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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' Opening Brief

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I. INTRODUCTION

This case concerns a dispute over insurance coverage. Appellants Seth and Molly Layman have been insured by Farmers or its affiliate Respondent 21st Century, since 2003. They have never been late on their payment, and have never missed a payment. In November of 2010, Molly Layman responded to a solicitation from 21st Century, advising her that she was eligible for a \$500 gift card by signing up for a paperless system being promoted by 21st Century. The Laymans signed up for part of the paperless system, but *did not* elect to receive their bills via the system. The Laymans then received, via the United States Mail, insurance cards showing coverage through July 3, 2011. They never received a bill or a notice of an offer to renew their insurance policy. On February 23, 2011, Seth Layman was involved in an automobile accident, and his vehicle struck a vehicle owned by Brent Gonzales. Mr. Gonzales submitted a claim to 21st Century, and as part of the initial claim review, Heather Turner of 21st Century examined the Layman's file. 21st Century's file showed, incorrectly, that the Laymans had been mailed a bill for their insurance premium. 21st Century's file also showed, incorrectly, that 21st Century had mailed a notice of pending cancellation to the Laymans at their home address. 21st Century then denied the Laymans' claim for coverage, contending that the policy had been canceled by 21st Century for

non-payment of premium. Subsequently, 21st Century learned that the bills had never been sent to the Laymans, and that the notice of pending cancellation had also not been sent to the Laymans. In fact, 21st Century has never sent the Laymans a bill to their home address or their email address. Digitized images of the documents, however, had been uploaded into 21st Century's server. 21st Century then altered its basis for denying this claim, contending that its denial of coverage was proper under law. The trial court agreed, holding that uploading a digitized image of a document into 21st Century's servers, even if it was not received by the insureds, provided notices required by statute before a policy can be cancelled or non-renewed by an insurer. The trial court also ignored 21st Century's changing arguments, and dismissed the Laymans' claims of bad faith. This appeal follows.

II. ASSIGNMENTS OF ERROR

- a. The Trial Court erred when it found that 21st Century complied with RCW 48.18.291 by canceling this policy of insurance without providing the Laymans with a bill, or notice that their policy would be canceled for non-payment of premium if they did not make a timely payment.

- b. The Trial Court erred when it denied the Laymans' motion for summary judgment, holding that 21st Century complied with RCW 48.18.291 before canceling this policy of insurance.
- c. The Trial Court erred when it found that 21st Century complied with RCW 48.18.292 by uploading a digitized image of a document into 21st Century's server, instead of mailing the document, in writing, to the named insured.
- d. The Trial Court erred when it denied the Laymans motion for summary judgment, holding that 21st Century complied with RCW 48.18.292 before denying this claim.
- e. The Trial Court erred when it resolved disputed issues of material fact on the documents the Laymans elected to receive electronically.
- f. To the extent that the Trial Court relied on "illustrative" exhibits offered by 21st Century, the trial court erred in not basing its summary judgment determination on admissible evidence, or by impermissibly weighing the evidence.
- g. The Trial Court erred when it found that the Laymans elected not to renew their policy, as there are no facts offered to support such an inference, and such an inference cannot be decided in favor of the moving party on summary judgment.

- h. The Trial Court erred when it found that 21st Century did not act in bad faith.
- i. The Trial Court erred when it denied the Layman's motion for summary judgment on bad faith, implicitly holding that 21st Century conducted a reasonable investigation into the facts and circumstances before denying this claim, and that 21st Century had a reasonable justification for denying the claim.
- j. The Trial Court erred when it denied the Layman's motion for summary judgment on bad faith as a matter of law, implicitly holding that 21st Century acted reasonably when it arbitrarily resolved questions of coverage against its insured while third-party claims, and a duty to defend, were pending.
- k. The trial court erred when it denied the Laymans their reasonable attorney fees and costs under Olympic Steamship, the Consumer Protection Act, and the Insurance Fair Claims Conduct Act.

III. STATEMENT OF THE CASE

Seth and Molly Layman have had insurance coverage with Farmers Insurance Exchange for their automobiles since 2003. CP 29-31. In 2008,

their policy switched to 21st Century, a Farmers affiliate.¹ CP33. (They also have had homeowners' insurance through Farmers since 2003). The Laymans paid the first premium down payment in the amount of \$749.66 on July 2, 2008. CP 151. 21st Century issued a policy dated July 3, 2008 with a term through January 3, 2009. Thereafter, the Laymans consistently paid their biannual renewal payments by or before the due date. For example, on June 15, 2010, the Laymans paid 21st Century \$502.72 for the policy term of July 3, 2010 through January 3, 2011. CP 33. They never missed a payment and never made a late payment. CP 18. At no time prior to the events relevant to this dispute has 21st Century ever threatened to cancel their policy. CP 157.

21st Century Promoted its Paperless System

In July 2010, and for some time prior, 21st Century sent the Laymans postcards that promoted its "paperless" delivery system of documents. CP 159. The July postcard touted saving trees and the environment and offered an incentive—a gift card, for signing up. *Id.* The Laymans had received approximately a dozen such letters or cards in the mail and by email over the prior year or so. CP 158. Inundated with the offers, Molly decided to investigate 21st Century's offer. CP 160. In order to do so, she was required to create a user name and password on

¹ The original policy was issued by a different insurance carrier, but shortly after the policy was issued, 21st Century acquired the company and/or policy.

21st Century's website. *Id.* However, after doing so, she decided not to pursue it further. *Id.*

In November 2010, 21st Century offered a chance to win a \$500 Apple gift card for signing up for the paperless system. CP 161. After contacting 21st Century, Molly started the process. CP 161-162. One of the screens displayed the types of documents that could be received electronically: policy, billing, correspondence.² CP 163. Molly selected correspondence. CP 164. Shortly after signing up for electronic delivery, the Layman's received their proof of insurance cards from 21st Century, noting coverage for the period 1/3/2011 through 7/3/2011. CP 165-166. They did not receive a bill, nor did they receive an offer of renewal, stating when their premium for coverage would be due. CP 101-102.

