

No. 81160-1

SUPREME COURT OF THE STATE OF WASHINGTON

CORNHUSKER CASUALTY INSURANCE
COMPANY,

Plaintiff - Appellee,

v.

CHRIS KACHMAN and DEBBIE KACHMAN, husband and wife; ROCKERIES INC.,
a Washington corporation; and BROOKS SAMPLES, individually and as Personal
Representative of the Estate of Leanne Samples,

Defendants - Appellants

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. -06-35106

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Defendant/Appellant Brooks Samples' wife, Leanne Samples, suffered fatal injuries when a Rockeries, Inc. ("Rockeries") trailer loaded with boulders disconnected from a truck, rolled down a steep hill, and crashed into her vehicle as she was traveling through an intersection.

This case involves a dispute over whether Rockeries, a landscaping company, was insured by Plaintiff/Respondent Cornhusker Casualty Insurance Company ("Cornhusker") at the time of the incident. After Brooks Samples filed a wrongful death lawsuit against Rockeries, Cornhusker filed a declaratory judgment action in federal court, claiming that there was no coverage because Rockeries' policy had been canceled prior to Leanne Samples' death due to nonpayment of premiums.

RCW 48.18.290 requires that an insurer provide notice of cancellation of an insurance policy by "mailing" or actually "delivering" written notice to the insured. Cornhusker attempted to provide Rockeries with notice of cancellation by certified mail, which is only delivered if someone is present to sign for it at the time of the attempted delivery (or if the recipient goes to the Post Office to pick it up). The notice of cancellation that Cornhusker sent by certified mail was never delivered to Rockeries. This case involves the issue of whether certified mail, which

requires actual delivery to a person to be delivered, falls under the “mailing” prong or the “actual delivery” prong of RCW 48.18.290.

Finding the statute to be ambiguous, the Ninth Circuit Court of Appeals certified the following dispositive question to this Court:

Does sending notice of cancellation by certified mail satisfy the “mailed” requirement of RCW 48.18.290 (1997) and give sufficient notice of cancellation to comply with RCW 48.18.290, even if there is no proof that the cancellation letter was received by the insured?

Order Certifying Question to the Washington State Supreme Court at 1525-1526.

The answer to this question is “No.” Although certified mail is handled by the Post Office, it differs significantly from regular mail because it is *only delivered if someone is present to sign for it*. Certified mail is a form of personal delivery because it must be signed by someone to be delivered, unlike regular mail, which is deposited in the recipient’s mailbox regardless of whether anyone is present. While certified mail – if actually delivered – would satisfy the “actually delivered” prong of RCW 48.18.290, it does not comply with the “mailing” prong because it is not delivered in the same manner as regular mail and, as demonstrated by the facts of this case, has a far greater risk of non-delivery than regular mail. For the same reason, the presumption of delivery that applies to regular mail does not apply to certified mail.

Cornhusker had actual knowledge that certified mail was ineffective to provide Rokeries with notice because a certified letter sent by Cornhusker to Rokeries two months earlier was also returned. Cornhusker's failed use of certified mail to deliver notice of cancellation to Rokeries did not comply with the statute; put Cornhusker's interests in creating a paper trail ahead of Rokeries' interests; and was ineffective to cancel Rokeries' policy.

In order for certified mail to comply with the statute as a means of providing an insured with notice of cancellation, it must be *actually delivered* to the insured. This Court should construe RCW 48.18.290 such that certified mail falls under the "delivery" prong of the statute rather than the "mail" prong and answer the certified question in the negative.

II. STATEMENT OF FACTS

A. Cornhusker's attempted cancellation of Rokeries' policy

Rokeries' insurance policy with Cornhusker renewed on June 28, 2004, with an annual premium of \$10,223, payable in installments. *Declaration of Jackie Perry* at ¶ 6 (ER 27). Rokeries did not pay the first installment on time. As a result, Cornhusker sent a notice of cancellation for nonpayment to Rokeries' owners, Chris and Debbie Kachman, by certified mail on August 9, 2004. The Kachmans did not receive the

certified letter. Cornhusker knew they did not receive it because it was returned to Cornhusker on September 15, 2004. *Perry Decl.* at ¶ 12 (ER 29).

Despite the fact that the Kachmans never received the August 9, 2004 certified letter, they paid the installment before the cancellation date, and the policy remained in effect. *Perry Decl.* at ¶¶ 11 & 13 (ER 28-29). Cornhusker then sent an invoice for the next installment, which Rokeries again failed to pay on time. *Perry Decl.* at ¶ 14 (ER 29).

Despite the fact that the August 9, 2004 *certified* letter had been *returned as unclaimed* on September 15, 2004, Cornhusker again sent a notice of cancellation for nonpayment to the Kachmans by *certified* mail on September 29, 2004. *Perry Decl.* at ¶ 15 (ER 29). The notice stated that the policy would be canceled on October 19, 2004 unless payment was made. As before, the certified letter was not delivered to Rokeries and was returned to Cornhusker. *Perry Decl.* at ¶ 17 (ER 30). It is undisputed that Rokeries never received either of the certified letters sent by Cornhusker in August and September of 2004.

The fatal collision involving the Rokeries trailer occurred on October 22, 2004. Rokeries notified its insurance agent of the incident on October 25, 2004, and unaware of any cancellation notice, mailed a check in the amount of the next installment payment to Cornhusker on the

same day. Cornhusker returned the check and canceled Rockeries' policy as of October 19. *Perry Decl.* at ¶¶ 21-23 (ER 31).

B. Requirements for cancellation of the policy

RCW 48.18.290 governs cancellation of insurance policies:

(1) Cancellation by the insurer . . . may be effected . . . only upon compliance with the following:

(a) Written notice of such cancellation . . . *must be actually delivered or mailed* to the named insured [not less than ten days prior to the cancellation date, for nonpayment of premium] . . . ;

(2) The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper postage affixed, in a letter depository of the United States post office. The insurer shall retain in its records any such item so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.

