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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NO. 675079

ETHAN ALLEN AND DOROTHEA MARSHALL,

Appellants,

v.

STATE FARM FIRE AND
CASUALTY COMPANY,

Respondent.

APPELLANTS' BRIEF

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I. INTRODUCTION

This is an appeal from a summary judgment dismissal of an insurance bad faith suit.

Plaintiffs Ethan Allen and Dorothea Marshall insured their home with State Farm. On November 21, 2006, a 100 foot tall tree in their yard was hit by a freak lightening strike. An explosion destroyed the tree as moisture within the tree was instantly vaporized to steam. The explosion created a pressure wave that scattered retaining wall bricks about the yard and violently shook the house causing obvious damage to both the inside and outside the insured home.

State Farm's mishandling of the claim for the damage to their home is the source of this suit. It is based upon:

- (1) State Farm's tardy and unreasonable investigation of damages to their home before denying all but \$28,000 for repairs.
- (2) State Farm's refusal to follow the mandatory independent appraisal method of resolving a dispute on the amount of damage related to the lightning strike. State Farm withdrew from appraisal rather than allow consideration of

plaintiffs' claim for more than \$100,000 in additional repair costs.

Plaintiffs seek remand to the trial court to resolve material factual issues of fact regarding State Farm's response to a claim it admits was covered by its insurance policy.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted State Farm's Motion for Summary Judgment followed by entry of Judgment of Dismissal with an Award of Fees and Costs to Defendant.

Issues Pertaining to Assignment of Error

1. Was State Farm's investigation "prompt" as defined by the Uniform Claims Settlement Procedure regulations?
2. Could a reasonable jury believe that State Farm violated its obligation to conduct a "reasonable" investigation before denying a substantial part of plaintiffs' claim?
3. Is there evidence that State Farm breached the policy requirement of independent appraisal to determine the amount of plaintiffs' loss?

4. To prevail in an informal appraisal process, must a policyholder meet evidentiary standards established by the Rules of Evidence for proceedings in the courts of the State of Washington?

5. Is there evidence to support plaintiffs' claim of bad faith?

6. Could a reasonable jury find that plaintiffs were harmed by State Farm's violation of insurance regulations or lack of good faith?

III. STATEMENT OF THE CASE

A. The Insured Loss

Dr. Ethan Allen and his wife Dorothea Marshall insured their home with State Farm. (CP 210) On November 21, 2006, a freak bolt of lightning struck a 100 foot tall tree in the backyard of their home. (CP 98 and 132) Electrical current flowed through the water saturated woody materials in the tree, instantly turning the water into steam, which created a violent explosion. (CP 100) The tree was destroyed (CP 126) and the sudden steam expansion created a pressure wave that rocked the house. (CP 100)

Damage to both the outside and inside of the house was apparent. Windows were broken and window and doorframes became misaligned. Tiles were broken and dislodged. Walls and ceilings were cracked. HVAC ducts were dislodged and the kitchen counter became separated from the wall. (CP 79) After the

lightening strike, Dr. Allen and Ms. Marshall were no longer able to use their fireplace because of smoke intrusion into their home. (CP 133)

State Farm agreed that lightning related damage was a covered loss. (CP 149) After more than 11 months following the loss it issued a check for \$28,006.19 to cover all the repairs it conceded were related to the lightening strike. (CP 69) Plaintiffs challenged State Farm's denial of their claim for additional repairs and attempted to exercise their right to an independent appraisal of the amount of their loss. (CP 131)

B. The Investigation at Issue

State Farm was required by law to conduct an investigation of plaintiffs' claim that was both "prompt" and "reasonable."

WAC 284-30-370 Standards for prompt investigation of a claim: Every insurer must complete its investigation of a claim within thirty days after notification of a claim, unless the investigation cannot reasonably be completed within that time.

WAC 284-30-330 Specific unfair claims settlement practices defined: The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims.

...

(4) Refusing to pay claims without conducting a reasonable investigation.

State Farm's investigation of plaintiffs' claim proceeded on the following timeline.