A Third Party Makes a Claim Against the Laymans; the Laymans Suffer a Loss

On February 23, 2011, Seth Layman was involved in a collision with a 2008 Honda Fit. CP 172. He was at fault. *Id.* Although Seth Layman's vehicle was not damaged, the other vehicle was damaged and one of the occupants went to the hospital with a possible concussion. CP 173, 174. Seth did not make a claim against his policy; however the other party's insurer, AAA, made a claim. CP 173-174; 154-155. Call records

² According to the terms and conditions of the paperless system, 21st Century informed its insureds that they would send the documents to the insureds via email. CP 340. At no point in time, however, has 21st Century sent the documents to the insured's via email.

show the claim was made to 21st Century on February 24, 2012. CP 176.

The total damage to the Honda Fit was \$14,390.19. CP 178.

Three hours after the claim had been reported to 21st Century, Molly Layman received a phone call from 21st Century informing her that coverage for the claim would be denied. CP 155-156; 182. According to Heather Turner, the 21st Century adjuster assigned to the claim, she reviewed the 21st Century file, which contained electronic copies of documents purportedly sent to the Laymans. CP 181-182. 21st Century's files incorrectly showed that a hard copy of a billing invoice had been sent to the Laymans' home address. *Id.* Their files also incorrectly showed that a hard copy of a subsequent notice, warning the Laymans that their policy would be cancelled if payment was not made, was also sent to their home address. *Id.* The invoice and notice warning of cancellation, however, were never sent to the Laymans. CP 181-182. In fact, at no time relevant to this dispute has 21st Century *mailed* them a bill for this period of coverage. CP 101. At no time relevant to this dispute has 21st Century *emailed* them with a bill for this period of coverage. CP 101. At no time relevant to this dispute has 21st Century emailed them with a *notice that a bill was outstanding and unpaid.* CP 101. At no time relevant to this dispute has 21st Century *mailed* the Laymans a warning that they must pay the premium by a date certain or suffer a lapse in

coverage, nor has 21st Century *emailed* the Laymans such a notice, *or emailed them* to inform them that an important document, such as a warning that their policy would lapse if the payment was not made, required their review. CP. 102. These facts are undisputed.

21st Century Denies the Claim.

After confirming that 21st Century had the correct mailing address for the Laymans, 21st Century denied coverage for the claim. CP 183, 195. When Molly Layman informed Ms. Turner that she had not received a bill or notice that payment was due, believing that her mail had been stolen or mis-delivered, the 21st Century adjuster went to her supervisor, believing that coverage should exist under the policy. CP 37-38. However, she informed her supervisor, incorrectly, that 21st Century had mailed a *notice of renewal and pending cancellation to the Laymans at their home address*. CP 36-37. Her supervisor overruled her and directed her to deny the claim, noting that 21st Century had the Layman's correct address for the notice. CP 37-38. It is undisputed that this claim was denied with full knowledge that the insured faced third-party claims for liability arising out of the automobile accident that triggered the claim. CP 53.

A subsequent Investigation reveals that Digitized Images of the Documents were uploaded into 21st Century's Server.

Although 21st Century's record incorrectly showed that the invoice and notice of cancellation had been sent to the Laymans' home address, and that assumption was used by 21st Century as the basis for denying the claim for coverage, these documents were never sent to the Laymans. A subsequent investigation has revealed that a digitized image of the bill intended to inform the Laymans of the amount due and the due date for their policy premium was uploaded into 21st Century's server. CP 185. A subsequent investigation also revealed that when 21st Century did not receive the payment by the due date, it also uploaded a digitized image of a second bill into 21st Century's servers, stating that the Laymans' policy would be cancelled if they did not make payment. CP 347-348. These documents were never sent to the Laymans, either by mail or email. Rather, once the digitized image of a document is uploaded into 21st Century's server, a user of the paperless system may receive an email informing them that "a document" has been uploaded, but the email does not identify the type of document or inform the customer that it is time sensitive. The email sent to the customer does not identify the document as a bill. A customer would have to log into 21st Century's server in order to find out if the document was an important document, or simply junk mail. CP 189, 191-192. The Laymans, however, never logged into their account to view the images that had been uploaded. CP 167. Thus, it is

undisputed that the Laymans were not aware of a bill, or a deadline for payment, and were not aware of any purported offer to renew their insurance coverage, or a deadline by which they had to respond. Having received their insurance cards from 21st Century, they believed that they were covered.

21st Century does not reevaluate the Facts, but adjusts its arguments on why the claim was denied.

After the claim was denied, 21st Century did not re-evaluate its coverage determination in light of the facts it discovered, but rather, shifted its rationale in an attempt to justify its initial coverage determination. CP 51-52. For example, despite being told that the information sent to the Laymans did not contain a bill or billing information, 21st Century's claims representative never bothered to determine whether or not the email notification sent to the Laymans contained a bill. CP 48-50. When the Laymans informed 21st Century that they had not received either a mailed invoice or an invoice via email, and informed 21st Century that the emails they received did not contain a bill, 21st Century did not investigate what was contained in the emails sent to the Laymans, but stood by its denial of coverage. *Id.* When the Laymans filed a claim with the Washington Insurance Commissioner's office, 21st Century defended its actions by arguing that it complied with

Washington statutes by ‘sending’ the Laymans the required information electronically. CP 41-42.³ 21st Century juxtaposed its response to the OIC inquiry to make it appear that 21st Century had sent the Laymans the actual information, as opposed to a generic email stating that ‘documents are available for review.’ 21st Century asserted that “Mrs. Layman signed up for the paperless system and in doing so agreed to receive policy notifications via email.” CP 199⁴

After learning that the documents were never sent to the Laymans home via mail, or even email, 21st Century did not correct the notations in its claims files to indicate that the documents were never sent. 21st Century continued to assert that the documents had been sent by mail to the insureds at their home address well after 21st Century knew this to be untrue. When the Laymans asked 21st Century to clarify the documents that were sent to them at their home address, on March 24, 2011, 21st Century again stated that it had mailed a copy of the billing invoice for coverage for the period 1/2/11 through 7/3/11 to them at their home address. CP 62-63. This correspondence also stated, incorrectly, that a

³ 21st Century never mailed, or emailed, a bill or pending cancellation notice to the Laymans, or even an “offer” to renew their policy. Despite this fact, 21st Century argued before the OIC that it “sent” notice to the Laymans.

