

70540-7

70540-7

NO. 70540-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

SETH LAYMAN and MOLLY LAYMAN, husband and wife,

Appellants

v.

21ST CENTURY NORTH AMERICA INSURANCE CO.; and
FARMERS INSURANCE COMPANY OF WASHINGTON,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

21st Century's response is remarkable for what it does not contest. 21st Century admits that the Laymans have never been late on an insurance premium payment before, had never missed a payment due date, and had never been threatened with cancellation if their premiums were not paid. CP 18, 157. 21st Century admits that the Laymans received insurance cards from 21st Century, stating that they had coverage through July 3, 2011. CP 165-166. 21st Century makes no argument that the communication sent to the Laymans along with their insurance cards provided them with proper notice of an offer to renew, or of the amount due, or of a pending due date for an insurance premium. In fact, 21st Century concedes that it never sent the Laymans a bill or offer of renewal to their home address, *or their email address*. CP 101. 21st Century concedes that it never sent them notice, to their home address or their email address, that their policy would be cancelled for non-payment of premium if timely payment was not made. 21st Century never sent the Laymans an email indicating that there was a bill or time sensitive material for them to review online. 21st Century offers no argument or evidence that would suggest that the Laymans were "shopping" for a new insurance carrier, or that they sought to avoid the expense of insurance to save money, evidence which might suggest that the Laymans made a

conscious choice to allow their policy to lapse. Again, the undisputed evidence shows that the Laymans sought immediate coverage from 21st Century upon hearing 21st Century inform them that their policy had been canceled. 21st Century's denial of coverage rests upon its belief, unsupported by case law or legal authority, that uploading a digitized image of a bill onto 21st Century's server, a bill that the Laymans never received, constitutes an offer to renew under RCW 48.18.292. As shown below, this argument has no merit, and demonstrates 21st Century has acted in bad faith as a matter of law.

II. REPLY

A. 21st Century's Motion is Premised on Disputed Issues of Fact.

1. The Laymans Did Not Sign Up for Paperless Billing.

21st Century asserts that these claims were properly dismissed by the trial court because the Laymans did not accept 21st Century's offer to renew their policy. Brief of Respondent, p.9. 21st Century concedes that the Laymans did not have actual notice of this offer to renew- no offer was mailed to the Layman's home or emailed to the Layman's email address- and bases this argument that it provided notice of an opportunity to renew coverage on a disputed issue of material fact: that the Laymans signed up

for paperless billing. As Molly Layman testified, she signed up for “correspondence” and not electronic billing. CP 164.

21st Century, however, contends that Molly Layman signed up for billing and correspondence.¹ According to 21st Century, they then “sent” the Laymans an offer to renew their insurance coverage by uploading the document into 21st Century’s server for the Laymans to view. When the Laymans did not log in to view the document, no payment was made and 21st Century denied coverage for the loss. The fact that Molly denies signing up for the paperless system, while 21st Century claims that she did, demonstrates an issue of material fact that should have prevented the trial court from granting 21st Century’s motion for summary judgment. Indeed, under the facts of this case, 21st Century’s credibility is at issue.

In addition, 21st Century’s statements and documents that they produce call into question 21st Century’s credibility. A trial court is prohibited from resolving issues of credibility on summary judgment. *Blaise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1963). As noted in the Layman’s opening brief, 21st Century has claimed that it sent

¹ Before the trial court and now on appeal, 21st Century offers “illustrative” exhibits as evidence to suggest that the Laymans signed up for paperless billing. The Laymans objected to these illustrative exhibits as improper, and inadmissible, evidence for a summary judgment consideration. CP 113. The Laymans renew their objection to these “illustrative” exhibits being offered as evidence. Even if considered by the Court, however, the fact that Molly Layman denies signing up for paperless billing presents an issue of material fact that cannot be resolved on summary judgment.

documents to the Laymans when it did not, and has offered documents into evidence that materially differ from the documents that the Laymans actually received from 21st Century. The statement that the Laymans signed up for electronic billing is a disputed issue of material fact and rests upon the credibility of 21st Century. The trial court erred in resolving this material issue of fact.

2. Even If They Did Sign Up For Paperless Billing, the Paperless Billing Does Not Relieve the Insurer of Its Contractual and Statutory Requirements of Providing Notice.

