of Appeals At Trial

Judge Spanner, a jurist with many years of legal experience, properly followed the mandate of the Court of Appeals as set forth in its First Opinion. Ms. Tarasyuk maligns Judge Spanner’s rulings, going so far as to accuse him of “bias” (p. 11) and “preconceived prejudices” (p. 35) regarding her and her case. Ms. Tarasyuk further misstates his inquiry to counsel before trial as to the “four corners” of the Court of Appeals’ First Opinion.

Judge Spanner gave Ms. Tarasyuk exactly what she asked for (and what this Court ordered) on her first appeal—a trial on the merits.

1. **Judge Spanner Inquired only as to the Scope of the Arguments that Were Raised by Counsel, Not that he was Unconstrained by the First Opinion**

Ms. Tarasyuk argues that Judge Spanner “did not follow the prior Court of Appeals’ ruling on remand.” Appellant’s Brief, p. 44.

It is clear from the Report of Proceedings that Judge Spanner, prior to the trial, made inquiries to counsel regarding his ability to consider all the arguments or assertions of the parties in determining the specific rulings of the Court of Appeals (which were contested by the parties). See, Legal Briefing to Trial Court, CP 76-84, 85-95.

This is evident from the Court’s statement:

[Plaintiffs’ counsel] was indicating that certain matters have already been decided by the court of appeals, and reading between the lines what I understand him to say is, “we made certain arguments to the court of appeals, and the defense made certain arguments to the court of appeals, and the court of appeals ruled thusly without specifically mentioning those arguments.”

What do I do with that, [plaintiffs’ counsel]? RP 33

While the parties may have had different theories as to what was decided or undecided by the Court of Appeals in its First Opinion (see

below), it is clear that Judge Spanner properly followed the Court of Appeals' rulings addressing the two issues which upon remand were to be decided by the trial court:

(1) Whether the business use exclusion applied to the shed (i.e., was the shed used in whole or in part for business); and

(2) Whether Enumclaw complied with its duty of good faith.

See, First Opinion, pp. 11, 16.

2. The Court of Appeals Remanded for a Factual Determination of Whether the Shed was Used for Ms. Tarasyuk's Auto Repair Business

The first appeal before this Court was based on Ms. Tarasyuk's disagreement with the original grant of summary judgment in favor of Enumclaw. The trial court concluded that Enumclaw was not required to pay for damage to the shed, and also granted Enumclaw's motion dismissing Ms. Tarasyuk's bad faith claims. See, First Opinion, p. 7.

Ms. Tarasyuk argues now, as she did before Judge Spanner, that this Court, in its First Opinion, somehow decided that the storage of personal or business items by Ms. Tarasyuk inside her shed was irrelevant, and that the only issue "left to be decided by the trial court was whether any of the repair work was done inside of the shed." Appellant's Brief, p. 48.

This is far too limited a reading of this Court’s First Opinion. After finding that Enumclaw’s homeowners policy was unambiguous and did not provide coverage for the shed if it was “used in whole or in part for business,” this Court addressed the “second part of the inquiry,” that being “whether the shed was indeed being used for business and excluded from coverage.” First Opinion, p. 10. This Court stated:

However, a genuine issue of material fact remains as to whether the *shed* was being used for Ms. Tarasyuk’s business. Enumclaw claims that the shed was used for business because Ms. Tarasyuk had a business license and the shed was listed on the license application. However, Ms. Tarasyuk claimed that the work was completed outside the building. She presented competing evidence showing large repair equipment and vehicles outside the shed and the shed doors were too small to allow vehicles to enter the building. **She also presented testimony that the shed was used for general storage, not for business use.** Here, all reasonable inferences are to be drawn in favor of Ms. Tarasyuk, the nonmoving party. Thus, 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

From the bolded and underlined language of the Court’s ruling (conveniently ignored by Ms. Tarasyuk in her brief), it is clear this Court, in its First Opinion, ruled there was a disputed issue of fact as to the actual use of the shed for Ms. Tarasyuk’s car repair business. This Court did not

rule that the interior use of the shed was irrelevant and that the only issue on remand was a determination of the exterior use of the shed. This Court did not, contrary to Ms. Tarasyuk's assertion in her brief, instruct the trial court that "the only aspect left to be decided...was whether any of the repair work was done inside the shed."

Based upon this Court's mandate, Judge Spanner heard evidence regarding the use of the building, and in particular found substantial evidence that Ms. Tarasyuk used the interior of the shed for her business, thus falling within the exclusionary language of Enumclaw's policy (see part V.B below).

