

11-18-2009

# Farm Bureau Ins. Co. of Idaho v. Kinsey Appellant's Reply Brief Dckt. 36607

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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FARM BUREAU MUTUAL INSURANCE )  
COMPANY OF IDAHO, )

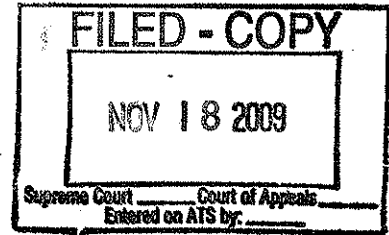
Docket No. 36607-2009

Plaintiff/Respondent, )

v. )

JAMEY KINSEY and M. WILMOTH )  
KINSEY, d/b/a KINSEY FAMILY )  
LIMITED PARTNERSHIP, )

Defendants. )



\_\_\_\_\_  
MICHAEL BROOKBANK, )

Intervenor/Appellant. )

\*\*\*\*\*

**APPELLANT'S REPLY BRIEF**

Appeal from the District Court of the Fifth Judicial District for Twin Falls County  
Honorable Randy J. Stoker, District Judge, Presiding

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I.

**INTRODUCTION.**

In Farm Bureau's response brief, it again asserts the burden of proof is on Brookbank "to prove that he is a resident of this insured household." (Respondent's Brief, pg. 8.) Further, Farm Bureau relies heavily on the trial court's findings of fact and only some of the objective factors to be considered. Therefore, this brief will first address the standard of review and burden of proof issues and then address the specific factors and the specific evidence regarding residency in the grandmother's household. Specific attention should be devoted to a comparison of Jamey Kinsey's connection to his girlfriend's house in comparison to his grandmother's house.

II.

**LAW AND ARGUMENT.**

**A. APPELLATE COURT DETERMINATION OF FACTS DE NOVO.**

In this case there was no live testimony. The record is entirely in the form of deposition testimony and documentary evidence. Therefore, this court must determine the facts independently from the record. The trial Courts findings of fact are not entitled to deference.

It is the established rule of this state that when evidence is wholly in the form of depositions and documentary evidence, as here, findings of fact are not binding on a reviewing court. (Citations omitted.) In such cases, the appellate court may determine the facts de novo from the record. (Citations omitted.)

D & M Development Company v. Sherwood and Roberts, Inc., 93 Idaho 200 at 204 (1969).

**B. THE TRIAL COURT ERRED PLACING BURDEN OF PROOF ON BROOKBANK.**

Farm bureau filed the declaratory judgment action but the trial court erred by concluding Brookbank had the burden to prove coverage. The Court stated:

Given the cited case law the court holds that Brookbank bears the burden of proof to demonstrate coverage. As such he must establish that Jamey was a resident of Wilmoth's household at the time of the incident giving rise to his claim. (R. 131.)

The law of Idaho is clear that if there is ambiguity, it is resolved in favor of coverage, *not otherwise as held by the trial court.* As stated by the Idaho Supreme Court in another "resident of household dispute":

Most courts interpret the phrase "resident of the same household" to extend coverage if this can be done under a reasonable interpretation of the facts. (Citation omitted.) If any doubt exists, the language of the policy will be interpreted against the insurance company and in favor of coverage.

AID Ins. Co. v. Armstrong, 119 Idaho 897 (Ct. App. 1991).

The trial court interpreted the facts resolving inferences in favor of Farm Bureau, instead of resolving ambiguities in favor of finding coverage. The trial court erred in doing so.

Brookbank contends he has made a prima facie showing that Kinsey was a resident of his grandmother's household. First, the accident occurred at the insured location. Second, Kinsey gave the investigating police officer the address of the insured location as his address on the day of the accident. Third, that is where he grew up and lived most of his life. Fourth, Farm Bureau alleged in its Declaratory Judgment Complaint that it believed Jamey Kinsey had "been staying in an outbuilding located at

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3497 E., 3000 N., Kimberly Idaho, at the time of the accident . . . ." (R. 8.) Fifth, Jamey Kinsey gave that same address to Brookbank in his answers to discovery. (R. 61.) Sixth, that is where he stored his money, paid his bills, stored his personal belongings and listed as his address with the State of Idaho on his driver's license as required by law. (R. 93.) Therefore, Brookbank has made out a prima facie case of coverage. The burden should shift to Farm Bureau to prove there is no coverage in this Declaratory Judgment action.

In Smith v. State Board of Medicine, 74 Idaho 191 (1953), this Court ruled that the Plaintiff in a Declaratory Judgment action carried the burden of proof.

This is a civil action, albeit for a declaratory judgment, and appellant as plaintiff had the burden to prove he was entitled to practice as he did without a license as a physician or surgeon.

Smith v. State Board of Medicine, 74 Idaho 191, at 194 (1953).

