

FILED

JUL 25 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 323897

STATE OF WASHINGTON, COURT OF APPEALS
DIVISION III

MARIYA TARASYUK,

Appellant/Plaintiff

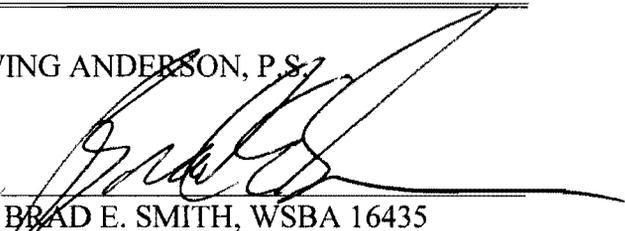
vs.

MUTUAL OF ENUMCLAW INSURANCE
COMPANY, a Washington corporation,

Respondent/Defendant.

BRIEF OF RESPONDENT MUTUAL OF ENUMCLAW
INSURANCE COMPANY

EWING ANDERSON, P.S.

By: 

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

522 W. Riverside Avenue, Suite 800
Spokane, WA 99201-0519
(509) 838-4261

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENT OF ERROR	1
II. ENUMCLAW’S RESPONSE TO TARASYUK’S STATEMENT OF THE CASE.....	2
A. Response To Tarasyuk’s Statement Of The Case	2
1. Purpose of Amendment of Policy	2
2. Timing of any Discussions Between Tarasyuk and Anna Mosecova Regarding the Nature of Car Repairs Performed by Tarasyuk on the Property	3
B. Enumclaw’s Statement Of Facts.....	4
C. Procedural History Of The Case	10
III. SUMMARY OF ARGUMENT	11
IV. ARGUMENT	12
A. Standard Of Review.....	12
B. The Trial Court Correctly Interpreted And Enforced Tarasyuk’s Homeowners Policy To Not Cover The Business Use Of The Shed.....	13
1. Rules to Aid in the Interpretation of Insurance Policies.....	13
2. The Enumclaw Policy Issued to Tarasyuk Unambiguously Excludes Coverage for the Business Use of the Shed	15

	<u>Page</u>
3. Extrinsic Evidence Should Only be Considered Where it Was Manifested Objectively Between the Parties—A Party’s Unexpressed Subjective Intent is Inadmissible	16
4. The Enumclaw Policy Clearly and Unambiguously Excludes Coverage for Other Structures Used for Business Purposes.....	20
5. The Undisputed Facts do Not Support Any Allegation That the Increase of Coverage B Was Intended to Cover the “Business Use” of the Shed.....	25
6. The Trial Court Correctly Held That the Agents’ Possible Knowledge Was Irrelevant, as They Had no Duty to Guaranty Tarasyuk Was Insured for Any Eventuality	27
C. The Trial Court Properly Dismissed Tarasyuk’s Bad Faith Claim.....	31
V. CONCLUSION.....	37

TABLE OF AUTHORITIES

Page

TABLE OF CASES

<u>Allstate Ins. v. Peasley</u> 131 Wn.2d 420, 932 P.2d 1244 (1997).....	14
<u>American Best Food, Inc. v. Alea London Ltd.</u> 168 Wn.2d 398, 229 P.3d 693, 702 (2010).....	31
<u>American Star Ins. Co. v. Grice</u> 121 Wn.2d 869, 854 P.2d 622 (1993).....	14
<u>Anderson Hay & Grain Co., Inc. v. United Dominion Ind., Inc.</u> 119 Wn.App. 249, 76 P.3d 1205 (2003).....	13
<u>Berg v. Hudesman</u> 115 Wn.2d 657, 801 P.2d 222 (1990).....	16,17
<u>Carew, Shaw & Bernasconi v. General Cas. of America</u> 189 Wash. 329, 65 P.2d 689, 692 (1937).....	15, 30
<u>Dombrosky v. Farmers Ins. Co.</u> 84 Wn.App. 245, 928 P.2d 1127 (1996).....	15
<u>Dwelley v. Chesterfield</u> 88 Wn.2d 331, 560 P.2d 353 (1997).....	17
<u>Gates v. Logan</u> 71 Wn.App. 673, 862 P.2d 134, 136 (1993).....	29
<u>Glaubach v. Regents Blue Shield</u> 149 Wn.2d 827, 74 P.2d 115 (2003).....	14
<u>Grange Ins. Co. v. Brosseau</u> 113 Wn.2d 92, 776 P.2d 123 (1989).....	12

	<u>Page</u>
<u>Jones v. Allstate Ins. Co.</u> 146 Wn.2d 291, 45 P.3d 1067 (2002).....	12
<u>Leanderson v. Farmers</u> 111 Wn.App. 230, 43 P.2d 1284 (Div. II 2002)	24
<u>Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh</u> 123 Wn.2d 678, 871 P.2d 146 (1994).....	17
<u>Overton v. Consolidated Ins. Co.</u> 145 Wn.2d 417, 38 P.3d 332 (2002).....	32
<u>Public Utility Dist. No. 1 v. International Ins. Co.</u> 124 Wn.2d 789, 881 P.2d 1020 (1994).....	14
<u>Rocky Mountain Cas. Co. v. St. Martin</u> 60 Wn.App. 5, 802 P.2d 144 (1990).....	24
<u>Shows v. Pemberton</u> 73 Wn.App. 107, 868 P.2d 164 (1994).....	29
<u>Stoughton v. Mutual of Enumclaw</u> 61 Wn.App. 365, 810 P.2d 80 (1991).....	24
<u>Stuart v. American States Ins. Co.</u> 134 Wn.2d 814, 953 P.2d 462 (1998).....	13,23,35
<u>Suter v. Virgil R. Lee & Son, Inc.</u> 51 Wn.App. 524, 754 P.2d 155 (1988) <i>quoting Jones v. Grewe</i> 189 Cal.App. 3d 950, 234 Cal.Rptr. 717 (1987).....	28,29,35,36
<u>Transcontinental Ins. Co. v. Washington Public Utilities Dist. Utility System</u> 111 Wn.2d 452, 760 P.2d 337 (1988).....	33