3. **The Trial Court Correctly Applied Washington Law Concerning Bad Faith, as Directed by the Court of Appeals on Demand**

Ms. Tarasyuk continually misunderstands and miss-cites this Court's First Opinion on whether the trial court properly granted summary judgment in Enumclaw's favor on the issue of Ms. Tarasyuk's bad faith claims. In so doing, her brief constantly focuses upon the single statement in the First Opinion 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."

First Opinion, p. 14. Ms. Tarasyuk argues, based upon this single statement, that this Court ruled bad faith was a given, and that the only issue to be tried was whether Enumclaw had a reasonable basis for its conduct, and that Judge Spanner, in determining the bad faith issues, improperly ruled that the burden of proof remained upon Ms. Tarasyuk. See Trial Court's COL 11; CP 727.

In analyzing Ms. Tarasyuk's arguments in the First Opinion, the Court correctly summarized her claims of bad faith:

She maintains that the bad faith occurred in one of two ways: (1) Enumclaw accepted premiums for the shed knowing that it would not be covered and subsequently denied coverage or, alternatively, (2) Enumclaw accepted premiums for the shed because it did not find Ms. Tarasyuk was using the shed for business, and then, changed its interpretation after the fire and denied coverage of the shed.

First Opinion, p. 14. However, the Court went on to state that:

Both of the scenarios **involve disputed facts** concerning Enumclaw's knowledge and actions....**Resolution of these factual disputes is necessary to Ms. Tarasyuk's bad faith claim.** Whether Enumclaw knew of the particular use prior to collecting premiums or changed its position on the use when it denied coverage are disputed issues of material fact crucial for determining reasonableness. The reasonableness of Enumclaw's actions is to be determined in light of all the facts and circumstances of the case. **Because of the disputed material facts, summary judgment was not appropriate.**

Id., pp. 15, 16. (Emphasis added).

The burden of proof of establishing a claim for bad faith is and always remains on the insured by preponderance of the evidence. *Smith v. Safeco Ins.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003). The Court, in its First Opinion, did not, in any fashion, rule that bad faith was proven as a matter of law, or the burden of proof had permanently shifted to Enumclaw to show the reasonableness of its actions. The Court determined that reversal of summary judgment was appropriate because Ms. Tarasyuk had met her burden to show a genuine issue of fact and the reasonableness of Enumclaw's actions. It remanded for a determination by the trial court of this factual disputes.

On remand, Judge Spanner correctly analyzed the evidence concerning what Enumclaw knew, *and when*, both from the testimony of its agents and, in particular, based on what Ms. Tarasyuk told Enumclaw and its agents (or specifically concealed or did not tell them) regarding the nature of her car repair activity and the many factors establishing that it was a business. FOF 13, 15; COL 6, 7, and 8. He therefore correctly determined that the bad faith claims "have not been established by the evidence." COL 11.

There is no support for Ms. Tarasyuk's assertion that the trial court did not follow this Court's direction on remand or applied a different bad faith standard than that prescribed by the First Opinion.

B. Enumclaw's Policy Did Not Cover Property Damage To Tarasyuk's Shed As It Was Being Used "In Part" For Business Purposes

The trial court considered all the evidence and ruled that Enumclaw's policy clearly and unambiguously excluded coverage for separate structures that were used in whole **or in part** for business purposes. COL 2; CP 725. He further ruled, based upon the undisputed evidence that Ms. Tarasyuk utilized the interior of the shed for storage of business inventory, tools and equipment, and business records, the shed was clearly used "in part" for business purposes. COL 3; CP 725.

Ms. Tarasyuk, in addressing this conclusion (part V.A. of her brief) presents a quagmire of irrelevant arguments that have no basis, in either the evidence submitted to the trial judge or in the law, about what the Harvey Monteith agents, Ms. Mosesova and Mr. Baumgartner, knew or might have observed. Ms. Tarasyuk's arguments are irrelevant because the trial court correctly ruled that:

(1) The Enumclaw policy was unambiguous and the shed was being used for business purposes;

(2) The Harvey Monteith agents (and by extension, Enumclaw) did not know of the “business attributes,” only what Ms. Tarasyuk informed them—which led to the reasonable conclusion that no “business” was being conducted on the premises; and

(3) Estoppel is not available under Washington law to expand the coverage of a clear and unambiguous insurance policy.