**C. THE COURT SHOULD FIRST SET FORTH THE FACTORS TO BE CONSIDERED AND THEN WEIGH THE EVIDENCE PRESENTED.**

Prior court decisions clearly set forth the objective factors to be considered in determining residency. This court should utilize the same factors. Below is an analysis of the factors and the evidence supporting a reasonable interpretation of residency.

The factors to be considered are set forth by the appellate courts as follows:

Several factors the court considered were the daughter's presence in or absence from the named insured's household at the time of the accident; the reasons for the daughter's absence; the relationship of the daughter to the named insured; living arrangements in earlier time periods; and the daughter's subjective or declared intent with respect to her residence.

AID Ins. Co. v. Armstrong, 119 Idaho 897 at 901 (Ct. App. 1991).

1. FACTOR - Presence in or Absence From the Named Insured's Household at the Time of the Accident.

Unlike the tortfeasors in AID Ins. Co. v. Armstrong, supra., and the grandson in Allstate Ins. Co. v. Macoby, 133 Idaho 593 (1999), the accident in this case occurred at the named insured's residence while the tortfeasor was actually present. The accident occurred adjacent to the insured household. This factor was not even considered by the trial court. It is an objective fact not dependent on credibility and cannot be controverted or interpreted away. In Allstate Insurance Co. v. Macoby, 133 Idaho 593 (1999), the accidental shooting occurred at the victim's home, not the insured location. In AID Ins. v. Armstrong, 119 Idaho 897 (Ct. App 1991), the accident occurred while she was living with her father. The father's insurer settled with the victim. The Court ruled the mother's insurer was not liable because the minor was living with the father, not the mother, at the time of the accident.. In this case, Jamey was actually at the insured location when the accident occurred.

Further, it was common belief that Jamey was living in the bunkhouse at the time of the accident. This fact was even admitted by Farm Bureau in its verified complaint.

12. Jamey Kinsey is believed to have been staying in an outbuilding located at 3497 E. 3000 N., Kimberly, Idaho, at the time of the incident that is the subject of the underlying Complaint. (R. 8.)

Farm Bureau affirmatively pled the fact Jamey Kinsey was staying in an outbuilding at the insured location "at the time of the incident." This is a judicial admission that conclusively establishes that fact.



We address first Strouse's statements in his complaint. Statements in the party's pleadings are generally seen as binding judicial admissions.

Strouse v. K-Teck, Inc., 129 Idaho 616 at 619 (Ct. App. 1997).

A judicial admission removes from the field of controversy the question of whether Neil Dille was an agent of Texas Refinery for the purpose of selling the Mightyplate roofing material to Sun Valley.

Sun Valley Potato Growers v. Texas Refinery Corporation, 139 Idaho 761 at 766 (2004).

There can be no dispute Jamey Kinsey was staying at the insured location at the time of the incident. That fact has been judicially admitted. Despite the admission of *Farm Bureau* and the fact Jamey was present at the exact time of the accident, the Court erroneously concluded: . . . Jamey's level of contact with his grandmother does not show a "close continuing connection at the time of the incident." (R. 134.)

2. FACTOR - The Relationship of Jamey to the Named Insured.

The evidence is extremely clear that Jamey and his grandmother had a very close, loving and trusting relationship. It is clear Jamey's relationship with his grandmother was the closest relationship he has in the entire world. The only other person to compare would be his girlfriend, Vicky. In comparison, the grandmother was closer and more trusted.

Consider the following evidence by comparing whether Vicky's house or the grandmother's house was utilized by Jamey.

a) Storage of personal belongings. Jamey testified he kept personal belongings in the bunkhouse at his grandmother's including CDs, a couch, a TV , an old

weight set, and clothes. He admitted he also kept things in his grandmother's house. (R 71, pg. 17, ll. 12 – pg. 18, ll. 7.)

In comparison, he admitted he kept some clothes at Vicky's but no furniture or other belongings. (R. 71, Deposition of Jamey Kinsey, pg. 18, ll. 11 – 17.)

b) Storage of money. Jamey testified he kept his money in his grandma's safe and she paid his bills for him.

Yeah. My grandma gets my tags for me and makes sure my insurance is paid. I give her money. She actually keeps my money in her safe. And it's been like this since I've had the pickup. It's never been changed or anything. Because I don't have an address. I don't even have a house. I stay with Vicky. (R. 74, Depo of Jamey Kinsey, p. 34, ll. 8 – 14.)

What is important here is a comparison of grandma and Vicky's houses. Jamey keeps his money in his grandma's house, not Vicky's. He designates his grandma's house for mail delivery, not Vicky's. Grandma pays the bills with Jamey's money, not Vicky. The court erred in concluding "they do not have a close continuing connection. . . ." (R. pg. 14.)