RCW 48.18.290 (emphasis added).¹ A copy of the statute is attached as an appendix to this brief.

¹ The applicable policy language regarding cancellation by Cornhusker is similar:

We may cancel this policy by *mailing or delivering* to the first Named Insured . . . written notice of cancellation . . . to the last mailing address known to us, at least:

C. Cornhusker's use of certified mail

Cornhusker chose to send notice of cancellation to Rockeries by certified mail, addressed to Chris and Debbie Kachman at their home, which was the address on file with Cornhusker.

A significant difference between certified mail and regular mail is that the Post Office will not deliver certified mail unless someone is present to sign for it:

The standard operating procedure . . . for delivery of . . . certified mail is that the . . . carrier will . . . attempt to *deliver [it] in person* to the address. . . . If the carrier is unable to *personally deliver* a certified letter, the carrier will leave a Form 3849 delivery notice indicating that an attempt was made to deliver the certified letter together with instructions to the recipient to go to the Post Office to pick up and sign for the certified letter.

Declaration of Paula Oates at ¶ 3 (ER 63) (Eatonville Post Master) (emphasis added); *see also Second Declaration of Paula Oates* at ¶ 3 (ER 100) (“In order for certified mail to be delivered, someone must be physically present to sign for it.”) and ER 89 (“A signature is required at the time of delivery.”), and *compare with Second Declaration of Paula Oates* at ¶ 5 (ER 100) (“Regular mail is deposited in a mail box regardless of whether anyone is physically present.”).

-
- a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium

ER 34 (emphasis added).

Because the Kachmans have a gate at their driveway, the Post Office will not deliver certified mail to their home. *Second Declaration of Paula Oates* at ¶ 4 (ER 100) (mail carriers will not open a gate to deliver certified mail). If a mail carrier is unable to deliver certified mail, the carrier is supposed to leave a form indicating that an attempt was made to deliver a certified letter and telling the recipient to go to the Post Office to pick it up. *See Declaration of Paula Oates* at ¶ 3 (ER 63). Even assuming that such a form was left in the Kachmans' mailbox,² it would have told them only that the Post Office was holding a certified letter, and that the Post Office's hours were Monday through Friday from 9 to 5. *See Second Declaration of Paula Oates* at ¶¶ 6-7 (ER 100). The notice would not have told them anything about the nature of the letter. It is unclear whether the notice would have identified the sender, but the evidence is that, at best, the sender would have been identified as "Berkshire," not Cornhusker. *Supplemental Declaration of Maureen Falecki* at ¶ 4 & Exhibit C (ER 107, 111). There is no evidence that the Kachmans knew that "Berkshire" and Cornhusker were related entities.

² The Kachmans stated that they never received a notice of attempt to deliver certified mail. *Declarations of Chris Kachman* at ¶ 9 (ER 97); *Debbie Kachman* at ¶ 11 (ER 95).

D. History of Rockeries' response to cancellation notices

Rockeries received notices of cancellation for nonpayment on several occasions while it was insured by Cornhusker. Rockeries paid the premium before the cancellation date on all but one occasion, when Rockeries paid the premium two days late. *See* ER 90-91 and ER 92. Cornhusker always accepted the late payments and continued Rockeries' coverage without any lapse. *Declaration of Jackie Perry in Support of Cornhusker's Reply* at ¶ 2 (ER 103-104). Only when Cornhusker knew that a claim could be made did it refuse to accept the late payment.

E. Decision in the federal district court

After Brooks Samples filed a wrongful death lawsuit against Rockeries in state court, Cornhusker filed a declaratory judgment action in federal court, seeking a ruling that there was no coverage based on Rockeries' failure to pay its premium in a timely manner.

The federal district court judge granted Cornhusker's motion for summary judgment. Although the federal district court judge acknowledged that "[t]he issue of whether or not certified mail complies with the statute . . . is perplexing, and it's an interesting and complicated issue" (RT at p. 4, lines 5-7 (ER 126)), he found the statute unambiguous and ruled that certified mail falls under the "mailing" prong of the statute rather than the "actual delivery" prong. *Order on Summary Judgment* at

p.6 (ER 117). Defendant/Appellant Samples appealed to the Ninth Circuit, which heard argument and then certified the dispositive question of the interpretation of RCW 48.18.290 to this Court.

III. ARGUMENT

- A. The legislative intent that insureds be notified of an insurer's intent to cancel their insurance favors a construction of RCW 48.18.290 that places "certified mail" under the "actual delivery" prong rather than the "mailing" prong.**

In construing RCW 48.18.290 and deciding the certified question, the Court should consider and give effect to the legislative intent. *State v. Cooper*, 156 Wn.2d 475, 479, 128 P.3d 1234 (2006) ("Statutory interpretation requires courts to give effect to the legislature's intent and purpose in passing a law."); *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004) (A court's "fundamental objective in construing a statute is to ascertain and carry out the legislature's intent."); *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 240, 59 P.3d 655 (2002) ("The first role of a court is to examine the language of a statute while adhering to the legislature's intent and purpose in enacting it."); *Tarver v. Smith*, 78 Wn.2d 152, 155, 470 P.2d 172 (1970) (main purpose of statutory interpretation is to ascertain and give effect to legislative intent); *State v. Lee*, 96 Wn. App. 336, 341, 979 P.2d 458 (1999) ("[I]f the language remains susceptible to two constructions, one of

which carries out and the other defeats the statute's manifest purpose, the former construction should be adopted."); *State v. Gilbert*, 33 Wn. App. 753, 755-756, 657 P.2d 350 (1983) (where statute is subject to two interpretations, that which best advances the legislative purpose should be adopted).

Here, it is undisputed that the legislative intent is that insureds be notified before their insurance is cancelled:

[Federal district court, Judge Leighton]: . . . Here, I would think we would all be agreed that actual notice is what is desired.

[Counsel for Cornhusker]: Of course, that is what is desired

RT at p.8 line 24 – p.9 line 3 (ER 130).