1. **Ms. Tarasyuk Received Exactly What She Asked for—a Homeowners Policy That did not Cover any Business use of the Shed**

Ms. Tarasyuk was a new client/customer to the Harvey Monteith Agency. RP 154. As a new customer, neither Mosesova nor Baumgartner had any prior knowledge of Ms. Tarasyuk, her property, or her auto repair business. She came to the Harvey Monteith Agency to obtain, and she received, a **homeowners** policy. She received exactly what she asked and paid for, a policy that covered her home and other structures, but only to the extent that:

We do not cover other structures:

1. Used in whole or in part for “business”.

Ex. 101.

In obtaining this homeowners coverage, Ms. Tarasyuk was specifically asked if any business was operated on the premises. Ms. Tarasyuk answered in the negative, and the application was marked “no.” Ex. 111; RP 154, 155; FOF 4; CP 720.

In determining what coverage existed for the shed under Enumclaw’s policy, the trial court determined (as did the Court of Appeals in its First Opinion) that the policy language was unambiguous and excluded coverage for separate structures used in whole or in part for business purposes. COL 2; CP 725. The trial court had no difficulty determining that the shed was used “in part” for business purposes by evaluating the undisputed evidence before him:

- The shed was used to store tools and equipment utilized by Ms. Tarasyuk in the repair of vehicles, such as hand tools, air compressors, battery chargers, and other diagnostic equipment such as scanners. RP 58, 59, 70, 71; Ex. 106
- The shed was utilized to store supplies and inventory used in the repair of vehicles, such as batteries, automobile parts, and engine oil. RP 249-251; Ex. 106
- Ms. Tarasyuk stored records in the shed pertaining to her business, including customer lists, customer receipts, receipts for parts used

in the business, business banking records, and repair manuals used for business purposes. RP 62, 64, 243-245

- Destroyed in the shed fire were also a laptop, printers and/or scanners that were used, at least in part, for the business of repairing automobiles. RP 60, 61, 66, 67; Ex. 106
- Although the vehicles were purportedly repaired only outside the shed, power for any tools that required electricity was supplied by outlets located inside the shed. RP 70, 71

Ms. Tarasyuk's argument that the shed should be covered because she only repaired vehicles outside not only mischaracterizes the First Opinion in this case, but also ignores the clear and unambiguous Enumclaw policy language that coverage for the shed is abrogated if it is used "in part" for a business. The trial court also heard and considered testimony and considered that operation of a business within a separate structure is a risk not anticipated or intended to be covered under a homeowners policy. COL 2; CP 725; RP 309, 311

Based upon the undisputed and uncontroverted evidence the shed was used "in part" for Ms. Tarasyuk's business, the trial court correctly concluded that coverage did not exist under the Enumclaw policy for the loss of the shed by fire.

2. **The Harvey Monteith Agents Could Only Know, and Justifiably Relied Upon, What Ms. Tarasyuk Informed Them of Concerning the use of the Shed**

Ms. Tarasyuk goes on at length in her brief to argue that Ms. Mosesova and Mr. Baumgartner “determined that the shed was not used for business purposes,” and therefore bound Enumclaw to this determination. In so arguing, Ms. Tarasyuk misconstrues and miss-cites the evidence submitted to the trial court and fails to disclose other evidence considered by the court in making its conclusions of law.

Ms. Tarasyuk was a new customer to the Harvey Monteith Agency—whatever information Ms. Mosesova and Mr. Baumgartner had regarding her home, her use of the shed, and her auto repair business could only come from Ms. Tarasyuk. Based on the limited information that Ms. Tarasyuk gave them, they in no way made a “determination” that her auto repair activity was somehow a “covered business” under her Enumclaw homeowners policy.

- Although Mr. Baumgartner went to the property to take pictures and noticed car repair activity, when he spoke to Ms. Tarasyuk at the property she only answered that they “fixed them,” and did not identify any of the numerous business attributes established by the testimony heard by the court. FOF 13, CP 722. Mr. Baumgartner did not recall seeing any business sign on the property (RP 85, 96, 97) and knew virtually nothing about Ms. Tarasyuk, her property, or anything else other than the fact he was requested to take

photographs for the new policy being issued through the Harvey Monteith Agency.