	<u>Page</u>
<u>Watkins v. Restorative Care Center</u> (citation omitted).....	17
<u>Weyerhaeuser Co. v. Commercial Union Ins. Co.</u> 142 Wn.2d 654, 15 P.2d 115 (2000).....	14
<u>Wright v. Safeco Ins. Co. of America</u> 124 Wn.App. 263, 109 P.3d 1 (2004).....	32,33

REGULATIONS AND RULES

RCW 48.30.015	31
RCW 48.30.015(1).....	32
WAC 284-30-330.....	36

**I. ISSUES PERTAINING TO APPELLANT'S
ASSIGNMENT OF ERROR**

Appellant Tarasyuk, in her opening brief, did not properly identify “issues” pertaining to her assignment of error. Rather, Ms. Tarasyuk cited only conclusory statements of law, which are unhelpful to the Court. While Respondent Mutual of Enumclaw (hereinafter “Enumclaw”) should not have to “fix” problems with Tarasyuk’s Brief, it presents the following issues to guide the Court’s review of Ms. Tarasyuk’s assignment of error.

1. Whether the trial court properly enforced the Enumclaw personal lines homeowners policy of insurance issued to Tarasyuk, which contained a clear and unambiguous exclusion for coverage for separate structures “used in whole or in part for business purposes.”

2. Whether the trial court properly determined, based upon the undisputed facts, that Tarasyuk was operating a “business” in and around the shed which was a separate structure covered under the policy.

3. Whether the trial court properly discounted the alleged facts known by the agents of the Harvey Monteith Insurance Agency, as they had no legal duty to provide insurance other than the homeowners coverage specifically requested by Tarasyuk.

4. Whether the Court properly dismissed Tarasyuk's extra-contractual causes of action for bad faith, which were all based upon Tarasyuk's incorrect and unsupported arguments that Enumclaw improperly denied coverage.

II. ENUMCLAW'S RESPONSE TO TARASYUK'S STATEMENT OF THE CASE

A. Response To Tarasyuk's Statement Of The Case.

Enumclaw must supplement the statement of the case provided by Tarasyuk, as it does not constitute a "fair statement of the facts and procedure" involved in this matter. Although Enumclaw will fully address, with citations to the record, all of the relevant facts below, Enumclaw must point out to the Court several specific areas where Tarasyuk continues to misconstrue the correct facts in the record.

1. Purpose of Amendment of Policy.

Tarasyuk repeatedly misleads the Court by alleging the amendment to the policy, which occurred in the spring of 2012, was to "add coverage for the shed," thus implying the shed was originally not covered and the amendment was specifically made to add business coverage for the auto

repair use of the shed involved in this case. See, Tarasyuk Appellant's Brief, pp. 2, 4, 6, 7.

In fact, it is clear from the record the amendment was necessary to increase the existing limits that had already provided "other structure" coverage to the shed, and was necessitated due to the size of the shed and the cost to rebuild/replace the shed should it become destroyed. CP 195-6, 199-202, 244, 248, 288, 290, 294, 302, 394, 541. There was always coverage to the shed, subject to non-business use as provided for by the terms of the policy purchased by Tarasyuk. CP 34, 38.

2. Timing of any Discussions Between Tarasyuk and Anna Mosecova Regarding the Nature of Car Repairs Performed by Tarasyuk on the Property.

At several points in her Appellant's Brief, Tarasyuk states she had discussions with the Harvey Monteith agent, Anna Mosecova, about the car repairs that were performed by her and her husband on the property, implying these discussions occurred when the application for the homeowners insurance was first taken. Tarasyuk Appellant's Brief, pp. 3, 12. However, the citations to the record provided by Tarasyuk do not support any contention there was any discussion at the time the application was taken about the fact that cars were repaired on the property. Rather, as

is clear from the citations below, any such discussions only occurred after Enumclaw had required the other structure limits be increased to reflect the actual size and cost to rebuild the shed. CP 183. Furthermore, there were absolutely no discussions about the business Tarasyuk was conducting on the property until **after** the fire.

B. Enumclaw's Statement Of Facts.

In January of 2012, Tarasyuk met with Anna Mosecova, an insurance agent with the Harvey Monteith Insurance Agency. Tarasyuk was a new customer to the agency. CP 181. She was specifically directed to Ms. Mosecova, as they shared knowledge of Russian and as Tarasyuk spoke imperfect English. CP 182-4. Tarasyuk sought homeowners insurance coverage for her personal residence, and not any business coverage. CP 177-78, 529.

On the homeowners application, Tarasyuk was specifically asked if any business was operated on the premises. CP 286. Specifically, the question inquired of "any...business conducted on the premises?" Tarasyuk marked the box "no." CP 177-78. At no time in this conversation did Tarasyuk mention that she and her husband repaired cars at their

premises, either for business or personal purposes. In fact, Ms. Mosecova did not even know of the presence of the shed on the premises. CP 287.

The application was forwarded to Enumclaw. Based on the agent's binder authority, Enumclaw issued a homeowners insurance policy with an effective date of January 11, 2011. CP 33. The homeowners policy provided coverage under Part A for the primary residence in the amount of \$230,462. CP 34. The policy also provided, under Coverage B, \$23,046 in coverage for "Other Structures," which included shops, sheds, or detached garages. Pursuant to normal underwriting practices, the amount of insurance for other structures was automatically set as 10 percent of the amount for the primary residence. CP 34. However, the policy did not provide coverage for any other structure used for business. It stated:

We do not cover other structures:

1. Used in whole or in part for "business"....

CP 38. The policy defined "business" as including "trade, profession or occupation." CP 36.

As part of the approval process, as this was a new policy issued through the agency, Enumclaw required photographs of the residence. CP 181. Ms. Mosecova requested another Harvey Monteith agent, Craig

Baumgartner, to take photographs of the Tarasyuk residence. CP 181. Mr. Baumgartner went out to the property and took numerous photographs of the residence and other structures on the property. He could not recall, however, whether he specifically noted seeing signs of an automobile repair business, but as it was not his policy or customer he was not focused on anything other than taking pictures. CP 187-192.