The purpose of statutes like RCW 48.18.290 -- requiring that insureds be provided with notice of cancellation -- "is to provide the insured the opportunity to obtain other insurance prior to cancellation." *See Taxter v. Safeco Ins. Co.*, 44 Wn. App. 124, 126, 721 P.2d 972 (1986); *see also Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 162, 52 P.3d 494 (2002) ("The purpose of the notice requirements in the insurance code is to enable the insureds . . . to take appropriate action in the face of impending cancellation of an existing policy. . . . Notice enables the insured to adjust by either making the payments in default, obtaining other insurance protection, or preparing to proceed without insurance

protection.” (citations omitted)). The Court should construe the statute in a way that fulfills the legislative purpose of providing insureds an opportunity to take action to maintain their insurance coverage.

The statutory requirement that insureds be provided notice of cancellation so that they can take steps to obtain other insurance or make a payment to keep their existing insurance in force is not solely for the protection of insureds. It protects the public in general. The importance that the Legislature places on automobile insurance to compensate people for injuries and losses is underscored by the Financial Responsibility Act, Chapter 46.29 RCW, which makes automobile insurance mandatory in Washington. This Court has long held that insurance policies “are not purely private affairs but abound with public policy considerations, one of which is that the risk-spreading theory of such policies should operate to afford to affected members of the public – frequently innocent third persons – the maximum protection possible consonant with fairness to the insurer.” *Oregon Auto Ins. Co. v. Salzberg*, 85 Wn.2d 372, 376-377, 535 P.2d 816 (1975). The legislative purpose underlying RCW 48.18.290 -- to give insureds an opportunity to take action before their insurance is cancelled -- is not fulfilled when certified mail is not delivered and the insured is left without notice of the impending cancellation, as happened here.

Interpreting RCW 48.18.290 in a manner that carries out the legislative intent requires that “certified mail” be placed under the “actually delivered” prong. Construing the statute such that a vague notice left in a mailbox indicating that the addressee has certified mail to pick up at the Post Office satisfies the “mailing” prong of the statute would undermine the legislative intent. Unlike regular mail, certified mail is only effective to provide notice of cancellation to an insured if it is actually delivered to the insured.

RCW 1.12.010 states: “The provisions of this code shall be liberally construed, and shall not be limited by any rule of construction.” Liberally construing RCW 48.18.290 requires that the benefit of the doubt goes to affording the greatest possible protection that the statute can provide to insureds to avoid being caught unaware of a pending insurance cancellation.³ The interpretation of “mailing” and “actual delivery” that best carries out the legislative intent is that certified mail falls under the “actual delivery” prong, requiring that an insurance company that chooses to provide notice of cancellation by certified mail prove actual delivery to

³ Construing the statute to place certified mail under the “actual delivery” prong is also consistent with the law regarding construction of insurance policies: “When a policy is fairly susceptible of two different interpretations, that interpretation most favorable to the insured must be applied, even though a different meaning may have been intended by the insurer.” *Ames v. Baker*, 68 Wn.2d 713, 717, 415 P.2d 74 (1966).

comply with the statute.

B. The differences between certified mail and regular mail favor construing the statute such that certified mail falls under the “actual delivery” prong.

RCW 48.18.290(1)(a) states that written notice of cancellation *must be actually delivered or mailed*. It is phrased in the disjunctive. Actual delivery and mailing are two different things. Certified mail cannot fall under both or there is redundancy. The statute should be construed such that certified mail falls under the “actual delivery” prong because the only way for an insured to receive certified mail is if the insured actually receives delivery and signs for it. An insurer that chooses to send notice of cancellation by certified mail is instructing the Post Office to obtain and return to the insurer written proof of actual delivery with the recipient’s signature on it.

Common experience and logic tell us that certified mail and regular mail are different, and postal regulations (ER 63, 89, 100) demonstrate that the selection of regular mail vs. certified or registered mail has a significant effect upon the opportunity afforded to the recipient actually to receive the letter. Further, the Legislature has specified, with respect to the use of certified mail, that “whenever the use of ‘registered’ mail is authorized by this code, ‘certified’ mail, with return receipt requested, may be used.” RCW 1.12.060. The Legislature specified, then,

that “certified” mail is equivalent to and can be used as a substitute for “registered” mail. But the Legislature made no similar provision allowing certified mail to be used as a substitute for regular mail.

Moreover, if “actual delivery” of certified mail is accomplished in the process of delivering certified mail (which did not happen here), it would be redundant and superfluous for “mail” to also be inclusive of certified mail because the delivery of certified mail to the insured would satisfy the “actual delivery” prong of the statute. Again, it is important that the Legislature framed the directive in the disjunctive: either “actual delivery” or “mailed.” “[E]ach word of the statute must be accorded meaning . . . so that no portion of the statute is rendered meaningless or superfluous.” *State v. Base*, 131 Wn. App. 207, 213-214, 126 P.3d 79 (2006) (citing *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005)).

Certified mail is no different from other common means of delivery such as courier or Federal Express. If the recipient is not present to receive actual delivery and sign for the item when the courier first attempts delivery, then a notice is left directing the recipient to contact the office of the delivery company to pick up the delivery or wait for delivery to be attempted again when the recipient is present to accept delivery. If Federal Express leaves a notice on a person’s door that they attempted

delivery and found the person not at home, is that “actual delivery”? The answer is obviously “no.” Delivery only occurs when the person goes to the office to pick the item up and sign for it or when delivery is made at a later time when the person is home. Because of this significant difference between certified mail and regular mail, RCW 48.18.290 should be interpreted as placing certified mail under the “actual delivery” prong of the statute.

C. The language of RCW 48.18.290 and a comparison with other statutes supports the interpretation that certified mail falls under the “actual delivery” prong rather than the “mailing” prong.