3. FACTOR - Living Arrangements in Earlier Time Periods.

It is undisputed and was acknowledged by the trial court that Jamey grew up on the family "home place." The insured location was Jamey's home growing up.

Jamey lived with his father on the "home place" after his parent's divorced and his mom moved to Texas. (See R. pg. 115). Right out of High School in 1989, he worked for Terry Hollifield and lived in the bunkhouse.

Q: When you were working for Terry Hollifield, where were you living?

A: I was living in that bunkhouse.  
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(R. 116, Depo. of Jamey Kinsey, pg. 11, ll. 8 – 10.)

Between 1990 and 2001 Jamey was in the Navy, lived with his mother in Texas, worked in the oil fields in Colorado, and traveled around until 2001. Upon his return from Texas in 2001, he lived in his grandmother's house for a short time. (R., pg. 129, para. 8, 9.)

When asked how many days a week he spent at his girlfriend, Vicky's, he responded:

A: It's not a matter of days per week. It's just whenever I'm around. You know, I bounce around with my buddies and stuff like that. We go hunting. I take trips and stuff like that. Or I just go to the mountains and disappear for 30 days, you know, stuff like that. (R. 117, pg. 15, ll. 6 -11.)

It is clear that in at least the first 21 years of his 37 total, Jamey lived at the insured location. After that, he traveled for about 10 – 11 years before returning to Idaho. When he did return, he lived with his grandma at least a short time. After that he "bounced around."

4. FACTOR - Declared Intent with Respect to Residence.

Mr. Kinsey's declared intent with respect to residence is totally inconsistent. While it is true that in his deposition he was asked his residence, he stated "333 Rock Creek Road, Hansen, Idaho."

Q: And what's your residence address?

A: 333 Rock Creek Road, Hansen, Idaho.

(R. 67, Depo. of Jamey Kinsey, pg. 4, ll. 17 – 18, taken November 3, 2008.)

However, he has consistently given his grandmother's address on numerous other occasions, including the day of the accident. On the accident report he listed his name and address as:

Kinsey, Jamey, 3497 East, 3000 North, Kimberly, Idaho. (R. 92.)

In his answers to discovery in the underlying injury lawsuit he listed his address as:

a. Jamey Kinsey

b. 3497 E, 3000 N., Kimberly, Idaho. (R. 61.)

In 2006, the State of Idaho Department of Transportation Idaho Driver's License Record listed Jamey Kinsey, 3497 East, 3000 North, Kimberly, Idaho, 83341. (R. 93.)

While it is certainly true Mr. Kinsey has stated on one occasion his address was 333 Rock Creek Road, Hansen, Idaho, on many more occasions including interrogatory answers which are judicial admissions, and official state records, he has consistently stated his grandmother's address as his address. Clearly, the Rock Creek address is an aberration, not a consistently declared address. This inconsistency or ambiguity should be resolved in favor of coverage.

### III.

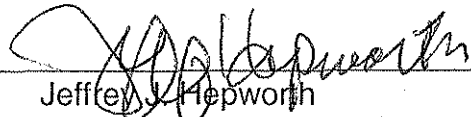
#### CONCLUSION.

In Declaratory Judgment actions, the burden of proof is on Farm Bureau, not Brookbank. Further, this Court is in just as good a position to evaluate the documentary evidence as the trial court and therefore should make its own independent findings of fact. Based upon the evidence including the binding judicial admissions of both Farm

Bureau and Jamey Kinsey, the evidence is conflicting. However, the accident occurred while Kinsey was at the insured location, he gave the police officer the insured location as his address, he answered interrogatory questions as to residence with the insured location address, his official address with the State of Idaho is the insured address. He grew up on the farm the first 21 years, left for out of state for 10 years but returned to the insured location. He kept his money and belongings at the home place. The only time he has ever given the address of 333 Rock Creek Road, Hansen, Idaho, was in a deposition where he was clearly trying to avoid insurance coverage. Given the multiple declarations to the contrary, this Court should declare Jamey Kinsey as a resident of his grandmother's household for insurance purposes.

DATED this 17th day of November, 2009.

JEFFREY J. HEPWORTH, P.A.  
& ASSOCIATES

By  \_\_\_\_\_  
Jeffrey J. Hepworth  
Attorneys for Intervenor/Appellant

**CERTIFICATE OF SERVICE**

The undersigned, a resident attorney of the State of Idaho, with offices at 161 5<sup>TH</sup> Avenue South, Suite 100, Twin Falls, Idaho, certifies that on the 17th day of November, 2009, he caused a true and correct copy of the APPELLANT REPLY BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

Kent L. Hawkins  
Merrill & Merrill  
P.O. Box 991  
Pocatello, ID 83204-0991

Hand Delivered	<u>      </u>
U.S. Mail	<u>  ✓  </u>
Fax	<u>      </u>
Fed. Express	<u>      </u>

  
Jeffrey J. Hepworth