November 21, 2006. Date of the lightning strike. (CP 132)

December 14, 2006. (23 days later) Adjuster first visited home and "noted that energy from the lightning strike shifted the house and caused structure damage to the home." (CP 9) State Farm decides to hire Pacific Engineering Technologies ("PET") to determine the extent of lightning related damage. (CP 67)

January 30, 2007. (68 days after loss) State Farm receives PET's report designating the scope of repairs it said was required for lightning related damage. (CP 68) Despite the homeowners' continuing complaints of smoke intrusion following the lightning strike, (CP 127) PET's inspection of the chimney located in the middle of the house and serving fireplaces on two floors (CP 78) was limited to visual

observation in attic and above the roofline. (CP 81, 121, 127)

August 2007. (Nine months after the loss.)

State Farm finally obtains a cost estimate for the limited repairs scoped in the contested PET report of January 30, 2007. (CP 68)

October 27, 2007. (More than 11 months after the loss) State Farm pays its insureds \$28,006.19 to repair only those items called out in the disputed January 30, 2007 PET report and closes its file. (CP 69)

C. Follow-Up “Investigation”

When State Farm declined to conduct any real testing for the smoke intrusion problem, plaintiffs retained Greater Northwest Chimney Company to restore their fireplace and chimney system for use. (CP 227) On February 20, 2008, plaintiffs invited State Farm to inspect the chimney “while it was open” for repairs. (CP 125) The chimney and fireplace repairs were completed 2½ weeks later on March 7, 2008 at a cost to the plaintiffs of \$27,830.48. (CP 227) Rather than accepting plaintiffs’ invitation to inspect the chimney and observe the repair procedures, State Farm’s waited to further

investigate until June 24, 2008 – 3½ months after the chimney and fireplace system had been repaired at the insured's own cost. (CP 98)

D. The Appraisal

Every homeowner's policy sold in Washington is required to include an appraisal provision.¹ When the insurer and its insured fail to agree on "the amount of loss" either can demand informal appraisal. Each selects "a competent and disinterested appraiser" to appraise the amount of the loss. If the two appraisers fail to agree, their differences are submitted to an umpire.

On December 28, 2007, plaintiffs demanded appraisal and both parties selected experienced property adjusters to appraise the amount of loss related to the lightning strike. Plaintiffs named Roger Howson to act as one of the independent appraisers. (CP 131) State farm appointed John Colvard as the other appraiser. (CP 69)

¹ Electronic gremlins appear to have attacked the copy of the policy submitted by State Farm which appears at CP 208. The page containing the appraisal requirement is missing. However, pursuant to RCW 48.18.120 the Insurance Commissioner promulgated WAC 284-20-010 to effect reasonable uniformity in the coverage of certain insurance contracts, including homeowners policies. All such policies must incorporate the language of the 1943 New York Standard Fire Insurance Policy unless alternate language is used "without diminishing any rights an insured would have" under the New York Standard policy. The appraisal requirement appears at line 123 of the Standard Fire Policy. A copy of that policy is posted on the Insurance Commissioner's website at: http://www.insurance.wa.gov/companies/rates_forms/documents/1943-NY-Standard-Fire-Insurance-Policy.pdf. The appraisal requirement in that form is attached as an Appendix to this brief.

Despite the fact that it knew full well that its policyholders were challenging the scope of repairs called out by State Farm's chosen engineering firm PET (CP 29), State Farm informed its insured and its own appraiser that the appraisal could only address the items of damage that were described in the January 30, 2007 report it commissioned from PET. (CP 123) Among several other claims of loss presented by plaintiffs, State Farm withdrew from consideration by the appraisers the cause of fireplace smoke intrusion that began immediately after the lightning strike. (CP 133)

Each of the appraisers separately advised State Farm that the investigation it had directed by PET was thought to be inadequate or failed to address items of damage claimed to have been caused by the lightning strike. (CP 69, 70, 96)

When it found that the appraisers were appraising lightning damage to items beyond the scope of the PET report, State Farm "put the appraisal process on hold" asserting that questions about lightning damage versus wear and tear were "coverage issues" not subject to appraisal. (CP 126)

In order to deflect blame for withdrawing from the appraisal, State Farm's adjuster declared that: "the primary reason that State Farm did not continue the appraisal process was based upon the

recommendation of Roger Howson that the appraisal could not continue.” (CP 73) This is directly contradicted by Roger Howson who declared that: “I did not tell or recommend to State Farm that the appraisal process could not continue,” (CP 128) as well as the Declaration Dorothea Marshall. (CP 133)

IV. ARGUMENT

Standard of Review

Each of the issues pertains to review of summary judgment and are subject to *de novo* review.