The term “mailed” is not defined in RCW 48.18.290. Elsewhere in the Revised Code of Washington, however, “mail” is defined as “regular mail,” (*see, e.g.,* RCW 15.44.010; RCW 15.65.020(27); RCW 15.66.010(17); RCW 16.67.030(13); RCW 34.05.010(10)), and “posting in the United States mail.” *See* RCW 48.17.540(4); RCW 48.115.035(5). No section of the Revised Code of Washington defines “mail” as including certified mail.

In circumstances where the Legislature intends for certified or registered mail to be used, the Legislature says so. *See, e.g.,* RCW 4.28.330; RCW 6.27.130(1); RCW 7.04.060; RCW 7.04A.090; RCW 11.11.050; RCW 11.56.110; RCW 11.88.040; RCW 12.40.040; RCW

14.08.122; RCW 18.35.100(3); RCW 19.28.381; RCW 22.09.120. Numerous other examples of statutes specifying the use of certified or registered mail could be given. In RCW Title 48, which governs insurance, several statutes specifically require the use of certified mail. *See, e.g.*, RCW 48.03.040(5); RCW 48.05.210(1)&(2); RCW 48.05.485; RCW 48.15.150(2); RCW 48.30.010(5), RCW 48.43.355. Where the Legislature intends for regular mail to be used, however, it simply uses the term “mail,” as in RCW 48.08.080(2)(b), RCW 48.17.450(2), and RCW 48.17.540(2)(a), (3), & (4).

* Although it does not define “mail,” RCW 48.18.290(2) does state how mailing “shall be effected.” It specifically describes how regular mail is mailed, not how certified mail is mailed. Certified mail must be taken into a post office so that additional paperwork can be filled out and an additional fee paid. *Supplemental Decl. of Maureen Falecki* at Exhibit B (ER 110); ER 54 (certified mail receipt showing that Cornhusker paid \$0.37 for postage and \$2.30 for the certified mail fee). RCW 48.18.290 simply calls for affixing postage to an envelope, not taking the letter to the Post Office to fill out paperwork and pay an additional fee. Additionally, the statute does not say anything about requiring an insured to go to a Post Office between 9:00 a.m. and 5:00 p.m. on a weekday to pick up a certified letter. There is absolutely nothing in the statute to support

imposing such a requirement on insureds for them to receive notice of cancellation. The Court should not write into the statute such a requirement where none exists. *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.”).

The fact that the Legislature intended for regular mail to be used is also demonstrated by RCW 48.18.290(3), which states, “The affidavit of the individual making or supervising such a mailing[] shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.” An affidavit would be unnecessary and superfluous for certified mail, which creates its own paper trail (including proof of actual delivery if it is delivered).

In order to be consistent with the Legislature’s distinct use of the terms “mail” and “certified mail” in other statutes, including within the insurance code itself, the term “mailed” in RCW 48.18.290 must be interpreted to mean “regular mail,” and to exclude the use of certified mail, which is a form of personal delivery because delivery of certified mail is contingent on someone being present to receive it. In RCW 48.43.040, which governs cancellation of fire insurance policies, the

Legislature expressly placed certified mail under the category of “actually delivered” and drew a clear distinction between certified and regular mail:

The notice required by this section shall be *actually delivered or mailed to the insured by certified mail*, return receipt requested, *and in addition by first class mail. . . .*

RCW 48.53.040(2) (emphasis added).⁴

RCW 48.18.290 provides that notice of cancellation shall be provided by either mailing **or** actually delivering it to the insured. Rather than hiring a process server to provide personal delivery of the notice, Cornhusker hired the U.S. Postal Service. Because Cornhusker failed in its attempt to actually deliver the notice to its insured, Cornhusker did not comply with the requirements of the statute.

⁴ RCW 18.35.100, which governs businesses that offer hearing and speech equipment, also recognizes certified mail as being equivalent to personal delivery:

Any notice required to be given by the department to a person who holds a license or interim permit may be given by *mailing* it to the address of the last establishment or facility of which the person has notified the department, except that notice to a licensee or interim permit holder of proceedings to deny, suspend, or revoke the license or interim permit shall be by *certified or registered mail or by means authorized for service of process*.

RCW 18.35.100(3) (emphasis added).

D. Public policy and established insurance law in Washington also favor a construction of RCW 48.18.290 that places certified mail under the “actual delivery” prong.

The Legislature has stated that there is a significant public policy interest in the practices of insurance companies:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters.

....

RCW 48.01.030. This Court has repeatedly held that insurers have a duty to “exercise a high standard of good faith which obligates [insurers] to deal fairly and give ‘*equal consideration*’ in all matters to the insured’s interests.” *Van Noy v. State Farm*, 142 Wn.2d 784, 793, 16 P.3d 574 (2001) (emphasis added).

Rather than giving equal consideration to its insured’s interests and sending the notice of cancellation by regular mail, Cornhusker put its own interests in creating a paper trail ahead of Rockeries’ interests in receiving notice of cancellation so that Rockeries could take action to protect itself. Cornhusker did so even after another certified letter had been returned just weeks before. *Perry Declaration* at ¶ 12 (ER 29). Cornhusker has not shown any advantage for using certified mail over regular mail except the advantage to Cornhusker of creating a paper trail.

Disregarding its obligations to its insured, Cornhusker seeks to impose an unauthorized obligation on its insured to go to the post office between 9:00 and 5:00 on a weekday to pick up the notice of cancellation.⁵ Nowhere in RCW 48.18.290 does it say that such an obligation can be imposed on an insured. The statute requires that the insurer either obtain personal delivery of a notice of cancellation or mail it to the insured. The statute does not allow insurers to require insureds to go to the post office to pick up a notice.

Cornhusker chose to send the notice of cancellation by certified mail for its own benefit because certified mail creates a paper trail that regular mail does not:

The company sent a notice of cancellation by registered letter requiring the personal receipt of the [insured]

. . .