- Ms. Mosesova asked Ms. Tarasyuk the policy application question of whether there was any “business” on the property. Ms. Tarasyuk responded “no.” RP 154; Ex. 111.
- During a more detailed discussion about the repair of vehicles with Ms. Tarasyuk, she indicated to Ms. Mosesova that it was only a “hobby” and that they only fixed vehicles for “friends and family.” RP 158, 159.
- Ms. Tarasyuk did not inform Ms. Mosesova when discussing the car repair activity of any of the other business attributes, such as her having a business license, a registered business trade name, business cards, advertising, or the significant profit she made from the auto repair business. FOF 9, 10, 15; RP 158-60; 241-42.
- Ms. Tarasyuk also did not inform Ms. Mosesova of the use of the inside of the shed for all of the business purposes identified above. FOF 12, 15; CP 721, 22.
- Although Ms. Tarasyuk testified that she told Ms. Mosesova that they only repaired vehicles outside the shed, Ms. Mosesova did not testify that this was part of their conversation. RP 158-59.

Based upon all of the evidence, the trial judge correctly determined that Ms. Mosesova and Mr. Baumgartner did not know Ms. Tarasyuk was operating a “business” of repairing cars on her property, as the term “business” is construed under the policy or under Washington law. COL 6, 7; CP 726. Ms. Tarasyuk’s attempts to misconstrue the evidence to imply some sort of “knowledge” of a business use or a “determination” of

business coverage under the Enumclaw homeowners policy simply fails both under the evidence and as a matter of law.

3. Estoppel is not a Remedy Available to Tarasyuk to Expand Coverage Notwithstanding the Agents' Purported Knowledge

Ms. Tarasyuk's argument in part V.A. of her brief amounts to nothing more than an attempt to expand the coverage of Enumclaw's clear and unambiguous homeowners policy (and essentially convert it into a business policy) based upon the purported knowledge of the Enumclaw/Harvey Monteith agents.

Neither a party to an insurance contract nor the court in construing the policy's meaning, can invoke the doctrine of estoppel to bring into existence a contract not made by the parties and create a coverage contrary to the express provisions of the contract the parties did make. Under no circumstances can the coverage or restrictions on the coverage be extended by the doctrines of estoppel or waiver. *Carew, Shaw & Bernasconi v. Gen. Cas. of America*, 189 Wash. 329, 336, 65 P.2d 689, 692 (1937). This is a principle established through a long line of Washington law.

Furthermore, as stated in part V.A. above, Ms. Tarasyuk has misconstrued the issues on remand as dictated by this Court in its First

Opinion. The extent of the agents' knowledge, if any, regarding what Ms. Tarasyuk was doing and whether Enumclaw was bound or changed its position as a result of that knowledge is relevant **only** to the issue of the **bad faith claims** made by Ms. Tarasyuk (see part V.D. below). Since coverage cannot be extended by estoppel, the trial court correctly held that the Enumclaw policy did not cover Ms. Tarasyuk's, shed as it was used in part for business.

C. **The Trial Court Did Not Void Ms. Tarasyuk's Policy/Coverage Based on Misrepresentations**

Ms. Tarasyuk attempts to raise a new issue on her second appeal. For the first time, Ms. Tarasyuk argues that the trial court somehow dismissed her complaint based on "misrepresentations," implying that the trial court **voided** the policy based upon the fraud/concealment provision of Mutual of Enumclaw's policy (Ex. 101). Ms. Tarasyuk argues that the trial court improperly based its decision on her misrepresentations, in the absence of any affirmative defense by Enumclaw raising this as an issue. While Ms. Tarasyuk is correct that Mutual of Enumclaw did not base its denial based upon "misrepresentations," she is ultimately incorrect in her argument on appeal, because the trial court did **not** void the policy/contract

based upon Ms. Tarasyuk's misrepresentations. This is notwithstanding Ms. Tarasyuk's blatant misrepresentation that Judge Spanner "summed up the case as one in which the insurance company was claiming the Plaintiff made misrepresentations." Appellant's Brief, pp. 30, 34².

As stated in part V.A above, Ms. Tarasyuk's claims regarding bad faith were grounded on her assertions that: (1) Enumclaw accepted premiums for the shed knowing it would not be covered and subsequently denied coverage or, alternatively, (2) Enumclaw accepted premiums for the shed because it did not find Ms. Tarasyuk was using the shed for business, and then changed its interpretation after the fire and denied coverage of the shed. In its First Opinion, this Court determined resolution of these disputed factual issues turned upon:

Whether Enumclaw knew of the particular use prior to collecting premiums or changed its position on the use when it denied coverage are disputed issues of material fact crucial for determining reasonableness. The reasonableness of

² Judge Spanner made this comment in the first day of trial, noting that the parties' counsel did not upload their briefing, so upon being assigned the trial he did not know what the case was about. His comment about the case being about "misrepresentations" was made to *his wife* during a morning walk *before* he had read the briefing about the issues. See, RP, p. 6. Although Appellant's Brief is replete with incorrect citations to the record (too many to highlight or point out in the context of a responsive brief), this one which further maligns Judge Spanner required comment.