21st Century's argument is also based on a premise, which cannot be supported, that by signing up for the paperless system, the Laymans policy of insurance was changed. 21st Century argues that by signing up for the paperless system, their policy was changed to include a requirement that they log into 21st Century's server to view documents. Such an argument contravenes the express language of 21st Century's policy. This policy cannot be changed except by endorsement. CP 311. To the extent that 21st Century is arguing that these terms and conditions of the paperless system became part of the policy and obligated the insureds to log into 21st Century's website, 21st Century is arguing that it changed the policy without endorsement.

Moreover, the terms and conditions of the paperless system state “Your bills are sent to you via e-mail and provide the option to pay online...” CP 340. If the bills are sent to the insured as promised by 21st Century, there would be no need for a user to log into the system. At best, the terms and conditions create an ambiguity under the policy, and at worst, the terms and conditions show that 21st Century breached its policy by failing to send the information to the insureds via email. This ambiguity in the policy cannot now be used by 21st Century to defeat coverage, but must be construed against the insurer. *McDonald Industries, Inc. v. Rollins Leasing Corp.*, 26 Wn.App. 376, 380, 613 P.2d 800, affirmed 95 Wn.2d 909, 603 P.2d 947 (1980).

B. The Trial Court Erred in its Interpretation of Law in Favor of 21st Century.

On appeal, 21st Century contends that it complied with the RCW 48.18.292 by uploading a digitized image of the information it sought to “communicate” to the insureds into 21st Century’s website. 21st Century has failed to cite any legal authority—not one case, statute, legal treatise, or law review article—that supports an argument that uploading an image into 21st Century’s server complied with RCW 48.18.292. 21st Century fails to cite any authority—not one case, statute, legal treatise, or law review article—that supports an argument that an image uploaded into 21st

Century's servers constitute a "writing" for purposes of providing notice required by statute. 21st Century fails to cite any authority—not one case, statute, legal treatise, or law review article—that suggests that uploading an image in a server satisfies the "to the named insured" requirement of the statute. In an attempt to avoid discussing this omission, 21st Century simply states that 'no Washington Court has addressed' the issues involved in this dispute. A Washington court need not articulate a basic, well-settled, legal principle that is found in a legal treatise in order for the meanings of those words to be effective in Washington law. More importantly for this analysis, any interpretation of the words "communicate", "in writing" and "to the named insured" must be interpreted, not according to rules of insurance policy construction², but statutory construction. As discussed more fully below, these arguments then demonstrate that 21st Century has acted in bad faith as a matter of law.

1. The Rules of Statutory Construction.

² 21st Century asserts that these words must be given a plain and ordinary meaning, citing *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Brief of Respondent, p. 17. *Boeing v. Aetna* provides rules of construction for language in an insurance policy, and not a statute. 21st Century's reliance upon *Boeing v. Aetna* as authorizing a plain and ordinary meaning is misplaced.

Before addressing 21st Century's arguments that it complied with RCW 48.18.292, Washington's rules on statutory construction, and insurance policy interpretation, must be restated.

The primary goal of *statutory construction* is to carry out legislative intent. *Woo v. Fireman's Fund Ins. Co.*, 150 Wn.App. 158, 164 (2009). In order to determine legislative intent, the Courts first consider the statute's plain meaning by looking at the text of the provision at issue, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Budik*, 173 Wash.2d 727, 733, 272 P.3d 816 (2012) (citing *State v. Ervin*, 169 Wash.2d 815, 820, 239 P.3d 354 (2010)). If a provision remains susceptible to two or more reasonable interpretations, it is ambiguous and the courts then consider the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent. *Budik*, 173 Wash.2d at 733, 272 P.3d 816. A court should not adopt an interpretation that renders any portion of the statute meaningless. *Woo*, 150 Wn.App. at 165. Courts favor interpretations that are consistent with the spirit of the enactment rather than literal readings that render the statute ineffective. *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833 (2003). “The interpretation that the court adopts should be the one that best advances the legislative purpose.” *Woo*, 150 Wn.App. at 165.