. . . If mailed in the ordinary unregistered letter, the notice would be delivered at the address named or forwarded and thus reached the [insured]. If directed, however, to an individual living at such address in a manner requiring a personal receipt, it is obvious it could not be delivered unless that person were available and the receipt personally given. . . . In attempting to procure the personal receipt of the [insured] for its own evidential purposes, [the insurer] overreached itself and defeated the very object of the

⁵ See *Cornhusker's Reply Brief* at p.20 (ER 101) ("The insureds here were obligated to pick up the certified letter at the post office.") and p.21 (ER 102) ("It was . . . Rockeries' obligation to pick up the letter from the post office.").

provision of the policy – reasonably certain notice to the [insured] and relief of the company from following his changes of residence.

Werner v. Commonwealth Casualty Co., 160 A. 547, 548 (N.J. Err. & App. 1932). In addition to being contrary to the Legislature’s intent, it was contrary to Cornhusker’s duties to its insured for Cornhusker to choose a method of delivery for its own benefit rather than using regular mail, which had a much greater likelihood of providing actual notice to Rockeries. See *Van Noy v. State Farm*, 142 Wn.2d 784, 793, 16 P.3d 574 (2001) (describing insurers’ duty to “deal fairly and give ‘equal consideration’ in all matters to the insured’s interests”).

A notice of cancellation sent to Rockeries by certified mail two months earlier was also returned to Cornhusker. *Perry Decl.* at ¶ 12 (ER 29). Cornhusker had knowledge of both the general risk of non-delivery attendant with certified mail, as well as specific knowledge that certified mail was not an effective means of providing notice to Rockeries. Yet Cornhusker again sent notice of cancellation by certified mail. The term “mailing” should not be interpreted in a way that gives an insurer discretion to use either regular mail or certified mail as a means of “mailing,” when the insurer knows that certified mail is less likely to result in notice to the insured than regular mail, and the insurer uses certified mail solely for its own benefit in creating a paper trail.

E. Because certified mail is a form of personal delivery, proof of actual delivery of the notice of cancellation is required for certified mail to satisfy the notice requirements of RCW 48.18.290.

Although proof of mailing is sufficient to establish compliance with RCW 48.18.290 if notice is sent by regular mail, when notice is provided by a form of personal delivery, such as certified mail, proof of actual receipt by the insured is required. The presumption of delivery that applies to regular mail does not apply to certified mail:

Although plaintiff claims the request for reconsideration was sent to defendant by certified mail, plaintiff has no record of a return receipt ever being received. While the law presumes delivery of a properly addressed piece of mail, *McPartlin v. Commissioner*, 653 F.2d 1185, 1191 (7th Cir. 1981), no such presumption exists for certified mail where the return receipt is not received by the sender, *Mulder v. Commissioner*, 855 F.2d 208, 212 (5th Cir. 1988); *McPartlin*, 653 F.2d at 1191. The reason is that the sender of a certified letter who does not receive the return receipt is on notice that the addressee may not have received the letter. See *McPartlin*, 653 F.2d at 1191. . . .

Moya v. United States, 35 F.3d 501, 504 (10th Cir. 1994). The cases relied upon by Cornhusker for the proposition that proof of mailing is sufficient and that proof of receipt is not required only apply to regular mail. Those cases are implicitly premised on the presumption of delivery that applies to regular mail. Because the presumption of delivery does not apply to certified mail, proof of mailing is not sufficient under RCW 48.18.290 to

establish notice of cancellation when notice is sent by certified mail rather than regular mail.

Cornhusker relies on *Wisniewski v. State Farm*, 25 Wn. App. 766, 609 P.2d 456 (1980), for the proposition that an insurer is not required to prove receipt of a notice of cancellation if the statutory mailing procedures are followed. In *Wisniewski*, however, the insurer mailed the notice of cancellation by regular mail.⁶ The opinion simply states that the notice of cancellation was “mailed.” *Wisniewski* did not address the issue of how certified mail fits into RCW 48.18.290 and therefore is unhelpful in answering the certified question.

If an insurer sends notice of cancellation by regular mail, it makes sense that proof of actual delivery is not required, because there is a presumption of delivery when regular mail is used. It does not make sense, however, to say that “proof of mailing is all that is necessary” or

⁶ *Wisniewski* cited *Trinity Universal Ins. Co. v. Willrich*, 13 Wn.2d 263, 124 P.2d 950 (1942), which also involved regular mail. *Trinity* specifically refers to the notice of cancellation being mailed by “ordinary mail.” *Trinity*, 13 Wn.2d at 266. The insurance policy at issue in *Trinity* only provided for cancellation by “mailing written notice” and therefore did not present the ambiguity at issue in this case of “mailing” vs. “delivery.” *Trinity*, 13 Wn.2d at 265. *Trinity* was also decided before RCW 48.18.290 was enacted and did not address the statutory construction issues present in this case. *Trinity*, 13 Wn.2d at 273 (“There is no statute in this state which prescribes, limits, or restricts the manner of giving notice of cancellation of casualty insurance policies of the kind with which we are here concerned . . .”). RCW 48.18.290 was enacted in 1947. *Wisniewski*, 25 Wn. App. at 767-786.

that “proof of receipt is not required” in the context of *certified* mail, because certified mail is only effective to provide notice *if there is proof of receipt*. Proof of mailing in the case of certified mail proves nothing other than that the sender paid the U.S. Postal Service to *attempt delivery* to the addressee. If there is no proof of receipt, it means that the certified mail was not delivered. If an insurer chooses to use a method of personal delivery – such as certified mail -- to provide notice of cancellation, then proof of actual delivery is required.