Enumclaw's actions is to be determined in light of all of the facts and circumstances of the case. First Opinion, p. 16.

The issue of what Enumclaw knew or did not know about Ms. Tarasyuk's car repair activities, or her operation of a business, depended almost entirely on what Ms. Tarasyuk informed Enumclaw (or concealed from Enumclaw and its agents) during the application process of the claim. The trial court therefore considered evidence regarding Ms. Tarasyuk's "representations" regarding the nature of her car repair activity. In so doing, the Court found that:

(1) When Mr. Baumgartner went to the Tarasyuk property to take photographs, he inquired why so many cars were parked there. Ms. Tarasyuk answered merely that they "fix them," but offered nothing more about the many business attributes of the repair activity. FOF 13.

(2) When coverage for the shed was increased based upon its being underinsured, Ms. Tarasyuk again reported to Ms. Mosesova that they did not operate a business. Rather, she represented the cars were repairs as a "hobby," and only repaired cars for friends and family. FOF 15; RP 158-59. She did not inform Ms. Mosesova, however, of any of the business attributes discovered only after the loss. FOF 9 and 10.

(3) Based upon these partial representations and failure to provide information that was solely within her knowledge, the Court found that Enumclaw's underwriters and the Harvey Monteith agents reasonably relied upon Ms. Tarasyuk's representations, and were unaware of the operation of a "business," as opposed to merely repair of vehicles for friends and family as a "hobby." FOF 13, 14, 15, 17.

These factual findings led to the Court's Conclusion of Law 7 that neither Enumclaw nor its agents were aware that a business was being conducted on the premises, and its Conclusion of Law 8 that Enumclaw did not accept premiums knowing that the business was being conducted on the premises, and they did not apply different definitions of a business, either when the policy was issued or after the loss had occurred.

It is clear that Judge Spanner understood the direction from this Court regarding the disputed issues of what Enumclaw knew or did not know about Ms. Tarasyuk's car repair business, and in finding in favor of Enumclaw, ruled that Ms. Tarasyuk herself made representations that the car repair activity did not constitute a business, and failed to disclose relevant information to Enumclaw or its agents. Judge Spanner did not rule that the policy was void based upon misrepresentations or any intent

to deceive. In so doing, he was consistent with Enumclaw's admissions at trial that they were not trying to void the policy based upon any alleged misrepresentations.

Judge Spanner's conclusions regarding "misrepresentations" were not applicable to the contractual issue, but solely to the reasonableness of Enumclaw's actions and whether it acted in bad faith as alleged by Ms. Tarasyuk.

Enumclaw's decision to enforce the contract as written (i.e., no coverage for the shed itself) as opposed to alleging fraud in the application process, actually worked in favor of Ms. Tarasyuk. Enumclaw may well have succeeded on a defense of fraud/misrepresentation, which would have voided the homeowners policy "ab initio." Instead, it chose to deny "separate structure" property damage coverage due to the business use of the shed, but honor and enforce the remainder of the policy which resulted in policy benefits of \$36,700 being paid to Ms. Tarasyuk for the loss of her personal property stored in the shed – benefits that would not have been payable if Enumclaw chose to void the policy for misrepresentations.

D. The Trial Court Correctly Found That Enumclaw Acted In Good Faith And That Ms. Tarasyuk Failed To Establish Her Bad Faith Claims

After hearing three days of testimony, virtually all of it coming from Ms. Tarasyuk's witnesses³, the trial court ultimately entered several Findings of Fact directly addressing Ms. Tarasyuk's bad faith claims, as well as several Conclusions of Law directly finding that her claims for bad faith, Consumer Protection Act and Insurance Fair Conduct Act violations had not been established by the evidence. COL 11; CP 727. The trial court's conclusions should be affirmed on appeal.