1. Was State Farm’s investigation as “prompt” as required by insurance regulations?

Court decisions uniformly recognize that insurers are obligated to promptly investigate the facts underlying a claim. Failure to promptly investigate demonstrates bad faith. 14 *Couch on Insurance*, §198.27.

In Washington, insurance regulations enforce that duty and define what is meant by a “prompt: investigation.

WAC 284-30-370 Standards for Prompt Review of a Claim: Every insurer must complete its investigation of a claim within thirty days after notification of claim, unless the investigation cannot reasonably be completed within that time. All persons involved in the investigation of a claim must provide reasonable assistance to the insurer in order to facilitate compliance with this provision.

This regulation recognizes that the investigations of some claims cannot reasonably be completed within the 30 days specified. However in this case, State Farm presented no evidence or argument that the 30 day time limit could not reasonably have been met.

Rather, the evidence is undisputed that a State Farm adjuster did not even interview its insureds or inspect the damaged home until 3 weeks after the November 21, 2006 loss. (CP 67) It took another 6½ weeks for State Farm's chosen engineers, PET, to complete the controversial January 30, 2007 report. (CP 68) State Farm then waited 6 months more until August 2007 to determine the cost of the repairs specified in the PET report. (CP 68)

On the evidence presented, reasonable minds would likely find that State Farm's investigation violated WAC 284-30-370 and was not "promptly" completed in good faith.

2. Could a reasonable jury find that State Farm failed to conduct a "reasonable" investigation before denying a significant part of plaintiffs' claim?

Failure to complete a "reasonable" investigation before refusing a claim for insurance benefits is specifically prohibited by the Unfair Claims Settlement Practice regulations.

WAC 284-30-330 Specific Unfair Claims Settlement Practices Defined: The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices of the insurer in the business of insurance, specifically applicable to the settlement of claims: . . . (4) Refusing to pay claims without conducting a reasonable investigation.

An insurer's timely and reasonable investigation is a significant part of its good faith duty to its policyholder. As stated in *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 281 (1998):

We agree with one commentator who states:

The implied covenant of good faith and fair dealing in the policy should necessarily require the insurer to conduct any necessary investigation in a timely fashion and to conduct a reasonable investigation before denying coverage. In the event the insurer fails in either regard, it will have breached the covenant and, therefore, the policy.

Allan D. Windt, *Insurance Claims & Disputes: Representation of Insurance Companies and Insureds* § 2.05, at 38 (3d ed. 1995).

The response to the claim of smoke from the fireplace is an example of an unreasonable investigation. The evidence presented included:

- Starting from the time of the lightning strike, plaintiffs were unable to use their fireplaces because of smoke intrusion. (CP 133)

- When Ms. Marshall complained that the engineers retained by State Farm didn't inspect the chimney, the adjuster told her that "PET does not look inside chimneys" – even though another State Farm adjuster had told her not to light a fire "until the inside was looked at." (CP 127)
- Even after the plaintiffs complained about PET's haphazard inspection of the chimney, its January 30, 2007 report said there was no lightning damage to the chimney. This was based entirely on exterior visual inspection "in the attic" and "above the roof surface" (CP 81) even though the chimney served fireplaces in both the daylight basement and main floor. (CP 79) It was located near the middle of the house (CP 78) so most of the exterior of the chimney was not open to view. It is noteworthy that investigation of the smoke complaint did not include a test fire.
- Plaintiffs hired the Greater Northwest Chimney Company to investigate and repair the chimney problem that State Farm continued to ignore. (CP 227) At that time, State Farm was invited to inspect the chimney and witness the repair. (CP 125) State Farm ignored that invitation and waited until 3½ months after the chimney had been rebuilt to send out another inspector. (CP 98)
- The appraiser appointed by the policyholders requested additional investigation. (CP 96)
- State Farm's own appraiser requested additional investigation. (CP 70)

When the reasonableness of a party's conduct is a material issue of fact, it is generally improper to grant summary judgment.

Morris v. McNicol, 83 Wn.2d 491, 495 (1974). A jury could well find

that the claim of the smoke from the fireplace was not reasonably investigated.

Furthermore, if its pleadings are to be believed, (and CR 11 gives basis to rely on their truthfulness) State Farm's own answer demonstrates violation of its duty to conduct a reasonable investigate.