Shortly thereafter, Jill Aniston, an Enumclaw underwriter, reviewed other photographs of the property from an on-line source and noted the shed thereon was very large, and therefore probably underinsured, using the standard limit of 10 percent of the limit on the primary residence. CP 195-99, 448. After discussions with Ms. Mosecova, Enumclaw's underwriters required the coverage on the shed be increased to reflect its value and the cost to repair or replace that shed should it be totally destroyed. CP 199-202. The increase had nothing to do with the presence of any business on the premises. CP 244, 248, 288, 290, 294, 302, 394, 541. In fact, Ms. Mosecova had a face-to-face meeting with Tarasyuk regarding the increase, and Tarasyuk assured Ms. Mosecova she and her husband only repaired vehicles for friends and family and were not paid

for those services. CP 183. She specifically refers to this “activity” as a “hobby.” CP 280.

Tarasyuk’s property consists of several acres of land. On the land is the specific shed which is the subject matter of this litigation. Since at least January 1, 2007, Tarasyuk had operated an automobile repair business on the premises named MV Auto and Boat Repair. CP 74. MV Auto and Boat Repair’s business address is the same as Tarasyuk’s primary residential address: 5601 W. Lattin Road, West Richland, Washington. CP 32, 72. Tarasyuk obtained a business license for MV Auto and Boat Repair sometime before 2007. CP 74.

In 2010, the year before the fire, Tarasyuk was approached by a Benton County representative about her conducting an automobile repair business on her property. CP 82. This person informed Tarasyuk she needed a special use permit to carry on her business. Id. On June 1, 2010, Tarasyuk applied with the Benton County Board of Adjustment for a special use permit. CP 76-77. On the application for said permit, 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**

CP 76-77. The total square footage of the shed was approximately 1,200 feet. CP 77. Tarasyuk knew the application for a business permit had to be answered truthfully and accurately. CP 83.

While Tarasyuk has steadfastly maintained throughout the litigation that the vehicles were only repaired outside of the shed, it is uncontested Tarasyuk used the shed to store various pieces of equipment that could be used by MV Auto and Boat Repair. Specifically, the shed was utilized to store batteries, tools, automobile parts, engine oil, business records, copies of customer receipts, and repair manuals. CP 91-100. When Tarasyuk filed her property loss claim with Enumclaw, she completed a form that identified the specific pieces of property that were destroyed in the fire and whether they were used for her business. CP 91-100. Numerous property items were identified for business use. CP 91-100. Tarasyuk has admitted that numerous pieces of property that were in the shed and destroyed by the fire were used for her business. CP 83-4. Tarasyuk's husband, Vladimir Pugachev (who lived with Tarasyuk at the premises and repaired vehicles for the business), confirmed the shed stored the business

computer and scanner used for the business. CP 105. Tarasyuk and Pugachev also created a business plan that was submitted to Benton County. CP 104, 281. This plan stated that MV Auto and Boat Repair intended to perform automobile diagnostics and oil and tire changes. CP 104. Pugachev also admitted the vast majority of the business records were destroyed in the shed fire. CP 104. He confirmed that customer records were stored in the shop and subsequently destroyed by the fire. CP 102-3.

Tarasyuk made a substantial profit from MV Auto and Boat Repair, especially when compared to her total net income. In her 2010 records submitted to the IRS, she reported she earned approximately \$4,475 from the auto repair business. CP 142, 153. This is compared to her total income of that year of \$23,344. CP 143. In 2011, Tarasyuk earned and reported to the IRS \$3,370 for the business (for the time period from January through August, when the business was destroyed by fire), compared to her total net income of that year of \$23,546. CP 81, 160-65.

On August 19, 2011, the shed was destroyed by an electrical fire. During the immediate discussion with Enumclaw's adjuster, Tarasyuk confessed that she had previously had a business policy but had decided

not to maintain it due to the cost. CP 497. Tarasyuk subsequently made a claim for both the loss of the shed as well as all personal property therein. Enumclaw indemnified Tarasyuk for the loss of her personal property in the shed, but denied coverage for the loss of the shed itself because it was used “in whole or in part for business.”

C. Procedural History Of The Case.

Tarasyuk’s Complaint was filed on May 11, 2012. CP 1. In addition to the claims of bad faith, the Complaint alleged only a breach of contract. CP 1-8.

Enumclaw filed its first Motion for Summary Judgment on February 1, 2013. CP 10. The original Note for Hearing was stricken, however, when Tarasyuk’s counsel asked for additional discovery to determine the extent of knowledge held by Harvey Monteith’s agents, as well as Enumclaw’s underwriters. CP 10, 565-66. Enumclaw then later re-filed an Amended Motion for Summary Judgment on September 10, 2013, specifically adding argument regarding Tarasyuk’s claims that Enumclaw should be required to cover the loss due to the knowledge of and actions of the Harvey Monteith agents who procured the policy for Tarasyuk through Mutual of Enumclaw. CP 9. On November 8, 2013, the

Honorable Robert Swisher of the Benton County Superior Court granted Enumclaw's Motion for Summary Judgment. A written order was entered on November 26, 2013. CP 550-51. Tarasyuk moved for reconsideration of the Court's ruling, which was denied by the Court. CP 568-70.

III. SUMMARY OF ARGUMENT

Appellant Mariya Tarasyuk purchased a homeowners policy of insurance from Defendant Mutual of Enumclaw Insurance Company. The policy covered her residence and various "other structures" on her property, including the shed which is the subject of this litigation.

The policy contained a specific and clear exclusion, however, that such other structures were not covered if they were "used in whole or in part for business."