1. Ms. Tarasyuk's Argument Concerning Bad Faith is Procedurally Defective on Several Points

a. The Trial Court's Findings of Fact are Verities on Appeal as Plaintiff's Did Not Assign Error to Them in her Brief

Ms. Tarasyuk challenges the trial court's Conclusions of Law 7, 8, 9, 10, and 11 regarding bad faith allegations. But she challenges those conclusions in light of the factual evidence submitted to the trial court. In

³ Enumclaw called only one witness, Ms. Tarasyuk herself, in its case-in-chief. Ms. Tarasyuk's testimony last approximately five minutes, and was done solely to admit an additional photograph of the shed. RP 390-92; Ex. 123.

fact, in her Argument she alleges the trial court “went against the weight of the evidence” in concluding Enumclaw did not act in bad faith.

Ms. Tarasyuk’s argument is derailed by her failure to assign error to the Court’s factual findings concerning the evidence of Enumclaw’s conduct. For each Conclusion of Law challenged, she recites to evidence she believes the trial court failed to consider or considered in the wrong light (i.e., based on Ms. Tarasyuk’s allegations and claims). But by her failure to assign error to any of the trial court’s Findings of Fact, they are verities on appeal and bar Ms. Tarasyuk’s arguments against the sufficiency of evidence to support them. *Johnson, supra*, at 216.

b. Ms. Tarasyuk Makes no Arguments Concerning CPA or IFCA Violations

Ms. Tarasyuk devoted virtually no argument whatsoever in her brief to her alleged claims under the Consumer Protection Act and Insurance Fair Conduct Act. She did not cite the statutes regarding those acts, any case law concerning those claims, and virtually no argument as to why Enumclaw’s alleged conduct was violative of those particular statutes. Failure to devote any argument to those claims constitutes a waiver on this

appeal. RAP 10.3(a)(b); *Farmer v. Davis*, 161 Wn.App. 420, 432, 250 P.3d 138 (2011).

c. **Ms. Tarasyuk Makes Arguments on Appeal Concerning Bad Faith That Were Not Raised Before the Trial Court**

This Court, in its First Opinion, succinctly summarized Ms. Tarasyuk's bad faith claims as follows:

She maintains that the bad faith occurred in one of two ways: (1) Enumclaw accepted premiums for the shed knowing that it would not be covered and subsequently denied coverage or, alternatively, (2) Enumclaw accepted premiums for the shed because it did not find Ms. Tarasyuk was using the shed for business, and then changed its interpretation after the fire and denied coverage of the shed.

First Opinion, p. 14.

Ms. Tarasyuk reiterated these bad faith arguments in her trial brief, quoting the Court of Appeals' summary of the bad faith claims almost verbatim. Ms. Tarasyuk's Trial Brief, p. 9 (CP 24).

For the first time in her appellate brief after the trial of this matter, Ms. Tarasyuk attempts to raise additional "arguments" concerning alleged bad faith conduct, that were not made either in the first appeal or before the trial court. These new arguments include "failing to have clear guidelines for its agents about what constitutes business use," "taking

photos of the property that did not follow their own protocol,” and “shifting the blame to plaintiff claiming that she was not forthright about the business activities going on around the shed.”

Raising arguments or theories for the first time on appeal that were not addressed to the trial court (or on the first appeal of this matter) forecloses any attempt by Plaintiff to now allege that Enumclaw did not act in good faith on these points. RAP 25; *Timberland Bank v. Mesaros*, 1 Wn.App. 2d. 602, 606, 406 P.3d 719 (2017).

2. Substantial Evidence Supports the Court’s Conclusions of Law That Enumclaw Acted in Good Faith

Even if the Court decides to address the substance of Ms. Tarasyuk’s claims regarding Enumclaw’s alleged bad faith conduct, the trial court properly considered and analyzed the ample evidence supporting Enumclaw’s good faith conduct. The Court’s Conclusions of Law will be addressed in order.

a. The Court Properly Concluded Enumclaw and its Agents Were Unaware a Business was Conducted on Tarasyuk’s Property

In its First Opinion, this Court already decided it was undisputed that Ms. Tarasyuk was conducting a business on her property. This is based

upon Washington law that defines a “business” for insurance purposes as one that has a “profit motive” and which was conducted on a regular and continuous basis. *Stuart v. American States*, 134 Wn.2d 814, 817, 953 P.2d 462 (1988).