Insurance policies are construed as a whole and given a fair and sensible construction. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998). Courts “liberally construe insurance policies to provide coverage wherever possible.” *Bordeaux, Inc. v. American Safety Insurance Company*, 145 Wn. App. 687, 694, 186 P.3d 1188 (Div. 1, 2008). Any ambiguity in the policy must be construed most favorably to the insured. *Id.*, citing *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dists’ Util. Sys.*, 111 Wn.2d 452, 456-457, 760 P.2d 337 (1988). Most importantly, insurance policies, unlike other contracts, must be interpreted in light of public policy and statutory considerations. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn.App. 695, 699, 683 P.2d 1234 (1984).

Here, the statute 21st Century seeks to apply is RCW 48.18.292. RCW 48.18.292 is a notice statute. “The purpose of the notice requirements in the insurance code is to enable the insureds—all of them—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” *Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 162 (2002)) (internal citations removed). Thus, this Court must adopt an interpretation that best advances this legislative purpose.

2. 21st Century Has Failed to Show it “Communicated” its Offer to Renew to the Laymans.

Broadly stated, 21st Century contends that it “communicated” its offer to renew the Laymans insurance through a bill sent to them via the paperless system, even though the Laymans never received it. Respondent Brief, p. 14. 21st Century, however, describes its “communications” with the Laymans in a more accurate light when it states that it “issued” its offer of renewal to the Laymans via the paperless delivery system (Respondent Brief, p. 6), and that it “processed and issued” a follow up request via the paperless system rather than “communicated” with them. Respondent Brief, p. 7. Issuing an offer to renew, but not providing it to the insured to act upon, is not “communicating” the offer. Regardless, 21st Century has offered no authority to support its argument that uploading a digitized image of an offer to renew into 21st Century’s servers, an offer the recipient never receives, satisfies the “communicate” requirement of Washington law.

Here, 21st Century ignores the legal treatises cited by the Laymans on this issue and argues that no Washington court has construed the term “communicate”. Rather than analyze the word in the context of the statute, or with the purpose of the statute in mind, 21st Century then offers a definition of “communicate” that does not require that the information

being conveyed to the insured actually be received by them. As the Laymans note in their opening brief, “communicate” is defined as “to convey knowledge of or information about: make known” and “to transmit information, thought, or feeling *so that it is satisfactorily received or understood.*” To the extent that 21st Century is offering or advocating a definition of “communicate” that does not require receipt of the information by the insured, 21st Century is advocating a definition that does not fulfill the purpose of the statute. 21st Century fails to cite any authority or offer any argument that the definition it proposes furthers the purpose of the statute.

While 21st Century argues that RCW 48.18.291 does not apply to the facts of this case, there can be no denying the Washington Court’s interpretation and purposes behind the notices required by the insurance statutes apply to the facts of this case. As noted by *Olivine and Cornhusker Casualty Ins. Co. v. Kachman*, 165 Wn.2d 404, 198 P.3d 505 (2008), strict compliance with the notice statutes is necessary, and an insurer’s failure to comply with the notices required by statute means that the policies remain in effect and the insured is entitled to coverage. Those same principles apply to RCW 48.18.292. While 21st Century may argue that this case does not fall within the scope of RCW 48.18.291, it offers no argument on why RCW 48.18.292 should be interpreted by the Courts in a

different manner than 290 or 291. The purposes behind the statutes are the same. Even if this case falls within RCW 48.18.292, *Olivine* and *Cornhusker Casualty* are instructive of how Washington Courts, including the state Supreme Court, would interpret this statute.

3. Case Law From Other Jurisdictions Is On Point.

While 21st Century now states that no Washington Court has addressed “communication” of an offer to renew a policy, 21st Century’s argument that an insured need not receive the offer of renewal for the information to be communicated has been raised, and rejected, by courts in other jurisdictions. In *Dauzat v. Gem Underwriters, Inc.*, 602 So.2d 196 (La. 1992), an insurer offered to renew Dauzat’s policy of insurance, but conveyed the information to the insurance broker, and not Dauzat. Dauzat was in an accident after the policy expired, and Dauzat filed suit for coverage, contending that the policy was still in effect because no notice of offer to renewal was provided by the insurer. In interpreting a statute virtually identical to Washington’s automobile insurance cancellation statutes, the Court noted that an insurer must renew a policy unless it complies with an exception to the statute, and one exception to renewal related to an insurer “manifesting” a willingness to renew a policy. The “insurer is not required to renew a policy or give notice of its intention not to renew if it has “manifested its willingness to renew.”