On the insurance application, when asked whether she conducted a business on the property, Tarasyuk responded "no." Later, when the amount of insurance for other structures was increased due to the size of the shed on the property, Tarasyuk again failed to disclose any business use of the shed or business conducted on the property, rather stating she and her husband only repaired some cars as a "hobby" for friends and family. Only after an electrical fire substantially damaged the shed did

Enumclaw learn that Tarasyuk operated a car repair business on the property, for which she and her husband received approximately 20 percent of their net income, for which they were licensed and advertised as a business, and where the shed was substantially used for business purposes through the storage of business supplies, their business computer laptop, and records. Based on this clear business use of the shed, Enumclaw denied coverage for the replacement of the shed, although it did pay for losses to the various contents contained therein.

Tarasyuk now seeks business coverage under her homeowners policy, notwithstanding her prior misrepresentations and/or failure to disclose this business use to Enumclaw or its agents.

IV. ARGUMENT

A. Standard Of Review.

Appellant Tarasyuk has correctly stated the appellate court reviews a trial court's summary judgment decisions *de novo*. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1067 (2002). The same is true with respect to the *de novo* review of a trial court's interpretation of an insurance policy. Grange Ins. Co. v. Brosseau, 113 Wn.2d 92, 95, 776 P.2d 123 (1989).

B. The Trial Court Correctly Interpreted And Enforced Tarasyuk's Homeowners Policy To Not Cover The Business Use Of The Shed.

Enumclaw seeks an order from this Court affirming the trial court's granting of summary judgment, as there was no genuine issue of material fact, and the Tarasyuk policy unambiguously excluded coverage for the shed, which was indisputably used for business purposes.

1. Rules to Aid in the Interpretation of Insurance Policies.

Ms. Tarasyuk starts her argument with the rather outrageous statement that, "[T]he court should give effect to the primary purpose of the insurance contract – coverage for damages." Appellant's Brief, p. 9. Unfortunately for her, the cases she cites in support of this claim do not stand for this proposition. Anderson Hay & Grain Co., Inc. v. United Dominion Ind., Inc., 119 Wn.App. 249, 254, 76 P.3d 1205 (2003), contains no such language, and Stuart v. American States Ins. Co., 134 Wn.2d 814, 818-19, 953 P.2d 462 (1998), speaks only of the fundamental "protective" purpose of insurance. Neither case stands for the proposition that insurance policies must cover all damages sustained by an insured, regardless of the clear terms, conditions, or exclusions of the policy. The "primary purpose" of the Tarasyuk policy was to provide coverage for the

personal use of the primary residence and outbuildings in accord with the terms and restrictions of the policy.

The primary goal of the court in interpreting an insurance policy is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole. Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 669, 15 P.2d 115 (2000). The insurance contract must be viewed in its entirety; a phrase cannot be interpreted in isolation. Allstate Ins. v. Peasley, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). A court cannot modify the contract or create an ambiguity where none exists. Id. A court must interpret the entire contract so as to give force and effect to each clause. Public Utility Dist. No. 1 v. International Ins. Co., 124 Wn.2d 789, 797, 881 P.2d 1020 (1994). To the extent possible, a policy must be harmonized so that all of its parts and provisions can be enforced. American Star Ins. Co. v. Grice, 121 Wn.2d 869, 874-75, 854 P.2d 622 (1993). A policy should not be subjected to a strained or forced interpretation that would lead to an absurd conclusion or render the contract nonsensical or ineffective. Glaubach v. Regents Blue Shield, 149 Wn.2d 827, 833, 74 P.2d 115 (2003).

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 liability 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. General Cas. of America, 189 Wash. 329, 336, 65 P.2d 689, 692 (1937).

Finally, although Tarasyuk is correct that exclusionary clauses, where ambiguous, will be strictly construed against the insurer, it is also true that an insured such as herself has an affirmative duty to read her policy and to know its terms and conditions. Dombrosky v. Farmers Ins. Co., 84 Wn.App. 245, 257, 928 P.2d 1127 (1996).

2. The Enumclaw Policy Issued to Tarasyuk Unambiguously Excludes Coverage for the Business Use of the Shed.

It is admitted and uncontested by Tarasyuk that she utilized the shed "in part" for business purposes. The policy clearly and unambiguously excluded coverage for "other structures" such as the shed if they were used "in whole or in part for business." This should end all discussion on coverage. The policy cannot be rewritten to provide coverage for a loss

which is clearly excluded. The trial court correctly granted summary judgment to Enumclaw, and all arguments by Tarasyuk to the contrary are merely “smoke and mirrors,” trying to avoid the obvious – she purchased a homeowners policy that did not cover her business.

3. **Extrinsic Evidence Should Only be Considered Where it Was Manifested Objectively Between the Parties—A Party’s Unexpressed Subjective Intent is Inadmissible.**

Tarasyuk seeks to have the Court amend or reform the insurance policy beyond its clear and express terms based on facts primarily relating to events or discussions that occurred after the policy was originally issued. Tarasyuk wants this Court to consider “extrinsic evidence” in order to determine the “primary intent of the contract.” However, Tarasyuk’s own cases involving interpretation of insurance policies and the “context rule” regarding extrinsic evidence do not support her argument.

Although the Washington Supreme Court in Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), did allow for the use of extrinsic evidence to determine the parties’ intent, Washington courts after Berg have been uniformly adamant this did not change the objective manifestation theory of contracts. As stated by the Supreme Court in

Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, 123 Wn.2d 678, 684,

871 P.2d 146 (1994):

We emphasize the language that “evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, *and not for the purpose of showing intention independent of the instrument.* (Italics in original) Berg, 115 Wn.2d at 669....The underlying principle is well established and was not changed by Berg.

We have long adhered to the objective manifestation theory of contracts. This theory means that we impute to a person an intention corresponding to the reasonable meaning of his words and acts. Petitioner’s unexpressed expressions are meaningless when attempting to ascertain the mutual intentions [of the parties]. Dwellely v. Chesterfield, 88 Wn.2d 331, 335, 560 P.2d 353 (1997).