The trial court correctly concluded that the Harvey Monteith agents, Baumgartner and Mosesova, were unaware that a business was being conducted on the premises because Ms. Tarasyuk failed to inform them of all of the “business” attributes regarding her conduct, and she clearly responded “no” when asked on the insurance application whether she conducted a business on the property. At every opportunity where Ms. Tarasyuk had the chance to inform Mr. Baumgartner or Ms. Mosesova about the nature of her “car repair activity,” she failed to do so. Even if mention of receipt of money did occur during the discussions between Ms. Tarasyuk and Ms. Mosesova (Ms. Mosesova declined any memory of money being mentioned. RP 150), it was clearly *de minimis* and part of Ms. Tarasyuk’s “hobby” where she repaired cars only for “friends and family.” A *de minimis* receipt of money (to reimburse for costs) is not a “profit motive” under Washington law. *Stuart, supra*, at 822, 23, citing

Annotation, 35 A.L.R. 5th 375 (1996); *Stoughton v. Mutual of Enumclaw*, 61 Wn.App. 365, 810 P.2d 80 (1991).

Based on the evidence, the obvious reason Mr. Harrell came to a different conclusion adjusting the loss as to whether a “business” was being conducted on Ms. Tarasyuk’s property, was based upon the fact that after the loss, Mr. Harrell and Enumclaw became aware of the substantial profit motive of Ms. Tarasyuk from her business⁴, as well as the full extent of her business attributes of her car repair business.

Ms. Tarasyuk’s frequent misstatements concerning the evidence (in particular, Mr. Baumgartner’s purported “knowledge” of the full activities of the car repair business based upon his visit to the property), are nothing more than Ms. Tarasyuk’s own one-sided view of the facts and her failure to admit that she actively concealed or failed to disclose to Enumclaw and its agents all of the attributes of her car repair business. The trial court properly concluded that Enumclaw and its agents were unaware that a “business” was being conducted, which directly supported its Conclusion of Law 8 that:

Enumclaw did not accept premiums knowing that a business was being conducted on the premises, and they did not apply different definitions of a business, whether when the policy was issued or after the loss had occurred.

CP 726

b. The Trial Court Properly Concluded That There was no Bad Faith Conduct Concerning the Photographs Taken of Tarasyuk's Property

Ms. Tarasyuk's hyper-focus on the issue of the property photographs is a classic red herring. This issue has no bearing on the coverage afforded under the Enumclaw policy, and is irrelevant to the issues before the trial court. Notwithstanding this irrelevancy, the trial court properly held she failed to prove bad faith or improper motive by Enumclaw or its agents.

Ms. Tarasyuk herself called Harvey Monteith agents Baumgartner and Mosesova as witnesses at trial. She examined them at length regarding the photographs taken by Mr. Baumgartner when he visited the property and the transmittal of photographs to Enumclaw's underwriting department. She called two Enumclaw underwriters as witnesses, and also questioned them about these photographs.

⁴ Speaking to Ms. Tarasyuk shortly after the loss, she affirmed that the income from car repairs was crucial to the support of her household. RP 357.

After hearing all Ms. Tarasyuk's witnesses, the trial court found that the evidence did not establish any intentional activity by Mr. Baumgartner or Ms. Mosesova to alter photographs (nor indeed did they even have the capability or knowledge of how to do so), and more importantly that neither of them had any motivation to alter photographs or try to deceive Enumclaw in any fashion concerning Ms. Tarasyuk's property. Neither Mr. Baumgartner nor Ms. Mosesova earned any commission on the homeowners policy purchased through the Harvey Monteith Agency, and the court heard testimony that any sort of deceptive conduct or acceptance of an improper business risk on a homeowners policy would jeopardize the agency's long-standing relationship with Enumclaw, and even impair the loss/ratio of the agency and negatively impact its bonus from Enumclaw. FOF 17; CP 723; RP 110, 309-11.

The trial court also found, based on the evidence, that there were many reasons why Mr. Baumgartner might not have sent all of the photographs he took of Ms. Tarasyuk's property to Enumclaw, as there was evidence that he would delete photos if they were out of focus, poorly taken, or overexposed. FOF 18; CP 723.

The trial court importantly noted that Ms. Tarasyuk's own photographic expert, Eric Archer, admitted that the photographs could have been resized or had metadata removed due to programs that may have been on Baumgartner or Mosesova's computers. FOF 19; CP 687, 88, 724. Mr. Archer did not ask to examine those computers as part of his investigation. CP 688. He could not give an opinion on whether the photos had been cropped. He admitted photos from cell phones often result in poor quality photos or duplicative or unwanted photos that are commonly deleted. CP 691-93. Based on the evidence, the Court correctly concluded there was no attempt to hide evidence of the business by the Harvey Monteith's agents, and that any missing photographs were likely deleted because they did not turn out. COL 9, 10.