⁴ As discussed below, 21st Century’s argument that it “sent” the information to the Laymans is deceptive in that is treating its uploading of a document into 21st Century’s servers for the Laymans to log into and view as “sending” it to them, even though these documents remain in 21st Century’s servers, and are never mailed, or emailed, to the insured.

billing invoice was sent to their address, warning them of the need to make payment to avoid a lapse in coverage. *Id.* Neither of these statements was true when made, and they were made with full knowledge that they were untrue at the time. CP 54-55. These false statements have a reverberating effect on the claim, and 21st Century's handling of it. When the Laymans' counsel asked 21st Century to review its coverage decision in February of 2012 before the Laymans filed suit, 21st Century then cited this information as to why its denial of coverage was proper. The claims log notes state: "Reviewed file. This loss was disclaimed as the policy had lapse. The insured claims she did not receive the bill or the dec page. The bill was sent to the insured's home on 12/10/10 with due date of 1/03/11. ... A cancellation notice was mailed to her home on 1/07/11". CP 65 Several days later, a second notation was made: "Our prior coverage investigation has revealed that the insured was sent notification of the premium due. The insured's attorney does not have any new information to share that would change our coverage decision." CP 67. Thus, 21st Century was not examining the coverage issues in light of the actual facts and circumstances, but relying upon information its adjusters knew to be false to support its rationale for denying this claim. These deficiencies were detailed by the Laymans' insurance expert, who opined that 21st Century's investigation of this claim was woefully inadequate. CP 69-74.

The Laymans Take Action to Secure Immediate Coverage.

Upon being informed by 21st Century that their policy had been cancelled, the Laymans sought immediate coverage from 21st Century, going so far as to obtain an insurance rider for one day of coverage from a separate carrier, since they had been unaware the payment had not been made, and they did not want to drive without insurance. CP 155-156. 21st Century accepted their payment, continuing coverage under the same policy number, and for the same term, but simply changing the start date to post date the accident. CP 33.

21st Century Communicates its Denial of Coverage to the Third Party Carrier seeking payment for the accident.

After denying coverage to the Laymans, 21st Century conveyed its coverage decision to the third-party claimant and their insurance carrier, AAA. CP 201. AAA has attempted to collect on the liability it paid to its insureds directly from the Laymans. CP 178, 201. It has subsequently transferred the claim to a third party collection agency, Afni Insurance Services. *Id.* Those claims are still pending.

Litigation History and Current Status

On March 2, 2011, Molly submitted a complaint to the Washington State Office of Insurance Commissioner. CP 29-31. 21st Century responded in a letter dated March 22, 2011, writing that “Due to the policy

canceling on 1/3/11, coverage was denied for this accident and a claim denial letter was sent to Mr. and Mrs. Layman on 2/25/11.” CP 198-199; 203-204. (Emphasis supplied.) In response to the OIC complaint, 21st Century defended its conduct by stating that the Laymans signed up for the paperless system and received email notifications of new documents available online for review. It treated the email notice of cancellation as effective notice for cancelling policies under RCW 48.18.291. It failed to disclose that Molly did not sign up for paperless *billing*, had not received or reviewed any billing invoices or notices to pay for coverage before cancellation either by mail or by email. 21st Century failed to inform the OIC that the emails it sent to the Laymans were generic, simply noting that a document had been uploaded into 21st Century’s servers, and mislead the OIC into believing that 21st Century had sent the documents to the Laymans via email.⁵ CP 198-199.

On January 19, 2012, the Laymans, through their counsel, notified the Washington State Office of Insurance Commissioner, pursuant to RCW 48.30, that they would file a civil lawsuit against 21st Century for breach of contract and violations of the Insurance Fair Conduct Act. CP 206-208. In light of this claim, 21st Century purportedly reviewed its file and, relying upon the statements in the file that the documents had been

⁵ OIC records show that the OIC believed that the invoices were actually sent to the Laymans via email. CP 214.

sent to the Laymans by United States mail, again concluded that that 21st Century properly cancelled the policy for non-payment. CP 210, 212. After satisfying the statutory notice and waiting period requirements, the Laymans filed an action to obtain coverage under the insurance policy, and for bad faith. 21st Century then removed this action to federal court, citing diversity of citizenship. CP 507-511. The case was litigated in Federal Court, and at the conclusion of discovery, both the Laymans and 21st Century moved for summary judgment. Before deciding the motions, Judge Coughenour remanded the case to state court, citing lack of federal court jurisdiction. CP 1066-1068; 1088-1093. The parties then agreed to submit their summary judgment materials, previously filed with the Federal Court, to the Island County Superior Court for ruling. On June 7, 2013, Judge Churchill found in favor of 21st Century, essentially holding that 21st Century complied with Washington law by uploading a notice of policy cancellation, or offer to renew, into its server, even if those documents were never sent to the insureds at their home address, and even if those documents were never received by the insureds. The Court dismissed the Layman's claims for bad faith, even though 21st Century denied coverage while a third-party claim was pending, and offered no authority in support of its argument that a digitized image uploaded into 21st Century's server, and not sent to the insured, satisfied the notice

requirements of the statute. Despite the Laymans offering expert testimony detailing the deficiencies in 21st Century's investigation, CP 69-74, the Trial Court found that 21st Century acted reasonably. The Laymans now appeal.

IV. ARGUMENT

A. The Standard of Review is De Novo.

Questions of law, and interpretation of insurance contracts, are reviewed de novo. *Bordeaux, Inc. v. American Safety Insurance Company*, 145 Wn. App. 687, 693, 186 P.3d 1188 (Div. 1, 2008). 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*, 145 Wn. App. at 694. 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).

B. 21st Century Failed to Comply with RCW 48.18.291 By Not Mailing Notice of Cancellation to the Laymans' Residence.

Washington has regulated the business of insurance, and insurance carriers, for some time. For automobiles, residents of this state are required to obtain specified minimum levels of coverage. RCW

46.30.020; RCW 46.29.090. To make sure these policies are not inadvertently canceled, Washington also requires an insurer to send written notice to its insured before it can cancel a policy of insurance for non-payment of premium. *Olivine Corp. v. United Capitol Ins. Co.*, 147 Wn.2d 148, 162 (2002) (“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”) (internal citations removed). When an insurance carrier fails to comply with the statutory requirements, the remedy to an insured is coverage, even though a policy may no longer be in effect. 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).