The principle is quite simple. **Unilateral or subjective purposes and intentions about the meanings of what is written do not constitute evidence of the parties’ intentions.** Watkins v. Restorative Care Center (citation omitted). “The relevant intention of a party is that manifested by him rather than any different undisclosed intention.” Restatement (Second) of Contracts, § 212, Comment a (1965). (Underlined emphasis added).

It is Enumclaw’s position that the policy is unambiguous and, by its terms, excludes coverage for separate structures such as the shed “used in whole or in part for business.” Tarasyuk’s arguments fail to change the

terms of the unambiguous policy because she never manifested an objective intent, to Enumclaw or its agents, that she wanted the business use of the shed insured. She never asked for business coverage, or inquired whether her business was covered. She points to no evidence of any objective manifestations of her “intent” that the shed be covered for its business use. All of the “evidence” regarding agent Craig Baumgartner’s inspection and photographing of the property, and Enumclaw’s underwriting department’s consideration of the same, is irrelevant—any of this information was never manifestively communicated to Tarasyuk as an expression of Enumclaw’s intent that the business use of the shed was either known or intended to be covered.

As for Tarasyuk’s expression of intent, she never communicated to Enumclaw or its agents any affirmation she was even conducting a business (see below) on the premises, or that she wanted insurance coverage for her car repair business. Rather, just the opposite is true—at every instance where Tarasyuk had an opportunity to communicate to Enumclaw (or its agents) the presence of a car repair business on the property, she denied the existence of a business whatsoever:

- In the application, she specifically responded “no” to the inquiry of whether she conducted a business on the property.¹
- Tarasyuk was purchasing a homeowners policy and not business coverage (even though she evidently had purchased commercial insurance in the past).
- When Enumclaw demanded that the level of coverage on other structures be increased to reflect the greater size and replacement cost of the shed, Tarasyuk specifically denied the business nature of the work performed (only a few jobs for friends and family) and the amount of money earned (token amounts, certainly not 20 percent of their net income).
- Upon receiving her policy and the clear language that excluded business use of the shed, “in whole or in part,” Tarasyuk did not request clarification or an amendment of the policy.

Because Tarasyuk never communicated to Enumclaw or its agents any objective manifestation of her desire or intent that her car repair business be insured, her arguments wanting the policy to be revised, amended, or reformed under the context rule are meritless—her

¹ Tarasyuk’s assertion in her brief that “at the time of the application Plaintiff told Defendant’s agent, Ms. Mosecova, that she repaired cars outside of the shed and was paid for these repairs” (Tarasyuk’s Brief, p. 12) is a blatant mischaracterization of the facts. To the extent any such conversation occurred, it was not at the time of application, but was when the amount of coverage for separate structures was increased from \$20,000 to \$60,000, and even then she misrepresented both the scope of the work performed and the money which was received from that work. CP 183, 280.

unexpressed subjective intent and desire is irrelevant and cannot be considered as “extrinsic evidence.”

4. **The Enumclaw Policy Clearly and Unambiguously Excludes Coverage for Other Structures Used for Business Purposes.**

The trial court correctly interpreted and enforced the Enumclaw homeowners policy issued to Tarasyuk as not providing coverage for replacement or repair of the shed, as the undisputed facts establish it was used for business purposes. The policy provision at issue in this case is clear and unambiguous, stating:

We do not cover other structures:

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

CP 38. The policy defines “business” as including any “trade, possession or occupation.” Id. Tarasyuk consistently attempts to mislead the Court by implying that the contract as originally written did not provide coverage for the shed, but only provided coverage after it was “amended” in the spring of 2012. This is incorrect. The policy as originally written provided up to \$23,046 coverage for the shed as an “other structure,” so long as it was not used in whole or in part for a business. This coverage existed at the time the contract was created, and continued after the other structure

limits were increased, once it was determined by Enumclaw the shed was larger than was originally known and would cost significantly more to repair or replace. The amount of coverage for other structures such as the shed was increased to reflect this greater replacement cost—but the shed was always covered under the policy, so long as its use conformed with the intent of the policy, to cover personal use, not the business use of the property.

Based upon the undisputed facts, it is obvious Tarasyuk did not have insurance coverage for the loss of her shed at the time of the fire, because it was used “in whole or in part” for her automobile repair business (MV Auto & Boat Repair). It is undisputed Tarasyuk was running an automobile repair business on her property. The business was advertised. CP 72. There was a sign on the street directing potential customers to her property. CP 88. She had years before obtained a business license for her car repair business. CP 74. She later applied for a conditional use permit from Benton County to operate a business on her property, contrary to the zoning laws. CP 82-83.

While Tarasyuk may have repaired the vehicles outside of the shed, it is uncontested she was using the shed for storage of parts and other

aspects of the repair business. Tarasyuk admitted the shed was used to store tools and supplies for MV Auto & Boat Repair. CP 83-84. Her husband, who also worked for the repair business, testified the shed was used to store automobile repair manuals and business records, including customer lists, receipts, part purchases, etc. CP 103. He further testified one of the items destroyed in the fire was a laptop that contained MV Auto & Boat records and repair manuals that were on CDs. CP 103. Photographic evidence of the loss also supported the existence of burned manuals and destroyed automobile batteries used in the business. CP 107-119.

Itemization of property lost in the fire inventoried by Tarasyuk after the loss also established the loss of tools and equipment used for the automobile repair business, including antifreeze, car batteries, a battery charger, air compressor, a coupler and torch, repair manuals, tires, five car stereos, alternators, 13 gallons of engine oil, etc. CP 91-100. Tarasyuk admitted all of these items were used at least in part for her auto repair business. CP 84, 91-100.

As mentioned above, the policy defines “business” as a “trade, profession or occupation.” Washington courts have consistently

interpreted similar “business pursuit” exclusions in homeowners policies. Stuart v. American States Ins. Co., 134 Wn.2d 814, 817, 953 P.2d 462, 463 (1988). In Stuart, a homeowners policy included a provision that excluded coverage for injuries arising out of “business pursuits of an insured.” Id. at 817. The term “business” was defined identically to that of the Enumclaw policy issued to Tarasyuk. The Stewart court held, for the exclusion to apply, that the insured’s business must be: (1) conducted on a regular and continuous basis, and (2) be profit motivated. Id. at 822.