The Amended Complaint makes the following allegation:

2. On November 21, 2006, plaintiffs' residence and surrounding premises were damaged when a tree next to their home was struck by lightning. (CP 1)

If its answer was "reasonably based on a lack of information or belief" as required, State Farm still had not conducted a reasonable investigation of plaintiffs' claims by July, 2010.

State Farm's Answer to this allegation was:

2. State Farm lacks sufficient information to permit it to admit or deny allegations of paragraph 2 of the Amended Complaint and therefore denies same. (CP 4)
3. **Is there evidence that State Farm breached the policy requirement of independent appraisal to determine the amount of plaintiffs' loss?**

The plaintiffs' right to establish the amount of their loss by independent appraisal is not disputed. WAC 284-20-010.²

² The language of the appraisal requirement in homeowners policies must be at least as favorable to policyholders as that contained in the Standard New York form and appears as an Appendix to this brief. WAC 284-20-010.

Plaintiffs demanded appraisal of their loss on December 28, 2007 (CP 131) and both parties appointed professional property adjusters to act as independent appraisers. (CP 69 and 139) The appraisers agreed that Greg Bertram would be the umpire if the appraisers failed to agree on the amount of the lightning related loss. (CP 94) Within the next month State Farm halted the appraisal. (CP 126)

When the plaintiffs asked the appraisers to consider their claim that the chimney failure was related to the lightning strike, State Farm “put the appraisal process on hold” (CP 126) and directed that “the only items that the appraisers can address are the damages identified in the PET report.” (CP 123)

State Farm took the position that it had the unilateral right to eliminate from the appraisal any claimed damage to the home that its report from PET did not certify as related to the lightning strike. (CP 69) State Farm never relented, arguing years later in its summary judgment reply that “proceeding with the appraisal of the dollar amount of the loss was pointless, because there was no agreement on the scope of the loss, which must be determined first.” (CP 135)

It is undisputed that the insurance policy covered plaintiffs' entire home and its contents (CP 208) against damage from the peril of lightning (CP 149) and that disagreement over the amount of that loss was to be settled by appraisal. But because their PET report opined that part of the damage was caused by wear and tear rather than the covered peril, State Farm wrongly "put the appraisal process on hold" (CP 126) claiming that the claim presented "coverage" questions beyond the scope of the amount of the insured loss.

4. By raising question about the preexisting condition of damaged property can an insurer defeat the right to appraisal?

This is not the first that that a State Farm company has unsuccessfully argued that it can deny a policyholder's right to appraisal by questioning whether the loss was partly caused by an uncovered peril such as wear and tear.

In *State Farm Lloyds v. Johnson*, 290 S.W. 3d 886 (2009) the Texas Supreme Court considered whether a claim for roof damage from a hail storm was subject to appraisal of the amount of loss. In resisting appraisal, State Farm argued that since "it is disputing not just which shingles were damaged, but which were damaged by hail" a "coverage" issue of causation was presented which was

beyond the scope of appraisal of the “amount of loss.” The court rejected this argument

. . .when the causation question involves separating loss due to a covered event from a property’s pre-existing condition. Wear and tear is excluded in most property policies (including this one) because it occurs in every case. If State Farm is correct that appraisers can never allocate damages between covered and excluded perils, then appraisals can never assess hail damage unless a roof is brand new. That would render appraisal clauses largely inoperative, a construction we must avoid.

This was the conclusion we reached in *Gulf Insurance Co. of Dallas v. Pappas*, a case in which a fire worsened pre-existing sags in the floors and roof of a building. The parties hotly disputed how much the floors sagged before the fire, and whether the building’s interior should be repaired or completely replaced to restore it to its previous condition. The court of appeals held these issues were for the appraisers rather than the jury, and by refusing the writ we adopted that opinion. If appraisers cannot take pre-existing wear and tear into consideration in valuing the amount of loss, then we should have reversed it instead.

Indeed, appraisers must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need. When asked to assess hail damage, appraisers look only at damage caused by hail; they do not consider leaky faucets or remodeling the kitchen. When asked to assess damage from a fender-bender, they include dents caused by the collision but not by something else.

Any appraisal necessarily includes some causation element, because setting the “amount of loss” requires appraisers to decide between damages for which coverage is claimed from damages caused by everything else.