The facts of this case demonstrate how unreliable certified mail is compared to regular mail, as a means of providing notice to insureds. Of the five certified letters sent by Cornhusker to Rockeries in 2004, only two were actually delivered to Rockeries – a 60% failure rate for certified mail. As previously indicated, certified letters mailed in August and September were returned to Cornhusker undelivered. *See Cornhusker’s Responsive Brief* (Ninth Circuit) at p.9 (admitting that August and September 2004 notices were returned undelivered); ER 47-49 (August 2004 certified letter); ER 51-54 (September 2004 certified letter); *Supplemental Declaration of Maureen Falecki* at ¶¶ 2 & 4 (ER 106-107) and Exhibits A & C (ER 109, 111) (indicating that delivery of two certified letters was attempted in November 2004, and only one of them was delivered); ER 29-30 (*Declaration of Jackie Perry* at ¶¶ 12 & 17,

indicating that certified letters sent in August and September were returned undelivered); SUPP. ER 32-33 (indicating that a notice of cancellation for nonpayment was also sent in March of 2004, presumably by certified mail; Appellant Samples assumes that this certified letter was received by Rockeries, but the record is silent on that question). This evidence of the low delivery rate for certified mail supports interpreting the statute in a manner that places certified mail under the “actual delivery” prong, which requires proof of delivery in order to cancel a policy. Any other interpretation would undermine the policy that the use of the U.S. mails creates a presumption of delivery.

The rule that an insurer need only show proof of mailing – not proof of receipt – does not apply to certified mail because (1) If certified mail is delivered, the sender receives a receipt as proof of delivery. If it is not delivered, it is returned to the sender; and (2) The presumption of delivery that applies to regular mail does not apply to certified mail. Based on logic, common experience, the facts of this case, and the weight of authority from other jurisdictions, it is clear that *Wisniewski* applies only to regular mail, which carries with it a presumption of delivery, and not to certified mail, which is a form of personal delivery and therefore requires proof of actual delivery.

In other contexts, Washington courts have held that the risk of non-delivery attendant with certified mail falls on the party choosing to use certified mail. *State v. Bazan*, 79 Wn. App. 723, 904 P.2d 1167 (1995), for example, involved a criminal procedure rule that provided for service of a summons “by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant’s address.” *Bazan*, 79 Wn. App. at 729. The State sent several summonses by certified mail, all of which were returned. The Court of Appeals acknowledged a presumption of delivery for regular mail but refused to apply the same presumption of delivery to certified mail:

Unlike *Kitchen* [holding that courts should presume delivery for regular first-class mail sent to the correct address and not returned to the sender], in this case the letter was sent by certified mail, not regular first class mail, and the notices of certified mail were returned “unclaimed.” Thus, there was no basis for the State or the trial court to assume that Bazan received notice of the charge filed against him.

Bazan, 79 Wn. App. at 730. The fact that *Bazan* was a criminal case does not detract from the court’s analysis of why the presumption of delivery for regular mail does not apply to certified mail. That analysis is directly applicable here.

Like the Court of Appeals in *Bazan*, several courts from other jurisdictions have remarked on the risk of nondelivery inherent in the use of certified mail:

Had the notice [of cancellation] been sent . . . by ordinary mail, the chances of it being received would have been much more likely than if sent by registered mail, requiring for delivery a personal call from the addressee, whereas, ordinary mail may be otherwise delivered. By attempting to insure delivery of the notice through the more certain means of registry, defendant thereby incurred a greater danger of nondelivery

Home Indemnity Co. of New York v. Same, 169 So. 154, 158 (La. Ct. App. 1936).

[D]efendant, although acting out of an abundance of caution by sending notice via certified mail instead of regular postage, increased the risk of nondelivery. This risk of nondelivery usually has been placed on the insurance company. . . .

. . . Had the defendant sent the notice by ordinary mailing, not only would the chance of its being received have been much more likely, but it would also have created the presumption of receipt. . . . This presumption, however, is rebuttable and the question of the credibility of the rebutting testimony is for the trier of fact to decide.

Larocque v. Rhode Island Joint Reinsurance Assn., 536 A.2d 529, 532 (R.I. 1988) (emphasis added); *see also Werner v. Commonwealth Casualty Co.*, 156 A. 116, 117 (N.J. Sup. 1931), *aff'd*, 160 A. 547 (N.J. Err. & App. 1932) (“There was no provision in the policy for the sending of a cancellation notice by registered mail, and the defendant company by

doing this, and asking for a return receipt, assumed the responsibility of personal delivery to the assured.”).

F. Most jurisdictions that have interpreted insurance policy language similar to the provisions of RCW 48.18.290 have held that non-delivered certified mail is insufficient notice to cancel an insurance policy.

Most courts that have considered the issue have held that an insurer’s failed use of certified mail to notify an insured of a policy’s cancellation does not satisfy the “mailing” requirement of insurance policies. In *Fidelity & Casualty Co. of New York v. Riley*, 178 A. 250 (Md. 1935), for example, the policy provided that the insurer could cancel by delivering or mailing written notice to the insured. The insurer sent notice by registered mail rather than regular mail. Like certified mail, registered mail is only delivered if there is someone present to receive it. *Riley*, 178 A. at 252. Due to this significant difference between regular and registered/certified mail, the *Riley* court held that the insurer’s failed use of registered mail did not comply with the cancellation requirements of the policy:

The policy required either “written notice delivered to the insured or mailed to his last address as shown by the records of the company.” It appears here that the company attempted to deliver a notice to the insured, in which case it would have been necessary not to prove mailing, but delivery of the notice to him A registered letter requires a receipt from the addressee or from someone at the place addressed who would customarily receive the addressee’s mail. If such a delivery had been made and receipt

taken, the cancellation clause with regard to mailing would have been gratified, the only difference being that an ordinary letter would have been dropped in the mail receptacle at the door, while the registered letter would have to be delivered to someone in the house and either would have been a mailing within the meaning of the policy. But in this case the notice never got into the house addressed and thus failed of its purpose. What was done here by the insurer was to give notice and then withdraw it.

...

... For the reasons which we have here assigned, it is the opinion of this court that the attempt here made by the [insurer] to cancel [the insured's policy] was not a mailing within the meaning of the cancellation clause of the policy and that the policy was in force on the day of the insured's accident.

Riley, 178 A. at 253.