Tarasyuk’s business has been operated on a regular and continuous basis since 2007. CP 74. In fact, the business was run at such a “regular and continuous basis” that it generated neighbor complaints. CP 121-122. In the year prior to the fire, Tarasyuk was seeking a conditional use permit from Benton County to allow her to continuously operate her car repair business, and even submitted a “business plan” to the county.

With respect to the profit motive, according to Tarasyuk’s tax returns, she earned \$4,475 in 2010 (the last full year before the fire), and this constituted approximately 20 percent of her household income. CP 142, 143. Those same records show she earned \$3,370 in 2011 from her car repair business, even though this represented only two-thirds of the

year's earnings (the fire occurred in August). Presuming a full year's earnings at this rate, 2011 would have been even more profitable for Tarasyuk, and represented a similar percentage of her net income. CP 160-65. As a matter of law, an enterprise that generated almost \$5,000 per year and 20 percent of a household's income must be considered to be "profit motivated." Since Tarasyuk's car repair operation was continuously operated for years and was motivated for profit, it constitutes a "business."

Other Washington decisions have uniformly upheld summary decisions of trial courts determining that an insured's activities constituted "business" as a matter of law. In fact, in Stoughton v. Mutual of Enumclaw, 61 Wn.App. 365, 810 P.2d 80 (1991), the appellate court reversed the trial court's denial of summary judgment and granted judgment as a matter of law for Enumclaw, determining that a retiree's odd jobs to supplement his retirement income constituted a "business." Id. at 370. In Rocky Mountain Cas. Co. v. St. Martin, 60 Wn.App. 5, 802 P.2d 144 (1990), summary judgment for the insurer was upheld based on an insured's babysitting activities. See, also, Leanderson v. Farmers, 111 Wn.App. 230, 43 P.2d 1284 (Div. II 2002).

It is telling that in Tarasyuk's briefing, she totally ignores the undisputed evidence regarding the business use of the shed, and chooses not to address Washington law concerning this point. It must therefore be considered she acknowledges and admits she was operating a car repair "business" on her property, and the shed was used "in whole or in part" for that business.

By the clear and unambiguous terms of the policy, because Tarasyuk was utilizing the shed, at least in part, for a business means there was no coverage for that shed at the time of the fire.

5. The Undisputed Facts do Not Support Any Allegation That the Increase of Coverage B Was Intended to Cover the "Business Use" of the Shed.

Notwithstanding the "spin" placed by Tarasyuk on the increase of "other structures" limits in 2011, the uncontested and undisputed evidence is that the increase had nothing to do with the fact Tarasyuk was operating a business in or around the shed. Enumclaw's underwriters learned of the presence of a large shed from photographs of the property obtained on line, and required the amount of coverage for "other structures," including the shed, be increased so the limits would be sufficient to replace the shed if it was destroyed. However, at no time prior to the fire did Ms. Mosecova

at the Harvey Monteith Agency or Enumclaw's underwriters learn Tarasyuk was operating a "business" on the property, one that was continuous and had a profit motive. Instead, the evidence is that when Ms. Mosecova discussed the need for an increase for the other structures, and Tarasyuk at that time could have clarified the extent of her business repairing automobiles, she instead stated only that they repaired a few vehicles for "friends and family," and received only token payments for the same. CP 183, 280. She never disclosed the fact they had a business license, advertised and sought customers outside of "friends and family," were seeking a conditional use permit from the county to continue operating their business, and made 20 percent of their income from this business. Ms. Mosecova, who testified she knows what constitutes a "business" due to profitability (CP 292, 509-10) was satisfied by Tarasyuk's responses that no "business" was being operated on the property that required coverage. If Tarasyuk had been more truthful with Ms. Mosecova or Enumclaw, or revealed that information which was solely within her knowledge and control, she would have been informed of her need for a business policy and the availability of the same. Unfortunately, she decided to "roll the dice" and proceed with her business

without coverage, and only after the loss tried to reform the policy to provide coverage which was not provided under her homeowners policy, and for which no premium was paid. In fact, after the loss, Enumclaw's adjuster spoke with Tarasyuk, and his notes from that conversation indicate she informed him she had carried business coverage in the past but did not want to pay the money for it when they got their new coverage with Enumclaw. CP 497.

From the undisputed facts it is clear the policy unambiguously does not provide coverage for the shed in question—it was being used in whole or in part as a “business” based upon the language of the policy, Washington law, and the facts of this case.

6. The Trial Court Correctly Held That the Agents' Possible Knowledge Was Irrelevant, as They Had no Duty to Guaranty Tarasyuk Was Insured for Any Eventuality.

Tarasyuk's position on appeal is significantly premised upon her contention that the agents of the Harvey Monteith Agency were aware of her car repair activity on the property, and that somehow this knowledge required them to procure business coverage for the car repairs, and that the policy was amended to reflect this. Virtually all the discovery conducted

by Tarasyuk after the original summary judgment filing by Enumclaw was directed towards this theory.

However, even if these facts were resolved in Tarasyuk's favor, they did not raise a genuine issue of material fact necessary to avoid summary judgment, because even if this knowledge existed, the Monteith Agency was not required to suggest or obtain any coverage for Tarasyuk other than the homeowners policy she requested and applied for.

Washington courts have uniformly held that an insurance agent's duty "does not include the obligation to procure a policy affording the client complete liability protection...." Suter v. Virgil R. Lee & Son, Inc., 51 Wn.App. 524, 528, 754 P.2d 155, 157 (1988) (*quoting Jones v. Grewe*, 189 Cal.App. 3d 950, 956, 234 Cal.Rptr. 717, 720 (1987)). This case is cited by most other Washington cases dealing with a claim in which the insured alleges negligence on the part of their agent for not providing them with adequate coverage.