The Florida Supreme Court likewise concluded in another State Farm case that appraisers were authorized to appraise the amount of a policyholder’s loss caused by hurricane Andrew. It acknowledged that whether a claim is covered can present a coverage issue beyond the scope of the appraisers authority. However, in *State Farm v. Licea*, 685 So. 2d 1285 (Fla. 1996) it held that appraisers are charged with measuring the amount of damage attributable to the covered peril.

Thus, where there is a demand for an appraisal under the policy, the only “defenses” which remain for the insurer to assert are that there is no coverage under the policy for the loss as a whole or that there has been a violation of the usual policy conditions such as fraud, lack of notice, and failure to cooperate. We interpret the appraisal clause to require an assessment of the amount of a loss. This necessarily includes determinations as to the cost of repair or replacement and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded causes.

5. The burden of proof issue.

In its Motion for Summary Judgment, State Farm argued that its insureds were not entitled to a trial because they had not adequately identified trial experts. It incorrectly argued that experts “*are the only persons who can support plaintiffs’ version of lightning – related damage and monetary damage such as loss of use, diminution in value, and emotional distress. . . .*” [Italics supplied] (CP 19) Of course, this expert witness requirement does not apply to the work of appraisers.

The right to an informal appraisal is especially important given the relative financial resources of insurers and their policyholders. As pointed out in *State Farm Lloyds v. Johnson*, 290 S.W. 3d 886 (Tex. 2009):

Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings. It would be a rare case in which appraisal could not be completed with less time and expense than it would take to file motions contesting it.

In *Beard v. Mt. Carroll Mutual Fire Ins. Co.*, 561 N.E.2d 116, 118 (1990 (Il. App.)), the Court noted an appraisal agreement provides:

“ . . . a contractual method for settling questions in a less complicated and expensive manner than through court adjudication. [W]hen as here, parties

agree to have value affixed by an appraisal, they must abide by their own agreement"

The *Beard* case dealt with an insurer sought to avoid appraisal of a claim for the total loss of a rental house arguing that "there was no property left to appraise." The opinion noted the wide range of informally obtained evidence appropriate for appraisers to consider.

For example, the owner of the property, as well as its tenant or neighbors, may have knowledge of the condition of the premises prior to the fire. There may be recent photographs of the premises. The appraisers themselves may even have had prior knowledge of the value of the property. . . .the value of destroyed property may be obtained from previous knowledge of the property by appraisers themselves, or it may be afforded a description of the property contained in the proof of loss or from measurements, plans, photographs, etc.

No authority exists that even suggests that an appraisal requires a hearing or evidence from expert witnesses – much less that appraisers can only consider evidence admissible under the Rules of Evidence.

Had trial proceeded the two appraisers could have testified regarding their own investigations and conclusions about the loss, allowing a "case within a case" consideration of the likely outcome of the interrupted appraisal. State Farm's own motion materials show

that both appraisers had a great deal of information available to them (though not as much expert help as they desired). They each could have testified to their opinions about the loss even on the truncated information referenced in the Motion for Summary Judgment. This included: Expert reports (CP 78, 99, 103), multiple meetings and inspections at the site, one where they were joined by a representative of McBride Construction (CP 69, 12, 126), photographs taken by State Farm's engineer (CP 86-88), as well as their own questioning of the insureds and reports of interviews by engineers retained by State Farm. (CP 78, 94, 98, 103)

An insurer should not be allowed to deny its insureds the right to informal appraisal. If it can force policyholders to endure delay and the expense to prepare and present expert testimony at trial, the insurer effectively denies its policyholder the benefit of an informal, low cost, appraisal.

6. Is there evidence to support plaintiffs' claim of bad faith?

As presented in sections 1 and 2 above, there is evidence that State Farm violated WAC 284-30-330 and 370 by failing to *promptly* and *reasonably* investigate plaintiffs' claim. A single violation of an Unfair Claims Settlement Practice regulation

constitutes bad faith. *Anderson v. State Farm*, 101 Wn. App. 323 (2000).

The legislature has authorized the Insurance Commissioner to promulgate regulations defining specific acts and practices that constitute a breach of an insurer's duty of good faith. Those requirements, imposed by WAC 283.30.300 *et seq.* are *minimum* standards. That regulation is not exclusive and other insurer activities may be deemed to constitute violations of the general good-faith standard established by RCW 48.01.030. . . . The trier of fact determines the reasonableness of an insurer's actions.