Dauzat, 602 So.2d at 199. “The primary issue raised by these facts is whether [the insurer] properly manifested its willingness to renew *Dauzat*’s policy.” *Id.* Interestingly, the determination of whether an insurer “manifested” an intention to renew in the Louisiana Court turned on whether the insurer “communicated” its willingness to renew to the insured. “[I]t is clear that the insurer’s willingness to renew the policy is ineffective unless it is communicated to the insured, because he will be aware that the choice of continuing coverage rests solely with him only if he knows that the company is willing to renew the policy.” *Dauzat*, 602 So.2d at 199, citing *Ray v. Associated Indemnity Corp.*, 373 So.2d 166, 168 (La. 1979). The *Dauzat* Court went on to state:

If the insured does not receive the necessary communication from the insurer, for whatever reason, then the insurer is subject to the notice of cancellation provisions of §636.1. ...The insurer’s intent to renew must be communicated to the insured; if not, and the burden of risk is placed on the insurer, then the insurer must notify the insured prior to cancelling the coverage in compliance with [the cancellation statutes].

Dauzat, 602 So.2d at 199.

Because the insurer did not provide the insured with notice of an offer to renew, the Court found that coverage for the loss was in effect, even though the insurer argued that it had offered to renew the policy and

the insured failed to make a premium when due, just as 21st Century has done in this case.³

Likewise, in *Garner v. GEICO*, 199 S.E.2d 350 (Ga. 1973), an insurer claimed that the policy expired on its own terms because a premium payment had not been made after an offer of renewal. The *Garner* Court noted that under the applicable Georgia statutes, an insurer could provide notice of cancellation and non-renewal by mailing these notices to the insured, but “no such express provision is made for the giving of the notice of willingness or intent to renew.” *Garner*, 199 S.E.2d at 352. Under well settled rules of statutory construction, the court found that the offer must actually be received by the named insured to be effective. The writing “unless communicated to the offeree, constitutes no offer” to renew a policy. *Id.*

This authority is not address by 21st Century. Indeed, as the Laymans noted in their opening brief, “When a statute requires that written notice be given, but does not specify how it must be given, the written notice is not effective until it is received.” 58 Am. Jur. 2d, *Notice*, §30. RCW 48.18.292 requires a notice to the insured in writing, yet 21st Century argues, without support, that the notice need not be received to be

³ As the Laymans have argued, because the statutes require the insurers to renew the policy unless a specific exception applies, the Courts treat a subsequent attempt by the insurer to deny coverage where notice was improper as an improper cancellation of the policy.

effective. There is no merit to 21st Century's argument that actual receipt is not required for the communication to be deemed effective.⁴

4. 21st Century Has Failed to Show That It Put Its Offer to Renew "In Writing".

In their opening brief, the Laymans noted that "[w]here written notice is required, an electronic mail message is insufficient to satisfy the requirement." 58 Am.Jur. 2d., *Notice* §35. 21st Century offers no argument or alternative authority to contradict this legal principle. Just as it did with "communicate", 21st Century does not examine the "writing" requirement under statutory construction, or with the purpose of the statute in mind, but rather, offers a dictionary definition of "writing" that broadly includes "other" suitable means of recording words, arguing that an email would satisfy this definition. Again, by coupling 21st Century's argument that the notice need not be received to be effective, 21st Century argues that it can comply with RCW 48.18.292 by placing its offer to renew in a foreign newspaper, or by hiring an airplane to trail a banner with the offer. In either case, the statutory purpose is not met, and the definition of "writing" is distorted well beyond the plain language found in the statute.

⁴ If 21st Century had wanted to avoid proving that the notice was received by the Laymans before it was effective, it could have sent the offer to renew under RCW 48.18.291(1). RCW 48.18.292 (1)(a). Under that scenario, proof of mailing would have been all that was required of 21st Century to show compliance with the statute. However, by seeking to convey notice without mailing the communication to the insured, the notice must be actually received by the insured in order to be effective notice. *Cornhusker Casualty Ins. Co. v. Kachman*, 165 Wn.2d 404, 198 P.3d 505 (2008).

Here, the legal authority cited by the Laymans establishes that where “written” notice is required, an electronic communication is not sufficient. An email can get lost or intercepted by a filter, making it an unreliable method of providing notice required by statute.⁵ 21st Century has not complied with RCW 48.18.292.