If an insurance agent advises a client they have "full coverage" on their automobile, that agent is not negligent and the insurance company is not estopped from denying coverage if the agent fails to notify the insured that their policy does *not* include underinsured motorist coverage if they

are operating a public bus. *See Shows v. Pemberton*, 73 Wn.App. 107, 868 P.2d 164 (1994) (court affirmed summary judgment dismissal of insured's claim, holding that it was not a question for the jury.).

Policy reasons for limiting the duty of the agent include the fact that “the insured knows the extent of his personal assets and ability to pay increased premiums better than the insurance agent,” and that, “it is unrealistic to expect an agent to advise an insured as to every possible insurance option, a logical requirement if there is a general duty to advise as to specific policy limits.” *Gates v. Logan*, 71 Wn.App. 673, 677, 862 P.2d 134, 136 (1993).

It would logically follow that an insurance agent would not have the duty to advise their client to obtain a business insurance policy, even if they had knowledge that the client was operating a business on their property, because that agent does not have an enhanced duty to “procure a policy affording the client complete liability protection.” *Suter*, 51 Wn.App. at 528, 754 P.2d at 157.

Based upon decided Washington law, even if the Monteith Agency representatives were aware of the “business” on Tarasyuk’s premises (which they were not), they are not liable (and therefore Enumclaw is not

vicariously responsible) for the fact that the homeowners policy applied for and paid for by Tarasyuk did not provide replacement coverage for a shed where a business was conducted “in whole or in part.”

To require otherwise would be creating insurance coverage for Tarasyuk that was not requested, nor for which a premium was paid.

One may not, by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make. The general rule is that, while an insurer may be estopped, by its conduct or its knowledge or by statute, from insisting upon a forfeiture of a policy, yet under no conditions can the coverage or restrictions on the coverage be extended by the doctrine of waiver or estoppel.

Carew, Shaw & Bernasconi v. General Gas Co. of America, 189 Wash. 329, 336, 65 P.2d 689, 692 (1937). Tarasyuk had exclusive knowledge of the extent of her business, which she did not share with either Enumclaw or the agents of the Harvey Monteith Agency. It is disingenuous for her to claim she should have been told to purchase a business policy, when she had evidently purchased such coverage before but avoided it in 2011 to avoid higher premiums. As Washington recognizes no duty on the agents to procure for her insurance not requested, Enumclaw cannot be estopped or bound by the agents’ limited knowledge of her activities.

C. The Trial Court Properly Dismissed Tarasyuk's Bad Faith Claim.

Tarasyuk's Complaint raised three allegations of bad faith. Her second cause of action alleged a violation of RCW 48.30.015 (the Insurance Fair Conduct Act), and her third cause of action alleged a violation of the Consumer Protection Act and the general duty of good faith. CP 1-8.

After properly holding that Enumclaw's policy clearly and unambiguously excluded the business use of Tarasyuk's shed, the trial court then had little difficulty disposing of Tarasyuk's claims of bad faith. This is because then, as now, Tarasyuk's sole arguments regarding bad faith concern: (1) Enumclaw's denial of Tarasyuk's claim for coverage to the shed, (2) unsupported conclusory statements that Enumclaw adjusted this claim with the intent of denying coverage, and (3) the tired argument concerning the photographs sent by the Harvey Monteith Agency to Enumclaw's underwriting department.

To establish a claim in bad faith, Tarasyuk must establish duty, breach, causation, and damages. American Best Food, Inc. v. Alea London Ltd., 168 Wn.2d 398, 229 P.3d 693, 702 (2010). To establish a breach,

Tarasyuk must prove that Enumclaw's action was unreasonable, frivolous, or unfounded. Id. IFCA shares a similar standard:

Any first party claimant to a policy of insurance who is *unreasonably* denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court....

RCW 48.30.015(1) (emphasis added).

An insurer is not liable for bad faith or an IFCA violation if its interpretation of the insurance policy and subsequent denial is reasonable. Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 433, 38 P.3d 332 (2002). Indeed, the test for bad faith denial of coverage is not whether the insurer's interpretation is correct, but whether the insurer's conduct was reasonable. Wright v. Safeco Ins. Co. of America, 124 Wn.App. 263, 280, 109 P.3d 1 (2004).

A court can decide, as a matter of law, that an insurer did not commit bad faith when it reasonably interpreted its insurance policy and, based on that reasonable interpretation, denied the claim. For example, in Overton, the Washington Supreme Court upheld a trial court's dismissal of a bad faith action when an insurer's interpretation of an insurance policy and subsequent denial was reasonable. Overton, supra, at 433-34. Likewise, in

Transcontinental Ins. Co. v. Washington Public Utilities Dist. Utility System, the Washington Supreme Court upheld a trial court's decision to grant summary judgment on an insured's bad faith claim because the insurer's denial of coverage was based on a reasonable interpretation of the policy. 111 Wn.2d 452, 470, 760 P.2d 337 (1988). Finally, Division I of the Court of Appeals overturned a trial court's decision *not to grant* summary judgment because the insurer properly denied coverage based on a reasonable interpretation of a policy exclusion. Wright, supra at 280.

Tarasyuk cannot establish a genuine issue of material fact that Enumclaw committed bad faith and/or violated IFCA/CPA when it denied her claim for coverage based on her use of the subject shed for her business. The policy provision at issue is clear and unambiguous. The facts are undisputed. Since Tarasyuk's primary, if not sole, argument regarding bad faith is that Enumclaw's coverage decision was incorrect, should the Court herein uphold the trial court's decision granting summary judgment to Enumclaw, then Tarasyuk's bad faith claim becomes moot.

In pretrial discovery, Tarasyuk basically confirmed her sole allegation of bad faith was Enumclaw's "incorrect denial" by failing to allege specific facts in response to a specific interrogatory which requested

she set forth the basis of her bad faith allegations. CP 129. If this Court upholds Enumclaw's interpretation of the policy and enforces it as written, it should similarly dismiss any and all claims for bad faith based upon this correct denial of coverage.