In particular, and of relevance here, RCW 48.18.291 provides that an automobile policy insurer must mail, by depositing in the United States mail an envelope directed to the insured at their last address, written notice of cancellation of the policy for non-payment of premium at least 10 days

prior to the date of cancellation. RCW 48.18.291(1). *See also Olivine Corp.*, 147 Wn.2d at 161.⁶

In the present case, it is undisputed that 21st Century *did not* mail a notice of pending cancellation for non-payment of premium to the Laymans. In investigating this claim, 21st Century examined its files, and noted that its files contained a copy of a document purportedly sent by mail to the Laymans' home. It denied this claim on that basis. 21st Century, however, was mistaken, as the notice of cancellation for non-payment of premium was never sent to the Laymans' home. In fact, 21st Century concedes that electronic communication does not comply with the notice requirements of RCW 48.18.291. CP 96; 220. It is undisputed that 21st Century did not comply with the notice requirements of RCW 48.18.291 before it cancelled the Laymans's policy for non-payment of premium. The Laymans are entitled to coverage, as the insurers' attempts to cancel the policy did not comply with the notice requirements of Washington law. *Olivine Corp.*, 147 Wn.2d at 163.

C. 21st Century's Argument is Unpersuasive and Litigation Driven.

⁶ In *Olivine Corp.*, the court held that the insurer did not provide Olivine with similar notice under RCW 48.18.290 where the insurer sent a finance company, which did not have a power of attorney from Olivine, written notice of its intent to cancel the policy for nonpayment of premium but failed to provide a copy of the notice or otherwise inform Olivine that the policy was purportedly canceled. *Olivine Corp.*, 147 Wn.2d at 152-161.

21st Century's denial of coverage, and statements before the OIC, clearly show that it "canceled" the Laymans' policy for non-payment of premium. CP56-57; 59-60. When the 21st Century Claim Manager was questioned on the reasons why 21st Century denied this claim, he specifically *disclaimed non-renewal* as a basis for the denial, reiterating that it was canceled by the insurer for non-payment of premium. CP 91-92. Faced with the admission that it failed to comply with the notice requirements for cancellations under RCW 48.18.291, 21st Century now argues that the Laymans "elected" not to renew their policy, and that 21st Century's conduct should be evaluated under RCW 48.18.292. This argument is a litigation driven argument that is not factually supported by the record, nor is it supported by law. Clearly, the trial court was swayed by the argument. 21st Century should be estopped from making this argument, as this was not the basis for which it denied the Layman's claim. *Vision One LLC v. Philadelphia Indemnity Insurance Co.*, 174 Wn.2d 501, 520, 276 P.3d 300 (2012). (citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 63, 1 P.3d 1167 (2000)).

D. If the Court Considers 21st Century's Argument under RCW 48.18.292, 21st Century Still Did Not Comply with the Statute.

21st Century has attempted to avoid its failure to send proper notice to the Laymans before they cancelled the Laymans' policy by arguing that

the Laymans made a conscious choice to non-renew their policy. Not only does such an argument raise a material issue of fact that cannot be resolved on summary judgment, but the argument is legally deficient. Under RCW 48.18.292, an insurer is required to renew a policy of insurance, and when the insurer fails to follow the required procedures for cancelling or non-renewing a policy, the law treats the deficient attempt as an improper cancellation of the policy. RCW 48.18.292; *Olivine*, 147 Wn.2d at 163; *Cornhusker Casualty*, 165 Wn.2d 404. The trial court decision resolved these disputed facts in favor of 21st Century, and ignored the application of Washington law.

1. RCW 48.18.292 is a Notice Statute.

RCW 48.18.292 is a “notice” statute, similar to RCW 48.18.291. “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*, 147 Wn.2d at 501. With respect to RCW 48.18.292, that same rationale applies: the purpose is to inform the insured of changes in coverage and premium amounts, before their coverage expires, so that an insured seeking replacement coverage has ample

opportunity and time to arrange coverage. *Armstrong v. Safeco Ins. Co.*, 50 Wn.App 254, 259, 748 P.2d 666 (1988).

2. RCW 48.18.292 Requires Renewal of Automobile Policies.

RCW 48.18.292, in plain terms, *requires an insurer to renew a policy of automobile insurance unless* certain exceptions are met. Before the trial court, 21st Century argued that RCW 48.18.292 (1)(b) applies.

That statute provides, in relevant part:

- (1) Each insurer shall be required to renew any contract of insurance subject to RCW 48.18.291 unless one of the following situations exist:
 - (b) At least twenty days prior to its expiration date, the insurer has communicated its willingness to renew in writing to the named insured, and has included therein a statement of the amount of the premium or portion thereof required to be paid by the insured to renew the policy, including the amount by which the premium or deductibles have changed from the previous policy period, and the date by which such payment must be made, and the insured fails to discharge when due his or her obligation in connection with the payment of such premium or portion thereof;

Thus, under the statute 21st Century contends applies, 21st Century is required to renew the policy unless 21st Century has “communicated” its willingness to renew “in writing to the named insured” the relevant billing information, as well as the date the payment is due, etc. If it fails to do so, the remedy is continued coverage. *Olivine Corp.*, 147 Wn.2d at 163; *Cornhusker Casualty*, 165 Wn.2d 404.

3. 21st Century has Not Complied with a Statutory Exception.

It is undisputed that 21st Century *did not* “communicate” its offer to the Laymans. *Webster’s Dictionary* defines “communicate” 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.*” (emphasis supplied). Uploading a digitized image of a document into 21st Century’s server does not “communicate” the information to the insured, especially when the insured does not receive the information, or is otherwise not made known of its content. Indeed, the purpose of the statute is not met if the insured is not provided the relevant information upon which to base a decision to renew, or find different coverage. Communicate means that the information is actually conveyed to the insured.⁷

Likewise, it is undisputed that 21st Century never put its supposed offer to renew “*in writing to the named insured*” as required by statute. Instead, 21st Century uploaded a digitized image of the information into 21st Century’s servers. CP 99. Authority holds that “[w]here written

⁷ Before the trial court, 21st Century asserted that the information need not be received by the insureds for 21st Century to have communicated the information. RP 15. As the Laymans noted, under 21st Century’s argument, 21st Century could have discharged its obligations under RCW 48.18.292 by placing an offer to renew the Laymans’ policy in the Miami Herald newspaper, yet there can be no dispute that such notice would not have conveyed the information to the Laymans, nor would the purpose of the statute have been met.