5. 21st Century Has Failed to Show That it Sent its Offer “to the Named Insured”.

Noticeably absent from 21st Century’s brief is any discussion whatsoever of the statutory requirement under RCW 48.18.292 that the communication be sent “to the named insured.” By offering no argument, 21st Century implicitly concedes that the notice, uploaded into 21st Century’s server and not sent *to the insured*, fails to satisfy the requirements of the statute.

6. 21st Century’s Argument Contradicts the Policy Terms.

21st Century’s argument that it satisfied the statutory requirement of communicating in writing to the named insured by uploading a digitized image of the bill onto 21st Century’s website also violates the express term of the insurance policy it issued to the Laymans. 21st Century notes that the termination provisions of the policy address cancellation, nonrenewal and automatic termination, but 21st Century fails to address a

⁵ Still, it bears repeating that even if an email can constitute a “writing” under statute, 21st Century never sent the Laymans with an email notice.

fourth section of the policy on terminations, section D, “Other Termination Provisions.” CP 313. That provision states that 21st Century may *deliver* any notice arising under the termination provisions instead of *mailing it*. The policy says nothing of emailing the notice instead of mailing it, and nothing about uploading the notice into 21st Century’s server for an insured to log in to view. No endorsement changed this policy provision. Viewed in context, this provision relating to the termination provisions provides that 21st Century will “mail” or “deliver” notices under this section of the policy. While 21st Century states that the “mail” or “deliver” requirements of RCW 48.18.290 and 291 are irrelevant to the notices required for an offer of renewal, that argument is contradicted by the 21st Century policy. The “mail or deliver” language of RCW 48.18.290 and 291 are clearly relevant.

What is also clear is that when 21st Century’s arguments on “communication” and “writing” are read in conjunction with each other, its arguments do not support the purpose of the insurance notice statutes. In fact, they contradict the notice intended by the legislature.

7. 21st Century’s Argument is Based on Constructive Notice.

The flaw in 21st Century’s argument is that it presumes that constructive notice or delivery will comply with the statute. Again, 21st

Century fails to cite any authority to support an argument that constructive notice is sufficient notice under the statute. In fact, case law cited by the Laymans demonstrates that constructive notice is insufficient under insurance cancellation notice statutes. *Strickland Motors Ins. Corp.*, 970 F.2d 132 (5th Cir.).

Likewise, while 21st Century seeks to blame the Laymans for not logging into 21st Century's servers, and devotes considerable argument to the issue, the legislature has placed the notice requirement of these statutes upon the insurer, not the insured. As noted in *Strickland Motors*, an insured's caution and forethought, or neglect, does not excuse the insurer from their statutorily imposed obligation. *Strickland Motors*, 970 F.2d at 137. The steps the Laymans could have taken to remedy the insurer's defective notice are irrelevant.

8. 21st Century's Arguments on Ratification are Irrelevant.

21st Century attempts to argue that the Laymans ratified a decision to receive bills via the paperless system. This argument has no merit. As noted in Washington Practice, a party charged with ratification must have acted voluntarily, with full knowledge of the facts. 25 WA PRAC § 11:9. (citations omitted). There can be no claim that the Laymans acted voluntarily, or with full knowledge of the facts.

C. The Trial Court Erred in Treating this as an “Automatic Termination” Rather than a Cancellation.

21st Century’s attempts to portray its actions as involving an automatic termination under the policy, and not a cancellation, flow from its attempts to make *Safeco Ins. Co. v. Irish*, 37 Wn.App.554, 681 P.2d 1294 (1984) appear relevant to the facts of this case. One need only review the letter 21st Century sent to the Laymans denying coverage and citing a cancellation by the insurer, CP 195-196, the arguments 21st Century made to the OIC on the policy being canceled, CP198-199, and the sworn testimony of the 21st Century claims manager stating that the policy was cancelled CP 91-92, to see that 21st Century is engaging in revisionist history in its arguments on why this claim was denied. One need only note that because insurance policies automatically renew unless an exception applies, the Courts treat improper notice issues as improper cancellations of the policy. *Olivine, Cornhusker Casualty*. One need only read *Irish* to see that it is distinguished from the facts of this case.