Harris, Washington Insurance Law, (3d) § 7.01

7. **Could a reasonable jury infer that plaintiffs' were emotionally distressed by State Farm's claims procedures?**

State Farm incorrectly argues that plaintiffs cannot recover for the emotional distress and inconvenience attested to in discovery responses (CP 196) without showing "objective symptomatology, . . . susceptible to medical diagnosis and proven by medical evidence." State Farm seeks to apply the *liability* standard for stand-alone claims for emotional distress. That strict standard does not apply to the *measure of damages* once liability has been established.

State Farm is again repeating an argument that it lost in *Anderson v. State Farm*, 101 Wn. App. 323 (2000). That case holds:

Moreover, because bad faith is a tort, a plaintiff is not limited to economic damages. *Coventry*, 136 Wash.3d at 284-285, 961 P.2d 933. Anderson alleges that she and her husband suffered emotional distress due to the financial difficulties. On remand she is entitled to a trial to prove the amount of damages, both financial and emotional, caused by State Farm's bad faith failure to disclose a pertinent coverage and the resulting delay in obtaining coverage.

In summary, Anderson has established as a matter of law the elements of a bad faith claim and a Consumer Protection Act claim arising from State Farm's failure to disclose the UIM coverage. She is entitled to trial to determine the amount of damages caused by the unnecessary ten-month delay before she knew a UIM claim was possible.

The *Anderson v. State Farm* case follows the reasoning of *Nord v. Shoreline Savings Assoc.*, 116 Wn.2d 477, 485 (1991) allowing recovery for emotional distress caused by breach of a fiduciary duty. In *Nord*, the only evidence of emotional distress was that plaintiff was "shocked, very hurt, and "upset." He was "incensed and found it very disturbing that he was mistreated" by a fiduciary. In holding this testimony was sufficient to uphold a jury award for emotional distress, the court stated:

Instead, defendant argued that the instruction was erroneous because it did not require a showing of objective symptoms, and because the evidence did not support the instruction. . . . However, the objective symptom requirement applies in cases where negligent infliction of emotional distress is asserted, and goes to proof of liability, not damages. *Hunsley*, 436, 553 P.2d 1096; see generally *Cagle*, 106 Wash.2d at 920, 726 P.2d 434. The trial court properly rejected defendant's claim that objective symptoms must be shown before compensatory emotional distress damages may be awarded. As to defendant's claim that the evidence did not support an award of emotional distress damages, we uphold that award, thus confirming the trial court's rejection of this objection.

8. **Could a reasonable jury infer that plaintiff's suffered loss of use and diminished value of their home by State Farm's delay and wrongful denial of part of their claim?**

The loss due to years of delay since the November 2006 lightning strike claim was presented is exemplified by plaintiffs' inability to use their fireplace until making self-financed repairs in March of 2008 (CP133, 227) at the least, this creates an inference that plaintiffs were damaged by the loss of the full use of their home and that the value of their home was diminished during the delay caused by mishandling of the contested portions of their claim.

V. REQUEST FOR AWARD OF ATTORNEYS FEES

Pursuant to RAP 18.1, plaintiffs seek an award of reasonable attorney fees on appeal under IFCA (RCW 48.30.015), the CPA (RCW 98.86), the *Olympic Steamship* case (117 Wn.2d 37) and the law of bad faith.

The award is appropriate when a policyholder is required to incur litigation costs to secure the benefits of an insurance contract or to establish bad faith conduct on the part of the insurer.

VI. CONCLUSION

Plaintiffs seek reversal of the Summary Judgment dismissal and remand for trial on each of their claims.

On remand, the parties should both be allowed to proceed under relaxed rules of evidence regarding expert opinions consistent with the appraisal process rather than the formal Rules of Evidence.

An award of attorney fees on appeal is also requested.

Respectively submitted this 19th day of December 2011.

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CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the State of Washington, that on December 19, 2011, I caused to be delivered a true and correct copy of: Appellants' Brief by ABC Legal Messengers, Inc. to:

Clerk, Court of Appeals, Division I
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123 Appraisal. In case the insured and this company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then, on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire; and failing for fifteen days to agree upon
130 such umpire, then on request of the insured or this company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized, of any two when filed with this company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.

www.insurance.wa.gov/companies/rates_forms/documents/1943-NY-Standard-Fire-Insurance-Policy.pdf
Lines 123 -140

APPENDIX