notice is required, an electronic mail message is insufficient to satisfy the requirement.” 58 Am.Jur. 2d., *Notice* §35. A digitized image is not a “writing” under statute, and uploading a document onto 21st Century’s server does not satisfy the requirement, express or implied, that the document be sent “to the named insured” as opposed to uploaded into a server. 21st Century offered no authority- no case law, no treatise, no statute, or law review article- that suggested an email constituted a “writing” required by statute. Emails can get lost, or screened by filters, making it inherently unreliable for delivering an important notice that is required by statute. 21st Century offered no authority- no case law, no treatise, not statute, or law review article, that suggested uploading a document into 21st Century’s server met the statutory requirement of communicating the offer *to the named insured*. It has not communicated anything *to the named insured* by uploading a document into its server. Quite simply, even under the statute that 21st Century contends applies, 21st Century failed to comply with the statutory requirements for non-renewals.⁸

A cursory review of relevant authority demonstrates why 21st Century has failed to offer any authority for its position. “When a statute

⁸ Even though 21st Century did not send the document to the Laymans via email, there is no Washington authority to support the claim that sending the document to the Laymans electronically, by email, satisfies RCW 48.18.292.

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. Indeed, in answering its certified question to the Ninth Circuit Court of Appeals, the Washington Supreme Court noted that certified mail sent, but never received by the insured, did not comply with the notice requirement for cancelling a policy for non-payment of premium. *Cornhusker Casualty Insurance Company v. Kachman*, 165 Wn.2d 404 198 P.3d 505 (2008).⁹ It found that in order for notice to be effective, the notice must be received by the insured. Indeed, when an insurance carrier follows the mandates of the statutes and sends a notice of renewal or notice of pending cancellation to an insured through the mail, compliance with the statute is all that is required, and the insurer need only show that they complied with the statute by mailing to deem the non-renewal or cancellation valid. See eg. *Wisniewski v. State Farm General Insurance Company*, 25 Wn. App. 766, 609 P.2d 456 (1980); *Isaacson v. DeMartin Agency, Inc.*, 77 Wn. App. 875, 893 P.2d 1123 (1995). Proof of mailing, as opposed to proof of delivery, is all that is required. However, when an insurer fails to follow the statutory requirements, as 21st Century

⁹ On facts similar to the present case, it bears noting that the Washington Supreme Court did not treat the lapse in coverage as a non-renewal, but rather, as an improper cancellation of the policy. That reasoning is sound: the insurer is required to renew, and when the insurer does not meet the exceptions for renewing a policy, the policy remains in effect, and the attempts to avoid coverage constitutes an improper cancellation of the policy.

has in this case, actual delivery of the notices are required. *Cornhusker Casualty*, 165 Wn.2d 404. 21st Century's arguments contravene this authority, and attempt to subvert the "actual delivery" requirement imposed by Washington law.¹⁰ The trial court was led astray by 21st Century's arguments.

This authority- that absent strict compliance with a statute, actual notice is required- is in accord with case law from other jurisdictions. In *Garner v. Government Emp. Ins. Co.*, 129 Ga.App. 235, 199 S.E.2d 350 (1973), an insurer attempted to argue that a policy was not renewed because it 'communicated' its willingness to renew to the insured, and the insured did not respond, just as 21st Century does in this case. There, the court stated: "That these notices contained an offer to renew, if unreceived, did not constitute an offer to the plaintiff to renew. That one puts in writing an offer, the writing, unless communicated to the offeree, constitutes no offer" to renew. *Garner*, 199 S.E. 2d at 352. Likewise, in *Dauzat v. Gem Underwriters*, 602 So.2d 196 (La. 1992), an offer to renew was not "communicated" to the insured. Relying upon prior authority, which held that a willingness to renew is ineffective if not communicated to the insured, the court found that proof of actual notice of delivery was

¹⁰ It should be noted that the legislative history of RCW 48.18.292 shows that the original statute allowed the insurer to communicate its willingness to renew "orally". That portion, allowing for oral communication was eliminated from the statute in 1973.

required before the denial of coverage was effective. *Accord, Everready Insurance Co. v. Hadzovic*, 182 A.D.2d 818, 582 N.Y.S.2d 508 (1992) (insurer failed to strictly comply with non-renewal statute resulting in continued coverage); *Strickland Motors Ins. Corp.*, 970 F.2d 132 (5th Cir.) (notice provision is intended to inform insured so that they may take appropriate action, and ‘neglect’ by insured does not negate the statutory notice requirement imposed on insurer); *Gaudet v. Crochet*, 448 So.2d 221 (La. 1984) (denial of receipt of notice allegedly sent presents question of fact that cannot be resolved on summary judgment).

4. Constructive Notice is not Sufficient- Actual Delivery is Required.

What 21st Century is truly arguing in connection with this claim is that constructive notice is sufficient to comply with the statute requiring notice. Essentially, 21st Century is arguing that the Laymans should be deemed to have “constructive notice” of the bill, and their offer to renew the policy, since it was uploaded into 21st Century’s server. 21st Century then argues that the Laymans are at fault for not logging into 21st Century’s server to see if they had been sent a bill, or an offer to renew their policy. CP 191. By focusing on the Laymans conduct, 21st Century is attempting to deflect its obligations under statute to provide notice of policy cancellation, or of an offer to renew the policy. Under the plain

terms of RCW 48.18.292, however, it is the insurer who must show that they complied with the statute or the policy will automatically renew, and arguments on the Laymans' conduct are irrelevant. 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. An insurer is not excused from their own statutory obligations by arguments that the insured could have done something different to have remedied the insurer's defective notice. Under Washington law, when an insurer elects to notify its insureds under the notice statutes in a manner other than identified by statute, the insurer must show actual delivery of the notice to comply with statute. *Cornhusker Casualty*, 165 Wn.2d at 413. The steps the insured could have taken to remedy the insurer's defective notice are irrelevant.

Regardless, 21st Century has offered no authority for treating constructive notice as sufficient notice under a statute. Indeed, constructive notice is a legal fiction that presumes notice *where no notice actually exists*. 58 Am. Jur. 2d, *Notice* §8. (Emphasis added). No Washington case holds that constructive notice satisfies the notice requirements of RCW 48.18.290, 291 or 292, and no treatise or other authority is offered by 21st Century to support a claim that an insurer complies with a statute requiring notice in writing when it uploads a

digitized image into its server for an insured to log into and view. 21st Century has led the trial court astray with its arguments.