In *American Automobile Ins. Co. v. Watts*, 67 So. 758 (Ala. 1914), the court found ambiguity in similar policy language that provided that "notice of cancellation deposited in the United States mail, postage prepaid, to the address of the assured, as stated herein, shall be sufficient notice" The notice was sent by registered mail and included a notation that the letter should be returned to the insurer in five days if delivery had not been successful. The insured was out of town and therefore never received it.

The court found that the policy's use of the term "mail" was ambiguous because of the "existence of different methods of mailing a letter, each equally permissible, and of differences in the opportunities

afforded to the addressee of actually receiving it, according as one or another method is adopted.” *Id.* at 760. The court refused to adopt an interpretation permitting the insurer to use a means of mailing that had a greater risk of non-delivery than regular mail:

[T]he method which the evidence shows was adopted by the [insurer] was one the adoption of which was so much more likely to result in depriving the [insured] of all benefit from the [policy provision] than another or other methods which were equally within the general terms used, and might as well have been chosen, that to hold that what the [insurer] did was a compliance with the [policy provision] would amount to giving it a construction, not strict, as required by the rule governing in such a case, but so loose and liberal in behalf of the [insurer] and so unfavorable to the [insured] as not to be permissible.

American Automobile Ins., 67 So. 758 at 760.

In *Conrad v. Universal Fire & Casualty Ins. Co.*, 686 N.E.2d 840 (Ind. 1997), the policy provided that the insurer could cancel it by providing written notice “mailed” or “delivered” to the insured, and that “proof of mailing shall be sufficient proof of notice.” *Conrad*, 686 N.E.2d at 841. The insurer sent the notice by certified mail, which was returned as “unclaimed.” After the insured’s house was destroyed by fire, the insurer claimed that the policy had been cancelled. The Indiana Supreme Court acknowledged that some cases interpreting similar cancellation provisions have held that actual receipt of notice is not required, and that proof of mailing is enough. *Conrad*, 686 N.E.2d at 842. Due to the

differences between regular and certified mail, however, the *Conrad* court held that the insurer's use of certified mail did not comply with the policy:

[The interpretation that proof of mailing is enough] envisions the use of ordinary mails as the "mailing" which the insurance company must prove. Ordinary mail has been traditionally viewed as reasonably assured of delivery and as reliably fulfilling the purpose of providing notice. This is of course the critical point because the purpose of providing notice is to enable the insured to obtain other coverage. . . .

Certified mail, return receipt requested, however, requires a signature from the recipient in order to be received. If the recipient is not present to sign, the mail is returned to sender as occurred in this case. **As a result, as a "mailing" device, it is not reasonably calculated to ensure receipt** Certified mail, return receipt requested, is useful for the sender. If used successfully, it creates a solid paper documentation of both the giving and receipt of notice. However, if it is not received, as in this case, it is returned and the sender is put on notice that the communication was ineffective. For this reason, certified mail, return receipt requested, is not a sufficiently reliable means of notifying the insured of the need to find new coverage that it can be elevated to an irrebuttable presumption that equates to a rule of law. Rather, if conclusively presumed to establish "notice" it is likely to create a pool of blithely uninsured individuals. For this reason, "courts have generally held that [under this notification provision] sending the notice of cancellation by registered letter does not constitute a compliance with the requirement as to the mailing of notice." 43 Am. Jur.2d at § 393 & Supp. 1997

. . . . [W]e agree with the courts that have held that proof of mailing, by certified mail or by ordinary mail, creates a presumption of delivery, but the presumption of delivery may be rebutted where a certified letter is returned undelivered. . . . **In short, [the insurer] cannot be allowed to rely on a presumed receipt of the notice when it was informed, as it requested, that in fact the notice was not received, and where the means it**

selected, return receipt requested, may have contributed to the nondelivery. This is not to say that use of certified mail can never constitute “proof of mailing” or that knowledge of nonreceipt of a certified letter by an insurer necessarily results in an ineffective notice. Rather, the circumstances of this case – use of a mailing method not reasonably calculated to ensure delivery plus knowledge of nondelivery by the sender – do not excuse the insurer from taking further steps to establish notice as a matter of law.

Because [the insurer] did not establish irrebuttable “proof of notice,” the policy may still have been in effect . . . at the time of the fire. Nonetheless, [the insurer’s] proof of mailing is admissible evidence and it becomes the burden of the [insureds] to establish that their nonreceipt was not attributable to their negligence or willful action. Resolution of this issue will turn on whether fault may be attributed to the [insureds]. . . .

Conrad, 686 N.E.2d at 842-843 (emphasis added). The reasoning of the Indiana Supreme Court in *Conrad* is supported by a long line of cases from other states. See, e.g., *Fichtner v. State Farm*, 560 N.Y.S.2d 94, 96 (N.Y. Sup. Ct. 1990) (registered mail did not comply with the policy requirement regarding written notice of cancellation; insurer should have given written notice personally or by regular mail); *Werner v. Commonwealth Cas. Co.*, 160 A. 547, 548 (N.J. Err. & App. 1932) (“In attempting to procure the personal receipt of the [insured] for its own evidential purposes, [the insurer] overreached itself and defeated the very object of the provision of the policy – reasonably certain notice to the [insured] and relief of the company from following his changes of residence.”); *Kamille v. Home Fire & Marine Ins. Co.*, 221 N.Y.S. 38

(N.Y. Sup. Ct. 1925) (written notice was not mailed in the manner required by the policy; presumption of delivery does not apply to registered mail). In accord with the majority of other jurisdictions that have addressed the issue, this Court should hold that certified mail, as a form of personal delivery, does not comply with the “mailing” prong of RCW 48.18.290, and that certified mail is ineffective to provide notice under the statute unless actual delivery is shown.

IV. CONCLUSION

RCW 48.18.290 should be construed in a manner that carries out the legislative intent of giving insureds notice of cancellation of an insurance policy and an opportunity to take action to maintain their insurance coverage. The statute should not be construed in a manner that allows an insurer that knows that certified mail will not reach its insured to satisfy the notice requirements of the statute by sending notice of cancellation by certified mail. Such an interpretation would defeat the purpose of the statute and the legislative intent.

