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Supreme Court No. 80420-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
MAY 22 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE OWNERS ASSOCIATION,

Petitioners.

REPLY TO RESPONDENT'S ANSWER TO PETITIONERS' MOTION TO STRIKE PORTIONS OF MUTUAL OF ENUMCLAW INSURANCE COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS

Daniel Zimberoff, WSBA #25552
Attorney for Petitioners
Villas at Harbour Pointe
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Petitioners Villas at Harbour Pointe Owners Association ("Association") and T & G Construction, Inc. ("T & G") provide the following Reply to Respondent's Answer to Petitioners' Motion to Strike Portions of Mutual of Enumclaw Insurance Company's Reply in Support of Motion to Dismiss.

I. ARGUMENT

The Association does not contend it was unaware that Mutual of Enumclaw's ("MOE") motion questioned the jurisdiction of this Court to decide this petition. Rather, the Association's motion is based on the fact that with the exception of a single sentence and citation to a single case (*Picardo v. Peck*, 95 Wn. 474 (1917)), MOE's Motion to Dismiss lacked ***any*** argument regarding this Court lacking either subject matter or *in personam* jurisdiction. All such argument, pages 1-8 of the Reply Brief, was raised for the first time in MOE's Reply.[1] Such action violates RAP 10.3(c).

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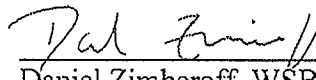
[1] For example and by its own admission, MOE's second argument (Section 2 of the Reply which incorporates RCW 23B.14.340 and *Ballard Sq. Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006)), was alleged for the first time in reply: "The application of RCW 23B.14.340 to the case at bar is being raised for the first time." Reply Brief at p. 2.

In its Answer to the Association's Motion to Strike, MOE fails to provide any explanation for why it failed to include the breadth and scope of its jurisdictional arguments in its original motion.[2] Waiting until the Reply to assert such arguments comports with a "'trial by ambush' style of advocacy, which has little place in our present-day adversarial system." *Lybbert v. Grant County*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000). Such conduct is expressly forbidden under RAP 10.3(c). Accordingly, Petitioners' Motion to Strike Portions of Mutual of Enumclaw Insurance Company's Reply in Support of Motion to Dismiss should be granted.

Respectfully submitted this 22nd day of May, 2008.

BARKER • MARTIN, P. S.



Daniel Zimberoff, WSBA No. 25552
Attorneys for Appellants Villas at
Harbour Pointe Owners Association
and T & G Construction, Inc.

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[2] Mutual of Enumclaw's claim that Section 3 of the Reply merely "responds to the Petitioners' challenge to the reasoning of *Picardo v. Peck*" is far from accurate. Section 3 extends well beyond any discussion of *Picardo*; in fact, *Picardo* is mentioned only in a single footnote of MOE's Reply.

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Petitioners.

CERTIFICATE OF SERVICE

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I, Ian McDonald, hereby certify and declare:

1. I am over the age of 18 years and am not a party to the within cause:

2. I am employed by the law firm of Barker Martin, P.S. My business and mailing address are 719 2nd Avenue, Suite 1200, Seattle, WA 98104-1749;

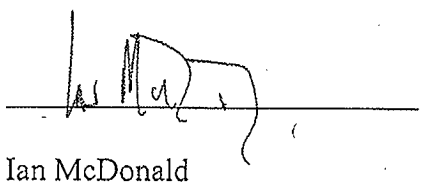
3. On the 22nd day of May 2008, I caused to be served Reply to Respondent's Answer to Petitioners' Motion to Strike Portions of Mutual Of Enumclaw Insurance Company's Reply in Support of Motion to Dismiss upon the following in the manner described below:

James M. Beecher
Brent Beecher
Hackett Beecher & Hart
1601 5th Avenue
Suite 2200
Seattle, WA 98101

Via Hand Delivery.

I declare under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

Signed this 22nd day of May, 2008 in Seattle, Washington



Ian McDonald

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Subject: Case No. 80420-6 - Reply on Motion to Strike

Dear Court Clerk,

In reference to Mutual of Enumclaw Insurance Company v. T&G Construction and Villas at Harbour Pointe Owners Association, case no. 80420-6, please find attached **Reply To Respondent's Answer to Petitioners' Motion To Strike Portions Of Mutual Of Enumclaw Insurance Company's Reply In Support Of Motion To Dismiss.**

The attorney for the party filing this brief is Daniel Zimberoff, WSBA no. 25552, phone no. (206)381-9806 and email danzimberoff@barkermartin.com.

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