Of equal importance, even if constructive notice is contemplated under a statute requiring notice in writing, constructive notice only applies when the individuals have been put on *inquiry* notice. Here, 21st Century did not send the Laymans an email telling them that ‘they had a bill to review’ or that ‘their bill is now available for review’. 21st Century did not send an email to the Laymans informing them they had an important document, or a time sensitive document, that they needed to view. Rather, 21st Century sent the Laymans an innocuous email stating “you have a new document available”. This did not place the Laymans on inquiry notice, or at the very least, raised a disputed issue of material fact on whether the Laymans had been put on inquiry notice. By implicitly holding that the Laymans had been placed on inquiry notice, or that constructive notice applied, the trial court has erred.

5. 21st Century’s Arguments on Automatic Termination Misled the Trial Court.

Because insurance contracts are generally contracts of adhesion, Courts look at insurance contracts in a light most favorable to the insured. *Panorama Vill. Condo. Owners Ass’n Bd of Dirs. V. Allstate Ins. Co.*, 144 Wn.2d 130, 141, 26 P.3d 910 (2001). The trial court did not construe this

adhesion contract in the light most favorable to the insured. This policy attempts to create an evidentiary presumption by stating:

C. Automatic Termination.

1. If *we* offer to renew or continue *your* policy and *you* or *your* representative do not accept by making timely payment of the premium due, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that *you* have not accepted *our* offer.

CP 313.

Before the trial court, 21st Century argued that the “automatic termination” provision in the policy applied, and that the Laymans should be deemed under the policy to have elected not to renew their policy. 21st Century’s argument, however, is little more than a request that the Court apply an evidentiary presumption that it inserted into an adhesion contract at the expense of its insureds. “[E]videntiary presumptions exist because the establishment of an intermediate fact more probably than not establishes the ultimate fact, and the intermediate fact is more capable of proof.” *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 619-20, 244 P.3d 1 (2010) (citing *Garland v. Cox*, 472 F.2d 875, 878–79 (4th Cir.1973)). “A presumption ‘is merely a procedural device dictating a particular result only in the absence of

contradictory evidence.” *Id.* at 619. “Presumptions ... may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.” *Id.*, citing *Mackowik v. Kansas City, St. J & C.B.R. Co.*, 196 Mo. 550, 94 S.W. 256, 262 (1906). “Once there is contrary evidence, the presumption disappears—with the facts established, there is no need for a procedural device that makes a fact more probable or not.” *Id.* at 620 (citing *Garland*, 472 F.2d at 879). “Then, ‘the case is in the judge's hands, free from any rule.’” *Id.*, (citing *Stumpf v. Montgomery*, 101 Okla. 257, 226 P. 65, 69 (1924)). To continue to apply the presumption is “but to play with shadows and reject substance.”” *Id.*

Here, the automatic termination provision is premised, by its express terms, on a proper offer to renew being conveyed to the insured. 21st Century did not convey the offer to renew to the Laymans, and the Laymans had no knowledge that such an offer had been made. The evidentiary presumption cannot apply under the facts of this case. Moreover, the fact that the Laymans did not purchase alternative insurance, and sought immediate coverage from 21st Century when they learned that 21st Century had canceled their policy, shows that the Laymans never intended to non-renew their policy. The evidence shows that the Laymans were never aware of an offer to renew their policy, providing evidence which contradicts the evidentiary assumption being

asserted. At the very least, an issue of material fact was presented on whether the Laymans intentionally non-renewed their policy, or whether they were unaware of an offer to renew, and 21st Century's purported notice was deficient. The trial court erred in holding for 21st Century.

E. 21ST Century's Non Renewal Arguments are Based on Inferences that Cannot be Drawn From the Record.

21st Century's argument, that it offered to renew the Laymans' policy and the Laymans elected not to renew their coverage, is not supported by fact, and not an inference to be drawn from the facts. The facts show that the Laymans were not aware of the offer to renew their coverage, and if they were not aware of the offer, they could not have elected not to renew their policy. This fundamental error pervades the trial court holding. 21st Century's argument is based on nothing more than argument, crafted from an evidentiary presumption that it inserted into this adhesion contract.

Moreover, absent factual testimony supporting the claim that Laymans elected not to renew their policy, 21st Century's argument is based upon an inference that they seek to draw in their favor. The fact remains that the Laymans were loyal customers of 21st Century. They had never missed a payment of an insurance premium, and did not obtain insurance coverage from another carrier. When they were told that they

did not have coverage, they obtained a rider for a single day of coverage just so Seth Layman could drive his vehicle from the airport to his home with insurance coverage. CP 17. The undisputed facts show that the Laymans are concerned about their insurance coverage. There is no evidence that the Laymans were facing financial constraints, and sought to save money by going without insurance. There is no factual evidence before the Court that would allow 21st Century to draw the inference it has attempted to raise. More importantly for resolving these claims on summary judgment, this inference- that the Laymans elected not to renew their policy- cannot be resolved in favor of 21st Century, as the moving party, on summary judgment. CR 56. Evidence before the trial court demonstrated that the facts underpinning 21st Century's argument were in dispute. The trial court erred in resolving this issue in favor of 21st Century.

F. The Trial Court Erred in Resolving Disputed Issues of Material Fact, Impermissibly Weighing Evidence, and Basing the Judgment on Inadmissible Evidence.

Procedurally, 21st Century's motion for summary judgment differed from that of Appellants' motion, as 21st Century's entire argument was premised upon the disputed claim that the Laymans signed up to receive their insurance bills under the paperless system. Molly Layman testified that they did not sign up to receive the bills via the paperless

system. CP 20. 21st Century argues that the Laymans did, thus giving them a ‘rational’ explanation for why they denied this claim when they uploaded the documents into 21st Century’s server.¹¹ 21st Century’s motion for summary judgment was premised upon this disputed issue of material fact, which the trial court improperly resolved in 21st Century’s favor.

Moreover, in an attempt to convince the trial court that summary judgment was proper, 21st Century created and submitted “illustrative” documents that 21st Century claimed showed that the Laymans testimony should not be believed by the Court. CP 112-113; 336; 338. The Laymans objected to these “illustrative” exhibits as inadmissible hearsay, not properly authenticated as admissible evidence, and as prejudicial and misleading. CP 112-113. Because summary judgment must be made on admissible evidence, the trial court’s consideration, and refusal to strike the information, constitutes clear error. Even if considered, these “illustrative” exhibits merely show an issue of material fact that cannot be resolved on summary judgment. By resolving these disputed issues in 21st Century’s favor, the trial court improperly weighed the evidence.