The only factual allegation cited by Tarasyuk in her Appellate Brief as supporting a claim for bad faith is still directly related to her failure to disclose she was operating a business as defined by the policy and Washington law, and instead only stated she was repairing vehicles on the property as a "hobby." She alleges that Enumclaw committed bad faith because, both before and after the loss, it ignored facts which should have informed it that Tarasyuk was repairing vehicles on the property. However, this mere knowledge is irrelevant for several purposes. Initially, as stated above, Tarasyuk herself affirmatively stated in her application she was not operating a business on the property, despite all the evidence to the contrary cited above. Later, when she had an opportunity to do so, she still indicated that any money made was de minimis and they only did repairs for friends and family, when in fact she was aware of facts that made these representations false and misleading. Many individuals repair vehicles on their property. This does not make the operation a "business"

for insurance purposes, to the extent the activity was not continuous and performed for a clear profit motive. Stewart, supra. Tarasyuk ignores the distinction under Washington law of what constitutes a “business” for insurance purposes, precisely because the true facts and law are totally contrary to her position. She knows she was operating a business under Washington law, but she failed to inform Enumclaw of this fact or obtain proper insurance for this activity.

Likewise, Tarasyuk’s allegations regarding the allegedly “altered” photographs is irrelevant. She did not even know certain photographs may or may not have been forwarded to Enumclaw, whether altered or not. This information is even more irrelevant when one considers, as the trial court did, that insurance agents under Washington law are not required “to procure a policy affording the client a complete liability protection.” Suter v. Virgil R. Lee & Son, Inc., 51 Wn.App. 524, 754 P.2d 155 (1988); RP at 27, Ins. 18-21. Tarasyuk made a conscious and informed decision to not request coverage for her business or inform the agents she had a business. Likewise, the agents (and vicariously, Enumclaw) were not required to provide insurance to Tarasyuk that she did not request or pay for.

Tarasyuk incorrectly argues that the Suter v. Virgil case should not have been cited by the trial court as establishing a duty of care in a bad faith case. The court did not consider Suter for that purpose. Enumclaw cited to the Suter v. Virgil case, and the trial court considered that case, in light of Tarasyuk's argument the agents acted improperly or negligently in failing to obtain coverage for Tarasyuk's business, in support of her argument the agent's knowledge and activities somehow bound Enumclaw to amend the contract. The Suter decision has nothing to do with bad faith standards in Washington, and was not cited by the court in reliance thereof.

With respect to Tarasyuk's claim under the Consumer Protection Act, again, to the extent Enumclaw made a proper and correct decision that no coverage existed for the loss of the storage shed, there was no "unfair or deceptive act" in trade or commerce. With respect to Tarasyuk's arguments that Enumclaw's conduct was violative of the Fair Claims Settlement Practices codified at WAC 284-30-330, again, her arguments all boil down to Enumclaw's coverage decision, not its claims handling or practices. She alleges there are only two "options" regarding Enumclaw's conduct, while not realizing there was a third: the storage shed was always

covered under the policy, just not for a business use.² The amount of coverage for other structures was increased, as well as the premium, solely to ensure the policy limits were sufficient to completely replace the other structures (including the shed) in the event of a covered loss. This did not change the fact that a business use for the shed was never covered under the policy, and the increase was not required due to any business use known or accepted by Enumclaw.

As Tarasyuk has failed to allege any facts to support a claim of bad faith under any of her three causes of action, other than her contention that Enumclaw made an incorrect coverage decision, the Court should dismiss her claims of bad faith in their entirety.

V. CONCLUSION

Tarasyuk is trying to obtain coverage for a risk she did not pay for. She requested a homeowners policy through Enumclaw's agents at the Harvey Monteith Agency, and she got what she requested. Like most homeowners policies, it does not cover business uses of the property. The

² The Tarasyuk homeowners policy had other restrictions other than the "business" use of other structures. For example, criminal or illegal uses of the property were also not covered. This is a further example that such policies do not provide coverage for every eventuality.

policy specifically, clearly, and unambiguously excluded coverage for other structures “used in whole or in part for business.” Tarasyuk affirmatively stated in her application that she did not operate a business, and later failed to disclose facts concerning the nature of the business and the income therefrom that would have resulted in the agent recommending a business policy.

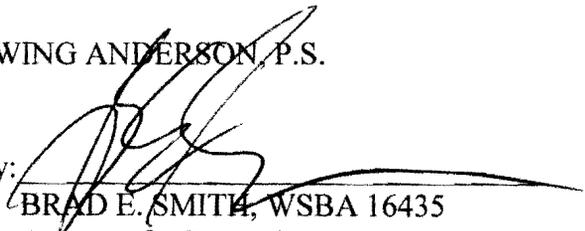
Only after a loss to her shed, which was indisputably used in part for her business, is Tarasyuk seeking coverage for something she did not pay for. If she had not utilized the shed for business and the fire had destroyed it, Enumclaw would have been required to indemnify her for this loss, so long as all other terms of the policy were met. It would have done so at the higher liability limits of such coverage, which it increased, not due to the business nature of the use of the shed but due to its size and cost of replacement.

Tarasyuk never requested coverage for her business, and has presented no evidence where she manifested such an intent to Enumclaw or its agents. Tarasyuk got exactly what she paid for—a homeowners policy that covered her residence and non-business use of other structures. Enumclaw made the proper decision in denying coverage for the loss, and

acted at all times in good faith. The Court should affirm the decision of the trial court, which dismissed Tarasyuk's Complaint in its entirety.

DATED this 25th day of July 2014.

EWING ANDERSON, P.S.

By: 

BRAD E. SMITH, WSBA 16435
Attorney for Enumclaw

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July 2014, a true and correct copy of the foregoing document was served on the following in the manner set forth herein:

Ned Stratton
Brian J. Anderson
Anderson Law PLLC
5861 W Clearwater Avenue
Kennewick, WA 99336

U.S. Mail
 Hand Delivery
 Overnight Courier
 ~~Hand~~ E-Mail



BRAD E. SMITH