In *Irish*, Safeco “mailed to Irish’s correct address” a statement with a renewal premium. *Irish*, 37 Wn.App at 556 (emphasis supplied). Irish did not pay the premium when due, and on February 15, 1979, Plaintiff learned that the insurer demanded that it receive payment before February 17 for his policy to remain in force. *Id.* The insured’s vehicle was stolen,

and totaled, but he did not make the required premium payment, despite having actual knowledge that the premium was due by February 17. *Id.* at 556-557. Indeed, the court repeatedly noted that the premium was not paid, despite knowledge that it was due. Thus, *Irish* turns on the fact that the insurer had fully complied with the statute by sending written notice of the bill and pending cancellation to the insured at his home address, and with this knowledge, Irish never made the required payment.

Irish stands for the unremarkable proposition that an insured who receives *actual notice* of a payment due, and fails to make the required payment, is not entitled to continued coverage. In contrast, where the insured lacks notice of an offer to renew or attempt by the insurer to cancel the policy, the insurance remains in effect and the attempts by the insurer are deemed “cancellations” because the policy automatically renewed. The undisputed remedy for improper notice of an offer to renew or cancellation is coverage. Couch on Insurance 3d §29.8 (where an insurer fails to provide proper notice, policy continues in effect as if it was automatically renewed); *Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 163, 52 P.3d 494 (2002); *Cornhusker Casualty Insurance Company v. Kachman*, 165 Wn.2d 404, 198 P.3d 505 (2008).⁶

⁶ 21st Century also argues that a “cancellation” is a unilateral act of the insurer terminating coverage during the policy term. Brief of Respondent, p. 20. In an attempt to distinguish *Cornhusker Casualty*, however, 21st Century claims that it is inapplicable

Thus, because Washington law requires 21st Century to renew the Laymans' policy (RCW 48.18.292) *unless certain conditions are met*, it is 21st Century's burden to show that it complied with the statute, and that one or more exceptions to the legislative mandate apply in a non-renewal scenario. 21st Century has not shown that it complied with any of the exceptions to the statutory requirement that it renew the Laymans' policy, and its subsequent attempts to disavow coverage are treated as an improper cancellation of the policy.

D. The “Automatic Termination” Language of the Policy is Irrelevant.

21st Century also failed to offer any arguments on why the presumption they seek to raise on the automatic termination clause—that the Laymans elected not to accept 21st Century's offer of renewal—does not ‘disappear in the sunshine of actual facts.’ The actual facts showed that the Laymans were not aware of the offer to renew, and cannot be deemed to have made a conscious decision to allow the policy to lapse. An evidentiary presumption is not evidence, and the trial court erred in applying an evidentiary presumption of automatic termination when the facts showed that the Laymans never intended to have their insurance

to the present case because the insurer there ‘unilaterally canceled’ a policy that automatically renewed. Brief of Respondent, 21.

coverage lapse, and never made a conscious decision to reject an offer of renewal.

E. 21st Century has Acted in Bad Faith as a Matter of Law.⁷

The Laymans stand by their arguments on bad faith, and these arguments have not been refuted by 21st Century. 21st Century ignores its changing rationale for why it denied coverage, and offers no argument why it should not be estopped from asserting arguments it failed to raise in its denial of coverage, or estopped from changing the arguments that it raised before the OIC. It ignores the issues of material fact surrounding 21st Century's investigation and defense to coverage, proclaiming that its conduct was appropriate in its own eyes. This is not a dispute involving a simple 'mistake' or 'clumsiness' involving 21st Century. 21st Century denied coverage when it believed, wrongfully, that it had sent the Laymans a statutorily required notice that their policy would be cancelled if they did not pay their premium to the Layman's home address. CP 181-182. However, after being informed that this was not true, 21st Century did not revisit its coverage determination. 21st Century's claim representative made no attempt to determine what documents were, or were not, sent to the Laymans via the electronic system. CP 41-46. 21st Century argued before the OIC that it provided the notices required by

⁷ Because the issues of bad faith, IFCA and Consumer Protection Act violations are all intertwined, the Laymans incorporate their arguments on bad faith in one heading.

statute to the insured electronically, which was an untrue statement. 21st Century never corrected its files, so more than one year later, when the Laymans asked 21st Century to revisit their coverage determination before filing suit, 21st Century still maintained that 21st Century had sent a bill and notice of pending cancellation to the Laymans' home. CP 65.