Finally, the Laymans noted that the credibility of 21st Century was at issue, and could not be resolved on summary judgment. CP 112. For

¹¹ Note that the documents 21st Century uploaded into the system were not “correspondence” but a bill. CP 344-345; 347-348.

example, 21st Century claimed that it sent the Laymans correspondence dated 12/1/10, and produced a copy of that document in discovery. CP 76 The Laymans, however, produced the document that was actually sent to them, and the two documents are nothing alike. CP 78-85. Note that the correspondence actually sent to the Laymans *did not* contain a declarations page, or a dollar amount for the premium, which would have allowed them to compare coverage if they were shopping for coverage from a different carrier. Regardless, in March of 2010, after learning that it had not mailed documents to the Laymans home address, 21st Century sent correspondence to the Laymans, again stating that the documents had been mailed to their home address. CP 54-55. 21st Century's arguments are premised upon its credibility, and by demonstrating that what it said was untrue, issues of credibility should have prevented these claims from being resolved on summary judgment. To the extent that the trial court relied upon any documents or testimony from 21st Century, the trial court committed error by resolving issues of credibility on summary judgment.

G. 21st Century acted in Bad Faith as a Matter of Law.

It is well settled that the business of insurance is affected by the public interest, requiring good faith and honest practice. RCW 48.01.030. An insurer is charged with "preserving inviolate the integrity of insurance." *Id.* "This fiduciary duty to act in good faith is fairly broad

and may be breached by conduct short of bad faith or fraud.” *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 916-917, 792 P.2d 520 (1990).

Not only does an insurer’s denial of coverage without reasonable justification constitute bad faith, *Whistman v. West Am.*, 38 Wn. App. 580, 585, 686 P.2d 186 (1984), but a denial of coverage without conducting a reasonable investigation into an insured’s claim also constitutes breach of the duty to act in good faith. *Farrington Corp. v. Commonwealth Land Title Ins. Co. of Philadelphia*, 86 Wn. App. 399, 936 P.2d 1157 (1997).

Bad faith in the context of insurance can be found when an insurer fails to conduct a reasonable investigation before denying a claim, and/or denies a claim without reasonable justification. WAC 284-30-330(3); *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 337, 2 P.3d 1029 (2000).

Bad faith may also be decided as a matter of law. In *American Best Foods v. Alea London*, 168 Wn.2d 398, 299 P.3d 693 (2010), the Washington Supreme Court found that in a third-party context, where the insured is facing claims of liability by a third party, a declination of coverage based upon a questionable interpretation of law *was unreasonable as a matter of law* and constituted bad faith. *American Best*, 168 Wn.2d at 413. In that case, the Court noted that the insurer cannot arbitrarily resolve issues on coverage against the interests of the insured

while third party claims are pending against its insured. *American Best*, 168 Wn.2d at 413.

In the present case, *American Best* applies. Seth Layman was at fault for the accident with the vehicle owned by Brent Gonzales, and one or more occupants of the vehicle he struck were sent to the hospital with claimed injuries. These third parties submitted a claim against 21st Century's coverage, and Seth Layman would have been entitled to a defense to these claims if his coverage was in force. 21st Century denied this claim, now contending that they provided the Laymans with notices required by statute when they uploaded a digitized image of the Laymans bill into 21st Century's servers. 21st Century has offered no authority- no case law, no treatise, no law review article- that holds uploading a document into 21st Century's server satisfies a statute requiring written notice of an offer to renew a policy, especially when the purported offer was never received by the insured. 21st Century offers no authority- no case law, no treatise, no law review article- that establishes constructive notice is sufficient notice under the insurance notice statutes. 21st Century offers no authority- no case law, no treatise, no law review article- that shows uploading a document into 21st Century's server satisfies a notice that the insurer is required to send to the insured. 21st Century has offered no authority- no case law, no treatise, no law review article- that holds that

the insurer is relieved of the statutory notice requirement that the law has placed on the insurer. Yet 21st Century has resolved each of these issues in its favor, ignoring its duty to provide a defense to the insured if the policy is in effect. 21st Century did not file an action for declaratory relief, asking the Court to confirm that 21st Century was correct in its interpretation of the policy and notice statutes. 21st Century did not defend under a reservation of rights. This Court should hold, as a matter of law, that 21st Century has acted in bad faith.¹² None of 21st Century's ever changing arguments for why it denied this claim have merit in law or fact.

H. 21st Century Acted in Bad Faith When it Failed to Conduct a Reasonable Investigation into the Laymans Claims, and Failed to Revisit its Coverage Determination in Light of New Facts.

1. 21st Century Denied this Claim when it wrongly believed it had mailed a bill and notice of cancellation to the Laymans.

The duty of an insurer to conduct a reasonable investigation before denying a claim exists regardless of the ultimate conclusion regarding coverage. *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 87 P.3d 774 (2004); *Griffin v. Allstate Ins. Co.*, 108

¹² If the Laymans prevail on their bad faith claims, 21st Century would also be estopped from denying coverage for these claims. *Safeco v. Butler*, 118 Wn.2d at 401.

Wn. App. 133, 29 P.3d 777 (2001); *Coventry Associates v. American States Ins. Co.*, 136 Wn.2d 269, 961 P.2d 933 (1998). Even if bad faith cannot be found as a matter of law, the Laymans offered evidence that 21st Century failed to conduct a reasonable investigation before denying the claim, and based their denial upon information that a reasonable investigation would have shown to be untrue. CP 69-74. This claim was denied three hours and three minutes after it was reported. CP 182. At the very least, this evidence, coupled with the claims made by 21st Century, would have presented the trial court with disputed issues of material fact that could not be resolved on summary judgment.

Here, 21st Century examined its files, which contained copies of documents that were never sent to its insured. When the Laymans informed 21st Century that its files were wrong, and that the Laymans had not been sent a bill or warning that their policy would be cancelled if they did not make their payment, 21st Century simply noted that the document in their files showed that a bill had been mailed to the Laymans at their home address. The heart of the problem lies in 21st Century's own internal systems and record keeping practices. By 21st Century's own admission, 21st Century did not know what was actually sent to the Laymans, and what might have been sent electronically. 21st Century's files did not indicate that the Laymans had been enrolled in an electronic delivery

system, inviting the very error in their reasoning for why the claim was denied. 21st Century's deficient record keeping does not excuse 21st Century from conducting a reasonable investigation, especially when the Laymans are informing 21st Century that they had not received the documents.