Construing RCW 48.18.290 to carry out the legislative intent, it is clear that certified mail falls under the “delivery” prong of the statute. Certified mail is a form of personal delivery, requiring proof of actual delivery in order to provide effective notice of cancellation to an insured. The purpose of RCW 48.18.290 is defeated by an interpretation that places

certified mail under the “mailing” prong of the statute (requiring only proof of mailing for cancellation to be effective). Because certified mail is only delivered if the recipient is actually present to sign for it, it is a form of personal delivery and therefore requires proof of actual delivery for cancellation to be effective under RCW 48.18.290.

Cornhusker knew that certified mail was not an effective means of providing notice to Rokeries because a certified letter was returned to Cornhusker a matter of weeks before the certified letter at issue here was sent to Rokeries. Despite this knowledge, Cornhusker again sent notice by certified mail.

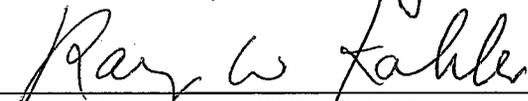
Certified mail has a much greater risk of non-delivery than regular mail, which is delivered regardless of whether anyone is present to sign for it. Cornhusker’s use of certified mail served its own interests in creating a paper trail, not the interests of its insured or the interests of the public, as indicated by Washington’s Financial Responsibility Act, in seeing that insurance coverage is maintained for the protection of innocent third parties who are injured or killed by motor vehicle collisions.

If notice of cancellation is sent by certified mail, actual delivery must be shown. Nowhere does RCW 48.18.290 state that insurers can impose upon insureds the burden of going to the post office to pick up a notice of cancellation. The language and purpose of the statute indicate

that the Legislature intended that regular mail, not certified mail, be used to provide insureds with notice of cancellation by mail.

The legislative purpose, public policy, common sense, the facts of this case, the weight of authority from other jurisdictions, and principles of statutory construction all support answering the certified question “No” and holding that notice of cancellation sent by certified mail does not satisfy the “mailing” prong of RCW 48.18.290 or the notice requirement of the statute, unless there is proof that the cancellation letter was actually received by the insured.

DATED this 26th day of February, 2008.


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48.18.290 Cancellation by insurer. (1) Cancellation by the insurer of any policy which by its terms is cancellable at the option of the insurer, or of any binder based on such policy which does not contain a clearly stated expiration date, may be effected as to any interest only upon compliance with the following:

(a) Written notice of such cancellation, accompanied by the actual reason therefor, must be actually delivered or mailed to the named insured not less than forty-five days prior to the effective date of the cancellation except for cancellation of insurance policies for nonpayment of premiums, which notice shall be not less than ten days prior to such date and except for cancellation of fire insurance policies under chapter 48.53 RCW, which notice shall not be less than five days prior to such date:

(b) Like notice must also be so delivered or mailed to each mortgagee, pledgee, or other person shown by the policy to have an interest in any loss which may occur thereunder. For purposes of this subsection (1)(b), "delivered" includes electronic transmittal, facsimile, or personal delivery.

(2) The mailing of any such notice shall be effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the United States post office. The insurer shall retain in its records any such item so mailed, together with its envelope, which was returned by the post office upon failure to find, or deliver the mailing to, the addressee.

(3) The affidavit of the individual making or supervising such a mailing, shall constitute prima facie evidence of such facts of the mailing as are therein affirmed.

(4) The portion of any premium paid to the insurer on account of the policy, unearned because of the cancellation and in amount as computed on the pro rata basis, must be actually paid to the insured or other person entitled thereto as shown by the policy or by any endorsement thereon, or be mailed to the insured or such person as soon as possible, and no later than forty-five days after the date of notice of cancellation to the insured for homeowners' dwelling fire, and private passenger auto. Any such payment may be made by cash, or by check, bank draft, or money order.

(5) This section shall not apply to contracts of life or disability insurance without provision for cancellation prior to the date to which premiums have been paid, or to contracts of insurance procured under the provisions of chapter 48.15 RCW. [1997 c 85 § 1; 1988 c 249 § 2; 1986 c 287 § 1; 1985 c 264 § 17; 1982 c 110 § 7; 1980 c 102 § 7; 1979 ex.s. c 199

§ 5; 1975-76 2nd ex.s. c 119 § 2; 1947 c 79 § 18.29; Rem. Supp. 1947 § 45.18.29.]

Effective date—1988 c 249: See note following RCW 48.18.299.

Application—1985 c 264 §§ 17-22: "Sections 17 through 22 of this act apply to all new or renewal policies issued or renewed after May 10, 1985. Sections 17 through 22 of this act shall not apply to or affect the validity of any notice of cancellation mailed or delivered prior to May 10, 1985. Sections 17 through 22 of this act shall not be construed to affect cancellation of a renewal policy, if notice of cancellation is mailed or delivered within forty-five days after May 10, 1985. Sections 17 through 22 of this act shall not be construed to require notice, other than that already required, of intention not to renew any policy which expires less than forty-five days after May 10, 1985." [1985 c 264 § 24.]

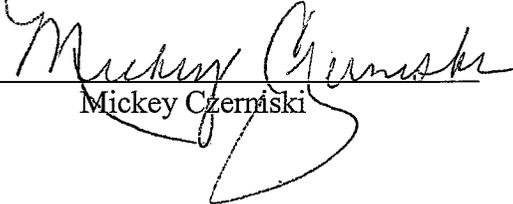
Certificate of Service

I declare under penalty of perjury under the laws of the State of Washington that on February 26th, 2008, I mailed a true and correct copy of Appellant's Opening Brief to:

Attorney for Cornhusker Casualty Insurance Company

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Dated this 26th day of February 2008, at Hoquiam, Washington.


Mickey Czernaski