Even if the scope of 21st Century's investigation, and whether or not it was reasonable, present issues of material fact for summary judgment, there can be no dispute that 21st Century has acted in bad faith as a matter of law. *American Best Foods v. Alea London*, 168 Wn.2d 398, 299 P.3d 693 (2010), holds that an insurer acts in bad faith as a matter of law, in the third party context, when it arbitrarily resolves issues on coverage against the insured while the third party claims are pending. *American Best*, 168 Wn.2d at 413. There, the insurer denied a claim for coverage because no Washington authority had addressed, or resolved, the underlying issues. Bad faith was found when the insurer arbitrarily resolved how Washington Courts would resolve the issue, instead of defending under a reservation of rights and filing an action for declaratory relief to verify its position. In the present case, 21st Century offers the argument that it denied coverage to the Laymans because it complied with RCW 48.18.292 by "communicating" "in writing" "to the named insured" by uploading a digitized image onto 21st Century's server, even if the

information was not received by the insured. 21st Century now concedes that “no Washington Court has construed the terms “communicate” and “in writing” in the context of RCW 48.18.292. The fact that 21st Century arbitrarily resolved these issues against their insured while claims were pending against the Laymans shows that 21st Century acted in bad faith as a matter of law. 21st Century makes no attempt to distinguish *American Best*, and does not even offer argument on why this Court cannot find bad faith as a matter of law.

Moreover, the essence of bad faith is a defense to coverage that is frivolous or unfounded. Here, 21st Century has offered no authority to support its arguments. 21st Century fails to cite one case, from any jurisdiction, that holds its conduct satisfies the notice requirements of an insurance statute. 21st Century fails to offer any argument that its interpretation of the insurance notice statutes furthers, rather than contradicts, the legislative purpose behind the statute. 21st Century’s defenses to these claims are both frivolous and unfounded.⁸

F. The Report of Buddy Paul is Not Inadmissible.

⁸The duty to act in good faith arises out of the contractual relationship between the parties. 21st Century cites case law suggesting that bad faith may only be brought by an insured under the policy, but cites authority where someone other than an insured attempts to make a claim of bad faith upon the insured’s policy. These cases are inapposite.

Before the Trial Court, the Laymans offered the expert report of Irving “Buddy” Paul. CP 69-74. Mr. Paul is a licensed attorney and an Adjunct Professor of Insurance Law at the University of Idaho College of Law. He has practices in insurance law for many years, has conducted training programs on behalf of multiple insurance carriers, and has served as a testifying expert on insurance coverage disputes and claims handling matters. His report, required for Federal Court, was filed in connection with this claim, and mirrors the report filed by 21st Century, in that it touches on 21st Century’s investigation into the Layman claim.

While the Paul Report notes a number of deficiencies related to 21st Century’s investigation, misleading statements to the OIC, and examples where 21st Century’s conduct fails to conform to custom and practice within the industry, 21st Century moves to strike it in its entirety. 21st Century’s description of the report and its contents are not accurate. For example, while the Report contains a discussion section with Mr. Paul explaining his reasoning, he also includes a section that summarizes his opinions, and 21st Century then refers to these section summaries to allege deficiencies. 21st Century’s arguments go to the weight and sufficiency, and not admissibility. Regardless, 21st Century’s bad faith is established as a matter of law with 21st Century’s own admission that it arbitrarily

resolved questionable interpretations of a legislative statute against the interests of its insured, while a third party claim was pending.

III. CONCLUSION

In short, 21st Century argues that it complied with RCW 48.18.292, yet it offers no legal authority to support its argument. Desperate to make RCW 48.18.292 the focus of the case, 21st Century fails to address the question of ‘what happens if the notice it claims to have provided under RCW 48.18.292 was ineffective?’ The answer to that question lies in case law, holding that the policy would have automatically renewed, the Laymans would be entitled to coverage, and 21st Century would be found to have improperly canceled the policy under RCW 48.18.291. In addition, by resolving these questions of whether its notice complied with the statute against their insured while a third party claim was pending, 21st Century acted in bad faith as a matter of law.

Dated this 27th day of November, 2013.

Respectfully submitted,

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