Moreover, while 21st Century claims that its paperless system was the vehicle used to provide the Laymans with notices required by Washington law, 21st Century did not conduct any investigation into whether its paperless system was valid in Washington before it implemented the system. CP 217-221; 94-96. More specifically, it did not conduct an investigation into the validity of the paperless system before it denied the Laymans coverage. Ms. Turner is not a lawyer, nor did she consult with a lawyer, or analyze the *Cornhusker Casualty Insurance Company v. Kachman* case before denying the claim on an invalid notification system. She did not even look at the emails 21st Century sent to Molly to determine what, if any, statements were made about the documents available online. CP 41-46. Moreover, she did not correct the false information in the file. Instead, she simply determined that the Laymans had not paid the premium and denied the claim. Though 21st Century disputed these points, this evidence simply provided the trial court with disputed issues of material fact that could not have been

resolved on summary judgment. The trial court erred by dismissing the Laymans' claims for bad faith, and in refusing to grant the Layman's motion for summary judgment on bad faith.

2. 21st Century Argued Before the OIC that it emailed the required notices to the Laymans.

21st Century's conduct before the OIC also demonstrates bad faith. When 21st Century learned that it had not mailed the required documents to the Laymans at their home address, 21st Century did not revisit its coverage determination in light of the facts then known, but rather, argued that it had provided the information to the Laymans in electronic form. 21st Century's argument was deceptive and untrue. 21st Century has never emailed a bill to the Laymans, nor has 21st Century ever emailed the Laymans with a notice that their policy of insurance would be cancelled if they did not make a premium payment. 21st Century knew that it uploaded a digitized image of the documents into 21st Century's server, and that the Laymans had not logged in to view the documents, when it argued to the OIC that it had provided the documents in electronic form. CP 198-199. 21st Century's statements are false and misleading, and to the extent that they are used as a basis for denying the Laymans' claim, they are frivolous. The trial court erred in granting 21st Century's motion for

summary judgment, and denying the Laymans' motion for summary judgment on bad faith.

3. 21st Century Failed to Reopen its Investigation on Coverage Based Upon the Erroneous Assumption that the Bills and Documents had Been Mailed to the Laymans.

In February of 2012, before this lawsuit was filed, the Laymans, through their counsel, invited 21st Century to revisit their coverage determination. 21st Century, however, stood by its coverage decision, basing the denial of coverage on the mistaken belief that hard copies of the required notices had been sent to the Laymans at their home address. The claim log notes state: "Reviewed file. This loss was disclaimed as the policy had lapse. The insured claims she did not receive the bill or the dec page. The bill was sent to the insured's home on 12/10/10 with due date of 1/03/11. ... A cancellation was mailed to her home on 1/07/11." CP 65. Nothing the Laymans' said would have changed 21st Century's analysis. CP 67. A reasonable investigation of the claim in February of 2012 would have shown that the bill and notice of cancellation were never sent to the Laymans at their home address. Heather Turner admitted that she knew these documents had not been sent to the Laymans at their home address shortly after the claim was reported. 21st Century never corrected its records to reflect what actually happened, and never analyzed whether

or not the electronic delivery system was sufficient to provide notice under Washington law. CP 217-221. The arguments that they are making on the paperless system meeting the requirements for notice under Washington law are driven by litigation and supplied by counsel. The log notes speak volumes. They do not indicate that 21st Century investigated its paperless system, or that the documents were uploaded into 21st Century's servers for the Laymans to log into, but incorrectly state that the documents were mailed to the Laymans at their home. Again, 21st Century is basing its denial upon information that a reasonable investigation would have shown to be untrue.

4. Plaintiffs are Entitled to Their Attorneys' Fees and Costs

If the Laymans prevail in this suit for coverage, or in their claims for bad faith, the Laymans would be entitled to recover reasonable attorneys' fees and costs incurred during this process. *Olympic Steamship* 117 Wn.2d 37 (1991). The Laymans request that they be awarded their reasonable attorney fees as an element of their damages. The Laymans also request that the Court enhance the damages awarded under their claims for violation of the Insurance Fair Conduct Act, and/or violations of the Consumer Protection Act.

V. CONCLUSION

At its heart, this coverage case is simple. The Laymans were insured under a policy of insurance, and Washington law requires an insurer to provide its insureds with notice before the policy is canceled or non-renewed. The notice must be in writing, to the insured's home address. The policy will automatically renew unless the insurer complies with a specific exception. Here, 21st Century admits that it did not send the Laymans a written notice to their home address, offering to renew their policy, informing them what their annual premium would be, or warning them that their policy was about to lapse since payment had not been made. The absence of written notice should be sufficient to resolve these claims. Rather than admit that it was wrong, 21st Century has argued that it 'offered' to renew the Laymans' policy by uploading a bill into 21st Century's server, a bill that the Laymans never received. 21st Century's argument that this satisfies the notice requirements of the statutes arbitrarily decided the issues in 21st Century's favor, while the Laymans faced third-party claims of liability. 21st Century acted in bad faith as a matter of law, yet the trial court granted 21st Century's motion for summary judgment, upholding the denial of coverage, and dismissing the claims of bad faith. At the very least, the Laymans presented evidence that contradicted 21st Century's arguments, making summary judgment in

favor of 21st Century impossible to grant. This case should be reversed,
with judgment directed in favor of the Laymans on their claims for
coverage, and their claims for bad faith.

Dated this 27th day of September, 2013.

Respectfully submitted,

BADGLEY MULLINS TURNER PLLC



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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

SETH LAYMAN and MOLLY)
LAYMAN, husband and wife,)
) Court of Appeal No. 70540-7
)
Appellants,)
) PROOF OF SERVICE
v.)
)
21ST CENTURY NORTH)
AMERICA INSURANCE CO.; and)
FARMERS INSURANCE)
COMPANY OF WASHINGTON,)
)
Respondents.)
_____)

I, Christina Limon, paralegal for BADGLEY MULLINS TURNER PLLC, attorneys for Appellants in the above entitled action, hereby certify under penalty of perjury that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 27th day of September, 2013, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. Appellant's Opening Brief; and
2. Proof of Service.

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Upon the attorney of record herein, as follows, to wit:

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Christina Limon, Paralegal