While Ms. Tarasyuk certainly has a different opinion regarding the evidence, and obviously sees a nefarious, hidden intent by the Harvey Monteith agents to deceive Enumclaw or somehow hide the "business" on her property, the trial court justly concluded to the contrary. This was completely justified as Ms. Tarasyuk never submitted any explanation or argument as to why the Harvey Monteith agents would be motivated to somehow alter photographs or try to hide the fact of her business on the

property. The evidence, in fact, supported the contrary conclusion—they had every reason to want to preserve their agency’s long-standing relationship with Enumclaw, and no motivation to somehow act inappropriately on behalf of Ms. Tarasyuk, a new customer to the agency for which they earned zero commissions on this particular homeowners policy.

The trial court was in the best position to evaluate all of the evidence concerning the conduct of Enumclaw as well as the conduct of Ms. Tarasyuk in her failure to communicate to Enumclaw or its agents the numerous business attributes of her “car repair activity.” The Court properly concluded that Enumclaw’s conduct was in good faith and that Plaintiff had failed to establish any violations of IFCA, the CPA, or the tort of bad faith.

V. CONCLUSION

Ms. Tarasyuk came to the Harvey Monteith Agency in 2011 to purchase a homeowners policy. She obtained exactly what she asked for, a policy of insurance that covered her home, as well as other structures on the property so long as they were not used in part for businesses.

What Ms. Tarasyuk did not ask for was a business or commercial policy that would cover her car repair business. At every opportunity to inform Enumclaw or its agents about the true extent of her car repair business, she failed to do so. Enumclaw issued the homeowners policy in reliance upon Ms. Tarasyuk's representations, without knowledge of the car repair business, and only after the loss learned of the substantial business attributes establishing that she was operating a business out of her shed.

Enumclaw properly denied coverage under the policy for the property damage to the structure itself, although it did pay \$36,700 for the personal and business property stored and destroyed therein. Ms. Tarasyuk is herself responsible for the lack of coverage for the structure itself, based upon her withholding evidence to Enumclaw and her failure to obtain proper insurance for her business use of the shed.

After the trial court initially granted summary judgment to Enumclaw, Ms. Tarasyuk appealed to this Court. She won that appeal, and obtained exactly what she asked for – a trial on the merits.

The trial court did exactly as was directed by this Court in the First Opinion – it took evidence on the disputed factual issues concerning the

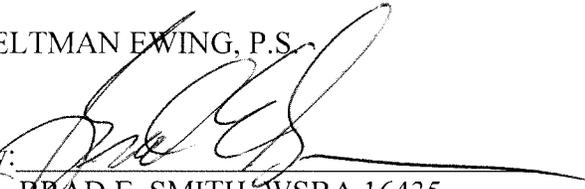
use of the shed and the reasonableness of Enumclaw's conduct. Judge Spanner was in the best position, after three days of testimony (virtually all of it from Plaintiff's own witnesses), to determine that the shed was used in part for business, and that Enumclaw's conduct was in good faith.

Ms. Tarasyuk, now disappointed by the outcome of the trial she requested and was granted, again appeals to this Court, accusing Judge Spanner of bias and prejudice, requesting this Court to substitute its own findings and conclusions for Judge Spanner's, regardless of his consideration of the evidence and the credibility of the witnesses.

The Court of Appeals is respectfully requested to affirm the trial court's Conclusions of Law and reject Ms. Tarasyuk's second appeal of this matter.

DATED this 24th day of April 2018.

FELTMAN EWING, P.S.

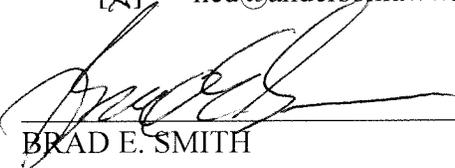
By: 

BRAD E. SMITH, WSBA 16435
Attorney for Enumclaw

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2018, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

Ned Stratton	<input checked="" type="checkbox"/>	U.S. Mail
Brian J. Anderson	<input type="checkbox"/>	Hand Delivery
Anderson Law PLLC	<input type="checkbox"/>	Overnight Courier
5861 W Clearwater Avenue	<input type="checkbox"/>	Fax
Kennewick, WA 99336	<input checked="" type="checkbox"/>	ned@andersonlawwa.com



BRAD E. SMITH